

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
Clifton Newman, Circuit Court Judge

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AUG - 7 2014

S.C. Supreme Court

RANDOLPH FRAZIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002758

JOHNSON PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to move for a continuance to allow him sufficient time to properly investigate the case and prepare for trial?

STATEMENT

A Lancaster County Grand Jury indicted Petitioner at the April 2008 term General Sessions for first degree burglary. App. 400-401. His case was called to trial on September 16, 2008 before the Honorable Paul Burch, and a jury. Assistant Solicitor Michael H. Lifsey represented the state, and William P. Frick represented Petitioner. App. 1. On September 17, 2009, the jury found Petitioner guilty. App. 347, l. 23 – 348, l. 6. He was sentenced by Judge Burch to life imprisonment. App. 355, l. 24 – 356, l. 25.

The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Frazier, 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011).

On September 7, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 360-366. The state filed a return to this application dated April 26, 2012. App. 370-374. On December 11, 2012, Petitioner, through his counsel, filed a supplement to his application for post-conviction relief raising the issue contained in this petition. App. 367-369. The matter proceeded to an evidentiary hearing on October 2, 2013 before the Honorable Clifton B. Newman. App. 375. Assistant Attorney General Suzanne H. White represented the state, and Charles T. Brooks, III represented Petitioner. App. 375. By order dated December 12, 2013, Judge Newman denied Petitioner relief. App. 393-399.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to move for a continuance to allow him sufficient time to properly investigate the case and prepare for trial.

PCR Hearing

A review of the trial transcript shows trial counsel did not ask for a continuance at the start of trial.

Petitioner testified at the PCR hearing that trial counsel was not adequately prepared to try his case. He explained, "Even Mr. Frick [trial counsel], he told the Judge that we weren't prepared to go with this trial at that time . . . And also Mr. Frick told the Judge he hadn't investigated the case, didn't know nothing about the case and he wasn't prepared for the case but yet still he tried the case anyway." App. 378, l. 20 – 379, l. 7.

Petitioner testified, "I feel like he [trial counsel] should have postponed that trial for a period of time until he could collect the evidence in representing me in that case because there was no evidence collected and . . . like I said, he told the Judge he hadn't had any time to investigate the case so he really didn't want to try the case but the Judge insist[ed] that he try the case." App. 380, ll. 6-16.

Trial counsel, William Frick, testified that he did not make any statements about not being prepared for trial in this case. He explained, "I represented Mr. Frazier [Petitioner] previously. We had a trial some couple of years before this one and it was one of those that was kind of sprung on me and I didn't really feel that I was ready to go forward on that case and I asked Judge Lockemy at that trial for a continuance based on needing to talk to Mr. Frazier a little bit more, and that request was denied. We did go to trial but we were successful on that trial, I don't recall that on this

particular case, though.” App. 384, ll. 7-21. He maintained that he was fully prepared to try this case. App. 386, ll. 3-5. On cross-examination, Frick again testified that he did not recall asking for a continuance in this case and that he “was ready to go to trial on this one.” App. 387, ll. 12-19.

At the conclusion of the testimony, Judge Newman said, “Listening to the testimony and reviewing the transcript it appears that Mr. Frick did all that he could do for Mr. Frazier. The evidence . . . was overwhelming that Mr. Frazier was guilty of this first degree burglary. He had a jury trial and he was convicted of first degree burglary. Mr. Frick represented him well at trial, did all he could do to help him but the evidence was too much for him to overcome . . . He has appealed the conviction, the conviction was upheld by the appellate courts and he has no basis to have the PCR granted. I deny the PCR.” App. 389, l. 22 – 391, l. 3.

Order of Dismissal

The PCR court found Petitioner “failed to meet his burden of proof” as to his claim of ineffective assistance of counsel. The court noted Petitioner “offered no evidence or testimony that [trial] Counsel was deficient in his representation.” The court also found “Counsel did all he could do for [Petitioner] at trial.” App. 396. Furthermore, the PCR court found “there was overwhelming evidence of [Petitioner’s] guilt of this charge; therefore, [Petitioner] was not prejudiced by any alleged deficient representation.” App. 396-297.

Discussion

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to move for a continuance to allow him sufficient time to properly investigate the case and prepare for trial.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Furthermore, the United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (finding “[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation”) (internal quotation omitted). The United States Supreme Court has also held that “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith, 539 U.S. 510, 527 (2003).

In this case, trial counsel’s performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel should have requested a continuance at the beginning of the trial to ensure that he was properly prepared to represent Petitioner at trial, especially since Petitioner was facing a possible sentence of life

imprisonment. Additionally, trial counsel should have properly investigated the case. See Strickland, 466 U.S. at 691

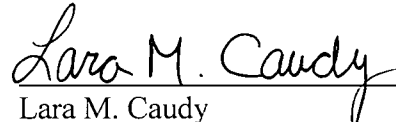
Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to move for a continuance to allow him sufficient time to investigate the case and prepare for trial prevented Petitioner from being able to properly challenge the state's evidence and present a defense.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LANCASTER COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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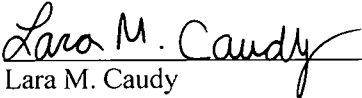
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randolph Frazier states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on October 2, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Randolph Frazier.

Respectfully submitted,


Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of August, 2014

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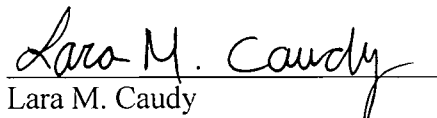
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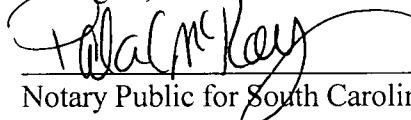
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Randolph Frazier, #268822, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of August, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of August, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.