

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

D. Garrison Hill, Circuit Court Judge

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JUL 18 2014

S.C. Supreme Court

Opinion No. 5207 (S.C. Ct. App. Filed 3/19/2014)

09-CP-36-00107

TED E. ABNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 24, 2014.

QUESTION PRESENTED

Did the Court of Appeals err in refusing to find trial counsel ineffective for not requesting the lesser included offense of strong-arm robbery when petitioner's defense at trial was that he committed the robbery but was not armed while doing so?

STATEMENT OF THE CASE

In January of 2005, the Newberry County Grand Jury indicted Abney for armed robbery and possession of a firearm or knife during the commission of a violent crime, indictment #05-GS-36-43. On May 17, 2005, Abney proceeded to jury trial before the Honorable Paul M. Burch. Attorney Charles Verner represented Abney at trial. Judge Burch directed a verdict of acquittal for the weapon charge. (App. p. 132, lines 5-18). The jury found Abney guilty of armed robbery and Judge Burch sentenced him to 26 years in prison. Abney appealed his sentence and conviction, and the South Carolina Court of Appeals dismissed the appeal. State v. Abney, Op. No. 2008-UP-184 (S.C. Ct. App. filed March 17, 2008).

On March 12, 2009, Abney filed an application for post-conviction relief. On March 9, 2010, an evidentiary hearing was held before the Honorable D. Garrison Hill. Attorney Gwendlyne Smalls represented Abney at the PCR hearing. On May 24, 2010, Judge Hill signed an order denying relief and dismissing the application. A timely notice of intent to appeal was filed. On November 3, 2010, Abney filed a petition for writ of certiorari. The State filed a return on February 16, 2011. In an order filed August 20, 2012, this Court granted the petition for writ of certiorari and ordered briefing. On December 19, 2012, Abney filed the brief of petitioner. On March 13, 2013, the State filed the brief of respondent. On November 15, 2013, a three judge panel of the Court of Appeals heard arguments in the case. On March 19, 2014, a majority of the Court of Appeals affirmed the denial of relief by the PCR judge. The petition for rehearing was filed on April 3, 2014, and denied on April 24, 2014. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in refusing to find trial counsel ineffective for not requesting the lesser included offense of strong-arm robbery when petitioner's defense at trial was that he committed the robbery but was not armed while doing so.

The jury found petitioner guilty of a robbery that occurred on October 30, 2004 at the Citgo gas station in Prosperity. Traci Roosen testified that she went inside the store and purchased a twelve pack of beer. (App. p. 49, lines 12-25). When she came back to her car the petitioner approached her and stole her purse. (App. pp. 49-51). According to the Ms. Roosen's testimony at trial, petitioner told her not to say anything or he would kill her. (App. p. 50, lines 3-5). Ms. Roosen testified that petitioner took his right hand and kept pushing it in her ribs. (App. p. 50, lines 8-10). She admitted that she never saw a gun but believed that he had a gun. (App. p. 54, lines 13-25). He never told her that he had a gun. (App. p. 55, lines 5-6). After petitioner took the purse, he threw it into a van and quickly left the gas station. (App. p. 50, lines 21 – p. 51, lines 1-7). Ms. Roosen identified petitioner from a photo lineup. A few days later petitioner contacted law enforcement and turned himself in. (App. pp 98-99). Petitioner gave a statement to law enforcement admitting that he took the purse but denying that he had a weapon. (App. p. 103, lines 2-9). The police never recovered a weapon. (App. p. 123, lines 1-5).

In opening statements counsel told the jury that petitioner admitted that he took the victim's pocketbook, but denied that he ever had a weapon. (App. 40 – 44). Again, during closing arguments, petitioner asserted that he robbed the victim, but did not possess a weapon while doing so. (App. 137 – 145). Trial counsel, however, never requested the lesser included offense of strong armed robbery. Counsel's failure to request the lesser included offense of strong arm robbery **after** informing the jury that petitioner was guilty of strong armed robbery constitutes ineffective

assistance of counsel. Petitioner was prejudiced by the error because he was convicted of armed robbery, the only choice given to the jury, rather than strong armed robbery and sentenced to 26 years rather than a maximum of 15 years for strong armed robbery. S.C. Code §§16-11-325, 330.

