ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

JOHNNY EARL MAHAFFEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002650

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for not preserving for appellate review the trial judge's refusal to grant a mistrial based on the fact that the decedent's mother held a framed photo of the decedent in view of the jury during closing arguments and the jury instruction?

STATEMENT

In November of 2006, the Anderson County Grand Jury indicted Mahaffey for murder and possession of a firearm during the commission of a violent crime, indictment #2006-GS-04-3508. On September 4, 2007, Mahaffey proceeded to jury trial before the Honorable J.C. Nicholson, Jr. Robert A. Gamble, Druanne White and G. Scott Thomason represented Mahaffey at trial. Rame Campbell prosecuted the case. The jury returned verdicts of guilty and Judge Nicholson sentenced Mahaffey to life in prison for murder and five years consecutive for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On November 7, 2011, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Mahaffey, Op. No. 2011-UP-494 (S.C.Ct.App. Filed November 7, 2011).

On April 20, 2012, Mahaffey filed an application for post conviction relief. The State filed a return on September 17, 2012. On September 18, 2013, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. Hugh Welborn represented Mahaffey at the PCR hearing. John W. Whitmire was present on behalf of the State. In a written order filed December 3, 2013, Judge McIntosh denied relief and dismissed the application. A timely notice of intent to appeal was filed on December 4, 2013. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for not objecting to the curative steps taken by the trial judge after counsel moved for a mistrial based on the fact that the decedent's mother held a framed photo of the decedent in view of the jury during jury instruction.

Immediately following the judge's instruction to the jury, defense counsel White moved for a mistrial. Counsel stated, "Move for a mistrial. I'd like to note for the record, the victim's mother or relative apparently is facing the jury with a picture of Ryan Cox [the decedent], apparently coughed throughout the argument and showed a picture to the jury. And I am moving at this time for a mistrial. Actually, I'm going to move it as double jeopardy, as well your Honor" (App. p. 683, lines 7-13). The woman who held the picture, the decedent's mother Ms. Jones, said: "I beg your forgiveness, Your Honor." The judge told the woman "Ma'am, be quiet and have a seat." (App. p. 683, lines 14-15)..

Defense counsel White told the judge that Ms. Jones "was flashing it [the photograph] and coughing." (App. p. 684, lines 1-2). Counsel said she first saw the photograph being shown to the jury after her closing argument and during the charge on the law. (App. p. 684, lines 3-14). Counsel told the judge, "She was holding it toward the jury, like this. (indicates.) For the record, I'm holding it up. Like toward her chest." (App. p. 684, lines 20-22).

The judge then asked the alternate jurors, who had not been sent to the jury room with the rest of the jury, if they could see the picture. (App. p. 684, lines 23 – 25). One alternate juror, Juror Mahaffey, could not see the picture because the podium blocked her view. (App. p. 685, line 1; p. 687, lines 10-18). The other alternate could see the picture and noticed it before the mistrial motion was made. (App. p. 685, lines 2-11).

The judge placed Ms. Jones under oath. Ms. Jones testified that during closing arguments and the jury instruction she was holding on her lap a photograph of her son, the decedent, Ryan Cox. (App. p. 685, line 14 – p. 686, lines 1-18). When the judge questioned the victim's advocate about what had just occurred, the advocate denied having knowledge that Jones was holding the photograph up for the jury to view. (App. p. 686, lines 19-24).

The judge then brought the jurors into the courtroom and asked, "Ladies and gentlemen, I want to ask you a question. There's a lady sitting on the second row in the jury box – excuse me, in the audience, did anybody – now you can look at me -- see the lady sitting on the second row during the closing arguments and the jury charge? Did anybody see the lady? Anybody look at that lady during the closing arguments and the charge?" (App. p. 688, lines 18-24). Two jurors admitted seeing the lady and noticed that she was holding a picture. (App. p. 688, line 25 – p. 689, lines 1-8). The judge individually questioned the two jurors. Upon questioning by the judge, Juror #72, Hanna Hill, stated that she noticed the lady holding a picture but did not know who the lady was and did not know whose picture she was holding. (App. p. 690, lines 1-6).

