

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Steven H. John, Circuit Court Judge

S.C. Supreme Court

LEWIS E. PIPHER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000176

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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Division of Appellate Defense
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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to cross examine Witnesses Eolder and Officer Crews about the time of the incident to show that it was still daylight which would have eliminated the aggravating circumstance of night time for burglary second degree?

STATEMENT

In November 2009, the Horry County Grand Jury indicted Lewis Pipher on the charge of burglary first degree. On June 15, 2010, Pipher proceeded to trial before the Honorable Larry Hyman and a jury. Pipher and his co-defendant, his wife (Shelly Mauney Pipher), were tried together. Pipher was represented by Bobby G. Frederick, and his wife was represented by William Thomas Floyd. The state was represented by Michael J. O'Sullivan. App. 1-2. The trial judge granted a directed verdict as to the burglary first degree. App. 219, ll. 7 – 14. The judge then proceeded on the charges of burglary second degree and burglary third degree. App. 221, ll. 20 -23. The jury found Pipher guilty of burglary second degree. Judge Hyman sentenced Pipher to fifteen years suspended to the service of nine years and three years probation. App. 392, ll. 21 – App. 393, ll. 1.

On August 20, 2012, Pipher filed an application for post-conviction relief (PCR). The state filed a return on November 30, 2012. An evidentiary hearing was held on December 16, 2013 before the Honorable Steven H. John. Pipher was represented by Jarrod M. McPherson, and the state was represented by Joshua L. Thomas. App. 414. On January 10, 2014, Judge John issued an order denying Pipher's PCR application and dismissing it with prejudice. App. 447-App. 454. Pipher's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to cross examine Witnesses Eolder and Officer Crews about the time of the incident to show that it was still daylight which would have eliminated the aggravating circumstance of night time for burglary second degree.

Lewis Pipher and his wife, Shelly, were tried by the state for burglary first degree based on the allegation that they entered a dwelling at night with the intent to steal a washer and dryer on August 31, 2009. At the close of the State's case, the judge granted the defense motion for a directed verdict of acquittal for burglary first degree based on the fact that the building entered did not qualify as a dwelling pursuant to State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct.App. 2008) and State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979). App.7, ll. 1 – app. 8. ll. 5; App. 217, ll. 5 - App. 219, ll. 7 – 14.

Carolyn Duncan testified at trial that the house in question was rental property owned by her mother. The rental property was next to the house where her mother lived before she became ill and went to live with the daughter. App. 197, ll. 21 – App. 198, ll. 12; App. 200, ll. 1 – App. 201, ll. 24.

During the trial, Jackie Eodler testified that she lived very near the incident location. She observed something unusual happening at the building of the incident location around 9:00 or 9:30 in the evening. She saw a white truck stop at the house which she knew had been rented but was abandoned at the time. She heard someone say they needed to pick something up. She then saw the washer and dryer on the back of the truck. She heard banging noises and thought the chain link fence was being stolen. She followed the truck in her car and called 911. Defense counsel told the judge he had no questions for Ms. Eodler. App. 145, ll. 1 – App. 152, ll. 25.

Officer Jeremy Crews received the call from dispatch about the burglary, and proceeded to respond. He stopped the truck with the washer and dryer in the back and took custody of Pipher and Shelly. Officer Crews' testimony was that he stopped the truck around 9:00 in the nighttime. Defense counsel had no questions for officer Crews. App. 160, ll. 2 – 6; App. 190, ll. 16 – App. 23; App. 196, ll. 1 – 25.

Pipher did not testify at trial but his co-defendant, Shelly did. App. 3. Shelly Pipher testified on the day they were arrested, she and Pipher had bought a washing machine and dryer from Thomas Washington for \$150 about 2:30 that afternoon. They had to get a pickup truck to go get the appliances. It was late in the afternoon by the time they picked up the washer and dryer from the building where they were located. App. 247, l. – App. 252, ll. 23.