First, petitioner was entitled to the lesser included offense of strong armed robbery. A trial judge “is required to charge jury on lesser included offense if there is evidence from which it could be inferred that defendant committed lesser offense rather than greater.” State v. Drafts, 288 S.C. 30, 31, 340 S.E.2d 784, 785 (1986). See also State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984). “Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense.” State v. Tyndall, 2336, S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999); United States Constitution, Amendment 14. See also Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982); Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

S.C. Code §16-11-330 provides that a person who commits robbery “while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon” is guilty of armed robbery. In State v. Mitchell, 382 S.C. 1, 4-5, 675 S.E.2d 435, 437 (2009) the South Carolina Supreme Court wrote, “Included in armed robbery is the lesser included offense of robbery, which is defined as ‘the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.’ State v. Al-Amin, 353 S.C. 405, 424, 578 S.E.2d 32, 42 (Ct.App.2003)”. There is evidence from which it could be inferred that defendant committed robbery or strong arm robbery rather than armed robbery. Petitioner told the police that he did not have a weapon, a weapon was never recovered, he never said he had a weapon and the victim never

saw a weapon. The question of whether petitioner alleged by words or actions that he was armed while using a representation of a deadly weapon or any object which a person would reasonably believe to be a deadly weapon was a factual question to be resolved by the jury. If counsel had requested the lesser included charge and the judge had refused to charge strong armed robbery, the judge would have committed reversible error. Trial counsel was ineffective for failing to make the request. See Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (Ct. App. 2009).

At the PCR hearing, trial counsel testified that he did not request the lesser included instruction because both he and petitioner believed they were winning the case:

In the beginning and even during trial, through trial we wanted to plead guilty to common-law robbery, even assuming he was going to take a maximum sentence. I tell you, at the end of the State's case we thought we were winning the case. I thought as the lawyer that we were winning the case. Mr. Abney thought we were winning the case. A lot of the courtroom personnel talked to us.

There was a concern, you know, even after he snatched the purse, the lady chased him and he got into a car, started the car and drove away while she testified he was holding the pocketbook in one hand and pushing her away with the other hand. She clearly had the opportunity to see weapon at that point and still didn't. And we thought we were winning the case.

Ted (Petitioner) and I had discussed the possibility, after the directed verdict motion, of not putting in a lesser included, Ted and I specifically talked about, "Do you want a lesser included charge on common law robbery?" We thought, we both felt we were winning the case and so we didn't ask for a lesser included charge for common law robbery.

(App. 213 – 214).

Trial counsel testified that after the jury reached its verdict and his client sentenced, he had lunch with the deputies and the sheriff at a local restaurant. One of the jurors indicated that although

petitioner was not actually armed, they were not going to let “a creep like that just go home either.”

(App. 215, lines 10-16). During the PCR hearing trial counsel testified:

I will say in hindsight I believe that was legally wrong for me to do, not legally wrong, but it was clearly a tactical decision, we made a conscious choice not to ask the judge to charge common law robbery. The judge had already indicated he wasn't going to charge common law robbery anyway in chambers. It doesn't appear on the record because he made his decision in chambers, but all through the trial it was clear, when you read the transcript, I'm telling the jury he's guilty of purse snatching, which is common robbery, my closing, my opening. My problem in hindsight now is when we didn't charge common law robbery that was a trial decision we made, I think in hindsight that was an objectively wrong decision to make when you're telling the jury he's guilty of common law robbery but then not give them the option.

(App. p. 214, lines 8-25). Trial counsel later clarified that if he had requested the lesser included charge, the judge would have instructed the jury on strong armed robbery. (App. p. 216, lines 11-

21). When asked if the charge on the strong armed robbery would have had a result on the outcome of the case, trial counsel testified, ““I think it is to an even greater than probable because he would have been found guilty on common law robbery and would have been sentenced to fifteen years under common law. I don't have any doubt in my mind that would be the likely result.”

