

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Michael G. Nettles, Circuit Court Judge

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JUL 25 2014

S.C. Supreme Court

LEWIS D. WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000652

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to cross-examine Christian Richardson over his statement that he thought petitioner was in a gang to see whether he had personal knowledge of alleged gang involvement or just a rumor?

STATEMENT

Petitioner was convicted of first-degree burglary, armed robbery, and possession of a weapon after a jury trial held before the Honorable Ralph King Anderson on June 15 – 18, 2009, in Florence County. Respective sentences of twenty (20) years, twenty (20) years, and five (5) years were imposed. C. Stevens McLaurin, Esquire, was defense counsel. Patricia S. Parr, Esquire, was the assistant solicitor. (App. p. 1 – p. 524).

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on March 21, 2012. (App. p. 526). Petitioner filed an application for post-conviction relief on October 12, 2012. Respondent filed a return dated February 5, 2013. (App. p. 527 – p. 540). An evidentiary hearing was held on February 10, 2014, before the Honorable Michael Nettles. Petitioner was present and was represented by J. Scott Kozacki, Esquire. Respondent was represented by Joshua Lee Thomas, Assistant Attorney General. Both petitioner and defense counsel testified at the hearing. (App. p. 541 – p. 611). On March 7, 2014, Judge Nettles issued an order denying and dismissing the application for post-conviction relief. (App. p. 615 – p. 623).

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to cross-examine Christian Richardson over his statement that he thought petitioner was in a gang to see whether he had personal knowledge of alleged gang involvement or if it was just a rumor.

Defense counsel moved in limine to exclude any testimony by co-defendants that petitioner was a gang member. The co-defendants gave initial statements which did not implicate petitioner in the burglary and armed robbery. Then they gave a second statement which did implicate him. They said they didn't implicate him in the beginning because he was a gang member and they were afraid of him. (App. p. 41, line 22 – p. 43, line 3).

The assistant solicitor explained that the police had three suspects, but the victims said a fourth person was involved. After continued investigation, petitioner was determined to have been the fourth suspect. When this was found out, the two co-defendants gave information about petitioner. When asked why they didn't do this earlier, they said they were afraid of petitioner, he was a good bit older, and they knew he was part of a gang. (App. p. 43, lines 6 – 24).

Defense counsel said this case was not about some kind of gang retaliation and the prejudicial effect of mentioning gang membership would outweigh any probative value. If the co-defendants want to say they were scared they could, but they didn't have to mention that petitioner was in a gang. (App. p. 44, lines 1 – 17).

The trial court said it would probably let gang membership in, but just as it related to the co-defendants' statements. (App. p. 46, lines 3 -12).

Christian Richardson, a co-defendant, took the stand and testified as a State's witness. He was asked why he did not mention petitioner in his first statement. He said he was scared. He

didn't know if petitioner was trying to harm him, because petitioner was in a gang. (App. p. 280, lines 3 – 10).

Defense counsel failed to cross-examine Richardson over how he thought petitioner was in a gang. Did he have personal knowledge of this or was it just a rumor? Evidence of gang membership is very prejudicial. While it may have had some relevance as to why Richardson did not implicate petitioner in his first statement, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). While the trial court allowed the mention of gang membership, defense counsel could have taken the sting out of that mention by inquiring what knowledge Richardson had of petitioner being in a gang to see whether it was true or just a rumor. Cross-examination “is not only permitted to delve into the witness’ story to test the witness’ perception and memory, but the cross-examination has traditionally been allowed to impeach, i.e., discredit the witness.” Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974).

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel’s ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel’s errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A “reasonable probability” is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

Defense counsel was ineffective in failing to cross-examine Christian Richardson's statement of alleged gang membership by petitioner. This undermined confidence in the outcome of petitioner's trial.

CONCLUSION

Petitioner's writ should be granted and his convictions should be reversed.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in black ink, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

LEWIS D. WILLIAMS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000652

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lewis D. Williams states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 10, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Lewis D. Williams.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of July, 2014

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IN THE SUPREME COURT

Certiorari to Florence County
Michael G. Nettles, Circuit Court Judge

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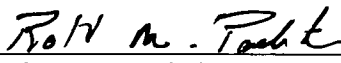
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000652

CERTIFICATE OF SERVICE

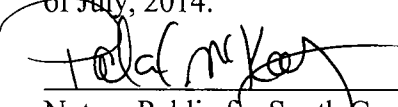
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Lewis D. Williams, #286960, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 25th day of July, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 25, 2022.