The judge charged the jury on second degree burglary noting the state must prove the defendant entered the building in the nighttime. The judge also charged the jury on third degree burglary, which did not require the nighttime aggravator. App. 342, ll. 12 – 15; App. 349, ll. 18 – 20; App. 353, ll. 3 – App. 354, ll. 4. The jury found Pipher guilty of second degree burglary. App. 367, ll. 22 – App. 368, ll. 24.

At his PCR hearing, Pipher testified that his trial attorney was ineffective because he did not cross examine some of the witnesses. Pipher felt that his attorney should have cross examined Jackie Eolder on the issue that it was still daylight and not nighttime when she saw Pipher and his wife. Eolder's testimony was that it was nighttime when she saw them. If his attorney had cross examined Ms. Eolder, and shown that it was daylight, then Pipher would not have been found guilty of second degree burglary. App. 417, ll. 12 – App. 420, ll. 8.

Trial counsel testified at the PCR hearing that he had no idea why he did not cross examine the witnesses Eolder and Officer Crews. He admitted that if he had, he might have been able to

show the time of day was still daylight since the nighttime was the only aggravating circumstance for second degree burglary. He did not know if he had investigated to try to find out the time of day and if it was still daylight. App. 428, ll. 8 – App. 430, ll. 25.

Trial counsel admitted that if Ms. Eodler said she followed Pipher's truck for 20 to 30 minutes; and Officer Crews said he stopped Pipher around 9:00 P.M.; it was possible that counsel could have shown that the incident occurred around 8:30. On August 31, 2009, the date of the incident, it was probably light outside still at 8:30. App. 434, ll. 17 – App. 435, ll. 3.

Counsel did not investigate government agencies for the time of sunset although he knew those records existed. App. 436, ll 2 – 11.

During his closing argument to the PCR court, Pipher's PCR attorney argued that Pipher's main issue for ineffective assistance of counsel was that through cross examination, trial counsel may have been able to show that the aggravating circumstance of nighttime was not met. App. 445, ll 1 – 12.

The PCR judge ruled that Pipher failed to carry his burden of proving that trial counsel was ineffective. The court found that trial counsel was thoroughly competent in his representation of Pipher. App. 451. The PCR judge wrote that the evidence "overwhelmingly indicated that the burglary occurred during the nighttime." The PCR judge stated that Pipher did not present any evidence at the PCR hearing regarding the actual time of sunset on the day of the burglary. App. 452.

South Carolina Code Section 16-11-312 (B)(2) provides that a person is guilty of second degree burglary if the person enters a building without consent and with intent to commit a crime therein, and either the entering or remaining occurs in the nighttime. The statute does not define nighttime.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).


A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant 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. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is 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).

Trial counsel was ineffective for not investigating the time of sunset on the day of the incident. Trial counsel was ineffective for not cross examining the witnesses, Ms. Eolder and Officer Crews to show the actual time of day the incident occurred and that it was still daylight. Ms. Eodler testified that she saw a male figure. App. 146, ll. 1 – 13. If trial counsel had cross examined her, he could have determined if she saw the man’s face. In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), nighttime was held at common law to be the period between sunset and sunrise during which there is not daylight enough by which to discern or identify a man’s face, except by artificial light or the moon. If she saw the man’s face, then it would be daylight.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Steven H. John, Circuit Court Judge

LEWIS E. PIPHER,

PETITIONER,

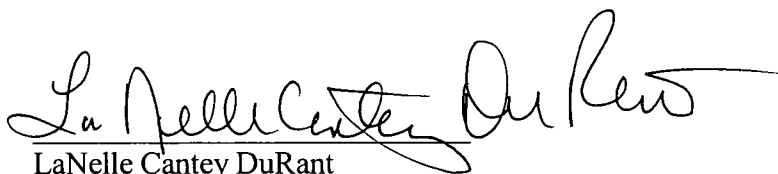
V.

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 have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Lewis E. Pipher, #341432, Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 22nd day of August, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of August, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.