(App. p. 218, lines 4-16).

Trial counsel rendered ineffective assistance of counsel by not requesting the lesser included jury instruction of strong armed robbery because, had he done so, the judge would have given the charge. The evidence supported giving the charge, and petitioner would have been convicted of an offense that carries up to 15 years instead of armed robbery, which carries 10 to 30 years. See Beck v. Alabama, 447 U.S. 625 (1980).

Trial counsel admitted that his initial trial strategy was to admit guilt on the strong armed robbery and challenge the State's failure to produce evidence of a weapon.. (App. p. 209, lines 23 –

p. 210, lines 1-16). Trial counsel stated, however, that the trial strategy changed and, “We went for broke, basically, and lost. I think the attorney at the end of the day has to make the decision to include it [the lesser included offense].” (App. p. 214, lines 25 – p.215, lines 1-2). Trial counsel admitted that the decision not to ask for the lesser included offense of strong armed robbery “. . . [w]as inconsistent with my original strategy in talking to the jury.” (App. p. 215, lines 8-9).

In Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) the South Carolina Supreme Court wrote:

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Roseboro, *supra*.

In Ingle the Court found that it was objectively unreasonable for counsel to question a witness without first determining if her testimony supported the theory of defense. In Roseboro the Court found that counsel’s strategy in failing to request an alibi charge was invalid under an objective standard of reasonableness. In the present case counsel’s failure to request a charge on the lesser included charge of strong armed robbery and employ a strategy of “all or nothing” was invalid under an objective standard of reasonableness where such strategy was inconsistent with counsel’s initial strategy to admit guilt of strong armed robbery and counsel informed the

jury that his client was guilty of strong armed robbery. In the order of dismissal the PCR judge wrote:

The Applicant, in consultation with his counsel, made a strategic choice not to request the jury be charged with the lesser included offense of strong armed robbery. The choice was made based on sound and experienced professional judgment, and was valid under the circumstances.

(App. 238). There is no probative evidence to support the PCR judge's finding that trial counsel's failure to request a charge on strong armed robbery was a valid strategic choice after admitting guilt of strong armed robbery. If counsel had employed a strategy that petitioner was not guilty of any type of robbery, armed or strong armed, then an "all or nothing" strategy may have been reasonable. Under the facts of this case, the decision was objectively unreasonable.

The fact that counsel consulted with petitioner about the decision not to request the charge on strong armed robbery does not excuse the deficiency. The decision whether to request a lesser included offense lies with the attorney, and not the client. A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testified in her his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977) (Burger, C.J., concurring). It is objectively unreasonable for an attorney to raise a particular defense, and then not request a jury instruction that allows the jury to consider that defense. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

Trial counsel was ineffective in failing to request a charge on strong armed robbery. The all or nothing strategy was objectively unreasonable where counsel admitted guilt on strong armed robbery. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if the jury had been instructed on the law of strong armed robbery, the jury would have returned

a verdict of guilty of strong armed robbery rather than armed robbery and petitioner would have faced a maximum sentence of 15 years rather than 30 years.

The majority opinion by the Court of Appeals, in support of finding that the failure to request a jury charge on the lesser included offense was valid trial strategy, cites cases from Alabama, Georgia and Utah. All three of the decisions relied upon by the majority are distinguished from the present case. In Harbin v. State, 14 So.3d 898 (Ala. Crim. App. 2008) the issue before the Court was whether the trial judge erred in *sua sponte* instructing the jury on heat of passion manslaughter as a lesser included offense of murder. In Harbin the Court wrote, “Here, the parties do not dispute, and the record clearly reflects, that heat-of-passion manslaughter is a lesser-included offense of murder as charged in the indictment in this case and that there was evidence presented at the trial supporting a charge on heat-of-passion manslaughter. Thus, the only question presented in this case is whether a trial court may instruct the jury on a lesser-included offense that is supported by the evidence in the face of the defendant's desire to pursue an all-or-nothing strategy with the jury. We hold that it may.” Harbin, 14 So.3d at 902. The Harbin case simply stands for the proposition that the trial judge in the present case would not have erred in *sua sponte* instructing the jury on the lesser included offense of strong armed robbery.