The other juror, Juror #58, James Graham, said he noticed the lady sitting in the audience holding the picture and he assumed it was a picture of the decedent, Ryan Cox. (App. p. 690, lines 9-25). He did not know who the lady was. (App. p. 691, lines 1-4). The judge then asked Juror #58, "Assuming the picture is of Ryan Cox, and she was holding that picture, how – would that affect you in any manner in deliberating in this case?" (App. p. 691, lines 14-17). The juror responded, "No, sir." The juror then told the judge, "My wife and I lost a child last year in a motorcycle accident, and we would probably do something similar." (App. p. 691, lines 18-23).

Outside of the presence of the jurors the judge announced that he was going to excuse Juror #58 from the jury, and replace him with alternate Juror #102, Ms. Mahaffey who said that she did not see the picture. (App. p. 678, lines 1-7). The judge then denied the motion for a mistrial stating, "For the record, I have interviewed all 14 jurors. Only one juror identify the picture as Ryan Cox. The other 12 are now on the jury, which includes the alternate, who did not see Mrs. Jones holding her son's picture. Except one lady said she glanced at her, saw the picture, did not know who it was; and did not know who this picture was. So your motion for a mistrial and your motion I believe for jeopardy to attach, whatever your motion was, is denied." (App. p. 692, line 25 – p. 693, lines 1-8).

When asked if the defendant wanted to place anything on the record, defense counsel stated, "Yes, sir. The picture, she was on the second row, she's approximately 20 feet or so from the jury. The picture, I would estimate, about 12 by 12, of the victim. She said she's holding it on the lap" (App. p. 693, lines 15-18). Defense counsel further stated, "Judge it's upright. She's holding it against her chest, upright, not laying flat, just upright. So it was facing the jury and the jury could see it." (App. p. 693, lines 21-23).

On direct appeal Petitioner argued that the trial court erred in denying the motion for a mistrial after the victim's mother held a photograph of the victim to her chest and coughed to attract the attention of the jurors during the jury charge. The South Carolina Court of Appeals affirmed the conviction writing, "After these curative steps were taken, Mahaffey failed to object to the curative measures or to renew the motion for a mistrial. Therefore, we find this issue to be unpreserved for our review." State v. Mahaffey, Op. No. 2011-UP-494 (S.C.Ct.App. Filed November 7, 2011) (citations omitted).

In the post conviction relief application petitioner alleged that trial counsel was ineffective in failing to renew the mistrial motion. (App. p. 720). Trial counsel's failure to renew the mistrial motion was addressed during the evidentiary hearing. (App. pp. 770 – 772). Defense counsel Gamble testified, "As far as renewal, I'm confused there because there was a ruling before that that said if you make the motion and it was ruled on then that was it. You didn't have to re-allege the motion to preserve it. Then the Supreme Court changed that somehow or another and said you had to reaffirm the motion in order to preserve it. Well, they go one way, and then they go the other way. You never know. I don't remember which law we were under in 2007 or whenever it was." (App. p. 751, lines 10-18).

In the order of dismissal the PCR judge wrote, "This Court finds Applicant did not meet his burden to prove ineffective assistance of counsel for failing to preserve the motion for mistrial for appellate review. A defense attorney is not deficient where there is no legal or factual basis for an objection bottomed and premised. Brown v. State, 375 S.C. 464, 485, 652 S.E.2d 765, 776 (Ct. App. 2007)." (App. p. 796). The PCR judge erred. Trial counsel was ineffective for failing to object to the curative steps taken by the judge and failing to renew the mistrial motion. Petitioner was prejudiced by counsel's deficient performance. Petitioner's conviction and sentence should be reversed and the case remanded for a new trial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an

objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Counsel was ineffective for failing to preserve for appellate review the judge's refusal to grant a mistrial. Counsel was ineffective by failing to object to the curative steps taken by the judge and failing to renew the mistrial motion. The judge abused his discretion in refusing to grant a mistrial after the deceased victim's mother held a photograph of the victim to her chest and coughed to attract the attention of the jurors during the closing arguments and jury charge. Petitioner was prejudiced by the deficient performance.

