ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

AUG 26 2014

S.C. Supreme Court

Certiorari to Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

RONNIE GOGGINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002756

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the record supports the PCR court's finding that Counsel effectively raised defenses to the jury where the State's only evidence that Petitioner was involved in a robbery in the streets at five o'clock in the morning was the victim's identification of him; where Petitioner maintained to Counsel that the victim was involved in a drug deal with another man and he was merely a bystander; where the victim gave changing statements to police about the details of the robbery and gave testimony about the case directly conflicting with the sworn testimony of an investigating police officer; and where Counsel did not argue any of these points to the jury but only proposed that the victim genuinely mistook Petitioner because he appeared in the two photo lineups that police gave him.

STATEMENT

Albert Geter claimed that on Saturday, August 2, 2008, he was up at 5:00 a.m. innocently walking the streets when two men robbed him by putting a handgun to his head and taking his cash. He was walking to "help a cousin clean a park, a city park that was in need of some repairs, some work" when he came upon a stranger who extended a hand and introduced himself as "Little Bull." Geter testified he "bent down" to shake the man's hand; when he stood back up, he felt a gun on the back of his head. App. 104, line 7—App. 105, line 22; App. 97, line 20—App. 98, line 21. Geter repeatedly testified the man with the gun then said, "[W]here [is] the money." App. 108, line 20—App. 109, line 17.

The State's only evidence implicating Petitioner was Geter's identification of Petitioner as the man whom he first encountered. App. 67, lines 17-25. He claimed after the other man asked where the money was, Petitioner searched his pockets "until he did find the money that I had"—$250 in cash that Geter claimed he intended to take somewhere to pay his rent. App. 109, line 19—App. 111, line 20; App. 267.

Petitioner maintained all along that Geter was involved in a drug transaction with the other individual. Geter was unhappy with the quality or quantity of the drugs, which provoked the individual to rob him. Petitioner was present but otherwise had no involvement. App. 188, lines 12-22.

On February 23, 2009, the Spartanburg County Grand Jury indicted Petitioner on one count of armed robbery. App. 280-281. On October 14, 2009, he proceeded to trial before The Honorable Roger L. Couch and a jury. Robert Hall represented Petitioner and Matt Kendall represented the State. App. 11.

In a pretrial *Neil v. Biggers*[1] hearing, evidence was presented that police showed Geter two six-pack lineups. Geter could not identify anyone during the first lineup, which occurred at the police station within an hour of the robbery. App. 30, line 21—App. 31, line 5; App. 43, lines 5-25. Geter testified about how the lineup at the police station proceeded:

> Q: When you saw it that day, when Officer Hrycaj showed you that lineup, were you able to positively pick him up?
>
> A: I wasn't—well I, I pointed to the guy who I thought it was, and she—the officer told me that that wasn't the person that, that robbed him. So—
>
> Q: Okay.
>
> A: —I was thinking okay, this guy can't be in this lineup because that's the only one that's here that looks like the guy that just robbed me.
>
> Q: Okay. Well, did you make a positive ID at that time or did you—tell me when you said you thought it was him or you were sure it was him.
>
> A: . . . [W]hen I looked at the lineup I pointed to this picture right here and she said well, it, that's not him, so—.
>
> * * *
>
> Q: Do you recall what you did say, say to the officer?
>
> A: I said, well, it must be somebody that look like him cause this guy right here is the one I remember that just robbed me.

App. 45, line 18—App. 46, line 20. On cross-examination, Geter testified he was absolutely certain he put his finger on the picture to indicate to Officer Hrycaj. App. 50, line 21—App. 51, line 7.

The State then called Officer Susan Hrycaj with the Spartanburg Public Safety Department to testify. App. 57, lines 15-21. During her examination, she averred six times over—three on

[1] 409 U.S. 188 (1972).

direct and three on cross—that Geter did not indicate to her a picture in any manner or with any degree of possibility; she was "very certain" of it. App. 61, lines 1-19; App. 62, line 24—App. 64, line 10. Six days later, Geter identified Petitioner to Officer Russell Porter. App. 67, lines 17-25. The court ruled to allow the identification evidence. App. 82, lines 11-16.

During trial, Geter admitted on cross-examination that his current allegation that Petitioner searched his pockets and took the money differed from an earlier account. On the day of the robbery, he gave to Officer Hrycaj a written statement that the man with the gun searched his pockets and took his money.[2] Geter explained, "after the events of that happening to you, everything was jumbled in my mind, I was disoriented, and I was scared, and I was terrified." App. 118, line 17—App. 119, line 17; App. 268.