In Ojemuyiwa v. State, 647 S.E.2d 598 (Ga.Ct.App. 2007) the Court found that trial counsel’s decision not to request a jury charge on the lesser included offense of misdemeanor obstruction was a valid trial strategy. In Ojemuyiwa, however, the defendant denied that she was guilty of both felony and the lesser included misdemeanor obstruction. In the present case, Petitioner admitted guilt of the lesser included charge of strong armed robbery and trial counsel told the jury in both the opening statement, (App. pp. 40-44) and the closing argument, (App. pp. 142-143) that Petitioner was guilty of strong armed robbery. In Ojemuyiwa, in finding the

decision not to request the lesser included a valid trial strategy, the Court wrote, “. . . [C]ounsel testified that based on conversations with Ojemuyiwa during plea negotiations during which she rejected the offer of probation, he did not think it was wise to offer the jury a lesser alternative upon which to convict Ojemuyiwa.” 647 S.E.2d at 605. In contrast, in the present case trial counsel testified during the PCR hearing that Petitioner was willing to plead guilty to common law robbery. (App. p. 213, lines 2-13).

In Havard v. State, 928 So. 2d 771 (Miss. 2006), the Mississippi Supreme Court found that trial counsel’s decision not to request the lesser included offense of murder or manslaughter when Havard was charged with capital murder based on the underlying felony of sexual battery was an appropriate trial strategy. Havard denied the underlying felony of sexual battery but told police he accidentally dropped the child against the commode after bathing her, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed. The present case presents a starkly different factual situation in which Petitioner gave a statement to law enforcement admitting that he took the purse but denying that he had a weapon. (App. p. 103, lines 2-9). Petitioner did not deny committing the robbery. Petitioner only denied that he was armed during the robbery, leaving the factual determination of whether Petitioner’s acts constituted armed robbery or strong arm robbery to the jury.

As reflected by the trial judge’s denial of the directed verdict motion as to armed robbery but granting a verdict of acquittal for possession of a firearm or knife during the commission of a violent crime, there is some evidence, however scant, from which the jury could find Petitioner guilty of armed robbery although the State failed to prove that Petitioner was actually armed. According to the witness at trial, Petitioner told her not to say anything or he would kill her. (App. p. 50, lines 3-5). The witness testified that Petitioner took his right hand and kept pushing it in her

ribs. (App. p. 50, lines 8-10). She admitted that she never saw a gun but believed that he had a gun. (App. p. 54, lines 13-25). Petitioner never told her that he had a gun. (App. p. 55, lines 5-6). This evidence combined with the fact that Petitioner and trial counsel admitted guilt of strong armed robbery renders counsel's failure to request a charge on strong armed robbery deficient. Under the facts of this case, aside from any misunderstanding of the law by trial counsel, the failure to request the lesser included offense of strong arm robbery can not be deemed a valid trial strategy.

Trial counsel failed to request the lesser included offense because, as testified by trial counsel at the PCR hearing, "Ted [Petitioner] and I had discussed the possibility, after the directed verdict motion, of not putting in a lesser included, Ted and I specifically talked about, "Do you want a lesser included charge on common law robbery?" We thought, we both felt we were winning the case and so we didn't ask for a lesser included charge for common law robbery." (App. p. 214, lines 1-7). Petitioner testified at the PCR hearing that he did not understand that he could be convicted of armed robbery even if he did not have a weapon. (App. pp. 193-197). Trial counsel's belief that he was "winning" was based on the fact that trial counsel believed that the jury could not find Petitioner guilty unless they found that he said he had a deadly weapon. As noted by the dissent:

Counsel understood the State could convict Abney of armed robbery without proving he possessed a gun, but misunderstood what the law required to accomplish that. Counsel stated in his closing argument, "The judge is going to charge you [that] unless [Abney] alleges he ha[d] a deadly weapon[,] threats do not make the crime armed robbery." The trial court recognized counsel's misunderstanding and interrupted at this point, stating, "Counsel, wait a minute now. I am going to have to step in on that. It says by action or words." Counsel then engaged the court in an argument in front of the jury, thereby clearly demonstrating his misunderstanding of the armed robbery statute. Counsel stated, "I take the position, your honor, that the words have to allege the representation of a weapon and I am going to cite the case I brought." To this, the court responded, "I am

going to charge exactly what the law says and I am pointing out to you, it says 'either by action or words.'" Counsel then stated, still in the presence of the jury, "Yes, sir. And I am going to ask the judge to charge the jury also that the mere use of the words alone does not make it armed robbery. And at the end of my closing argument I would ask for an argument, just a closing charges motion."

State v. Abney, Op. No. 5207 (S.C.Ct.App. filed March 19, 2014). (App. p. 139, line 12 – p. 140, lines 1-6).

Trial counsel's misunderstanding of the law is further demonstrated when he objected to the judge's charge to the jury. (App. pp. 156 – 158). Trial counsel argued:

Your Honor, as a Court's Exhibit introduce the case of State v. Muldrow which again my request for the judge to charge words alone are not sufficient to establish a representation of a deadly weapon for purposes of the armed robbery statute which allows a finding of armed robbery when the robber alleged, when the robbery alleged he is armed with a deadly weapon either by actions or word while using a representation of a deadly weapon to establish armed robbery offense. Under this provision the State had to show evidence corroborating an allegation of being armed either by words or the use of a physical representation of a deadly weapon.

(App. p. 157, lines 1-12). Counsel misinterprets State v. Muldrow. In State v. Muldrow, 348 S.C. 264, 267-268, 559 S.E.2d 847, 849 (2002) the South Carolina Supreme Court wrote:

Under § 16–11–330(A), the State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. See State v. Jones, 342 S.C. 248, 536 S.E.2d 396 (Ct.App.2000). The second prong of this statute was added by amendment in 1996.

Under the first prong of § 16–11–330(A), the presence of a weapon may be inferred from circumstantial evidence. See State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976). We have never had occasion, however, to consider whether words alone are sufficient to establish the element of a deadly weapon. Other courts have held words unaccompanied by any corroborating action are not sufficient. We concur with this general rule and hold words alone are not sufficient under the first prong of the statute. (footnote and internal citations omitted).

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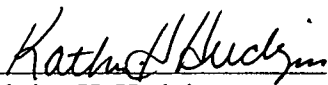
Trial counsel failed to recognize that the present case is not a “words alone” case like Muldrow. Counsel failed to recognize that under the **second** prong (Muldrow addressed the first prong) a jury could find that Petitioner’s **actions** met the requirement for armed robbery. It is precisely this failure to recognize the danger that Petitioner could be convicted of armed robbery that renders trial counsel’s failure to request the lesser included offense deficient. As noted by the dissent, “No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. See Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (Pleicones, J., dissenting) (stating a valid strategic decision cannot be “grounded in a fundamental misunderstanding of the law”); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where ‘an error of law was involved’).” State v. Abney, Op. No. 5207 (S.C.Ct.App. filed March 19, 2014).

Trial counsel was ineffective in failing to request a charge on strong armed robbery. The all or nothing strategy was objectively unreasonable where counsel admitted guilt on strong armed robbery, there was evidence, although weak, of armed robbery and counsel misunderstood the law of armed robbery. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if the jury had been instructed on the law of strong armed robbery, the jury would have returned a verdict of guilty of strong armed robbery rather than armed robbery and petitioner would have faced a maximum sentence of 15 years rather than 30 years.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County
D. Garrison Hill, Circuit Court Judge

Opinion No. (S.C. Ct. App. filed)
09-CP-36-00107

TED E. ABNEY,

PETITIONER,

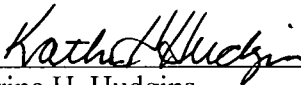
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

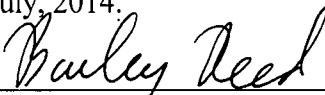
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Rutledge Johnson, Esquire, and the S.C. Court of Appeals this 18th day of July, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021