In State v. Paige, 375 S.C. 643, 647-648, 654 S.E.2d 300, 302 - 303 (Ct.App.2007) the South Carolina Court of Appeals addressed the issue of courtroom spectators wearing a button with a picture of the deceased victim and wrote:

> Turning to our own established law, we note the general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the trial court, and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). As to courtroom conduct, our courts have held that a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence. State v. Carrigan, 284 S.C. 610, 613-14, 328 S.E.2d 119, 121 (Ct.App.1985). In State v. Stewart, 278 S.C. 296, 295 S.E.2d 627 (1982), cert. denied, 459 U.S. 828, 103 S.Ct. 64, 74 L.Ed.2d 65 (1982), our supreme court stated as follows:

> The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution. While this right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment.
>
> Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912).
>
> It is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever. Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962); 75 Am.Jur.2d Trial § 40 (1974). His exercise of this duty will not be disturbed absent an abuse of discretion.
>
> Id. at 303-04, 295 S.E.2d at 630-31.

In Paige the Court of Appeals found that there was not sufficient evidence in the record to show that the jurors saw the buttons with a picture of the deceased victim. The Court wrote:

> Simply put, there is absolutely no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim. Accordingly, we find no actual or inherent prejudice to Paige based on the record before us. Additionally, the evidence is not clear and convincing of extraneous influences that "so interfered with the conduct of the trial, or so pressed upon the jury," as to become factors in the result of Paige's trial. State v. Stewart, 278 S.C. at 303, 295 S.E.2d at 631 (quoting State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912)).

State v. Paige, 375 S.C. at 649-650, 654 S.E.2d at 303 – 304. In the present case jurors saw the victim's mother holding a 12 by 12 photograph of her dead son twenty feet from the jury. Juror #72, who remained on the jury, admitted that she noticed the woman holding a picture. Although Juror #72 did not specifically admit that she assumed that the woman was the mother and the picture was of her deceased son, that assumption would have been reasonable. While the one juror who admitted that he assumed the photograph was of the deceased victim, Juror #58, was excused, the other jurors were not individually questioned as to what they might have seen

and the conclusions they may have drawn. Defense counsel testified that the mother "was flashing it [the photograph] and coughing." (App. p. 684, lines 1-2). It is unlikely the other jurors did not see this as well and simply did not grasp the scope of the judge's question posed to the jury as a whole. The alternate juror, Juror #102, who replaced Juror #58 was in the courtroom during portions of the mistrial motion. The judge did not question the alternate juror as to what affect that may have had on her deliberations. Unlike Paige the record in the present case demonstrates prejudice.

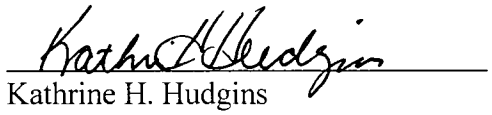
In the order of dismissal the PCR judge wrote, "This Court further notes the present scenario was substantial [sic] more harmless than the incident that occurred at trial in State v. Anderson, where the South Carolina Supreme court held a mistrial was not merited." (App. p. 797). In State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996), the Court found that a witness' outburst did not warrant the granting of a mistrial where the judge immediately called a recess, the incident was limited in scope and occurred a the beginning of the trial. In contrast in the present case, the mother displayed the photo of her deceased son to the jury during the closing arguments and the jury charge. Her actions constituted an improper influence requiring a mistrial.

Trial counsel was ineffective in failing to preserve for appellate review the trial judge's refusal to grant a mistrial. There is a reasonable probability that if the issue had been preserved, Petitioner would have prevailed on direct appeal. The PCR judge erred in refusing to grant relief.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2014.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire this 11th day of July, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of July, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.