After Geter, the State called Officer Porter to testify about the photo lineup identification. App. 132, line 14—App. 137, line 21. On cross-examination, Counsel for Petitioner elicited Officer's Porter's acknowledgement that Geter could not pick Petitioner out during a previous lineup

> Q: Had somebody else done a lineup?
>
> A: According to the incident report, the responding patrol officer also presented him a lineup.
>
> Q: Okay. And does your file indicate whether or not Mr. Goggins was in that first lineup?
>
> . . .
>
> A: Yes.
>
> . . .

[2] The first statement consisted of twelve hand-written lines of narrative. Geter signed below the statement and below a self-proving affidavit providing, "I have read this statement consisting of [one] page(s), and I swear or affirm that the facts contained therein are true and correct." App. 268.

> Q: And was Mr. Geter able to pick [Petitioner] out of that first lineup according to your file?
>
> A: No.

App. 139, line 16—Ap. 140, line 7.

After Officer Porter testified, the State rested without calling Officer Hrycaj. App. 142, line 25—App. 143, line 1. Counsel for Petitioner then rested the defense case without presenting evidence. App. 150, lines 13-19. In closing argument, the solicitor for the State stressed to the jury the credit-worthiness of Geter, saying, "You heard Albert say from the stand several time 100 percent sure, without a doubt, the man in front of me is the defendant, . . . Ronnie Goggins" and "Albert Geter is a hundred percent sure. No doubt in his mind that the man robbed him. . . . He's a hundred percent sure it's that man. He robbed him." App. 153, lines 18-20: App. 156, lines 6-9.

Likewise, Counsel for Petitioner focused on Geter's credibility, noting how "another officer showed him a lineup that Investigator Porter said he saw, and it had [Petitioner] on it." App. 158, lines 13-15. A little later he revisited the point: "On the day of this robbery, the day he says he was robbed, he could not pick [Petitioner] out. Six days later he picked him out of a lineup that they put in evidence. They didn't give a, give you the first one." App. 160, lines 9-12. He argued that the most sensible explanation for the inconsistency was that Geter convinced himself Petitioner was the robber because only his picture appeared in both lineups:

> But Investigator Porter said yeah, there were five people and [Petitioner] in the first, and the only repeat in the second lineup was Mr. Goggins.
>
> He's seen him twice now in a lineup. Of course he picked him out. I agree with [the solicitor]. You have to use your common sense.

App. 160, lines 12-18.

> The State wants you to believe that when he looked at that first lineup, for some reason he couldn't identify him, but six days later he could, and today he say yea, that's him. Well, the only thing consistent in those two lineups was [Petitioner]. . . .
>
> Unfortunately, we don't have that lineup for you to look at, at this point in evidence. But I think it's clear that it did exist, and I don't doubt Mr. Geter now has convinced himself that that's the man who did it.

App. 162, lines 2-14.

> He couldn't pick him out on the 2nd. He even looked at a picture of him for five other people [sic], and then he looked at the picture of him six days later with five different people. No repeats except [Petitioner]. Of course he picked him out. And as time went by, he convinced himself more and more that's the man.

App. 163, lines 7-12.

During deliberation, the jury asked the court to "reread the statements given by the victim in the initial report . . . on August 2nd and the statement . . . when the officer went to the victim's home for the visit." Because the statements were not in evidence, the court replayed the cross-examination of Officer Porter. App. 182, line 24—App. 183, line 16. The jury found Petitioner guilty, and the trial judge handed down a fifteen-year sentence. App. 185, lines 16-21; App. 192, lines 2-4. On March 15, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 205-212. The State filed a return on February 20, 2013. App. 213-216.

On June 27, 2013, Petitioner appeared at an evidentiary hearing before The Honorable R. Lawton McIntosh. Kenneth P. Shabel represented Petitioner and Suzanne H. White represented the State. App. 217. Petitioner testified about the inconsistencies in the statements Geter gave police fourteen months apart. He also described the police testimony at his trial regarding the photo lineups. App. 225, line 5—App. 236, line 22; App. 267-268.

Counsel testified that from his first meeting with Petitioner, he strongly suspected Petitioner knew who the robber and was aware of drug activity between him and Geter, but he did not want to identify the man. App. 243, lines 4-21. Counsel testified that his concern in the case was the admissibility of the photo identification under *Neil v. Biggers*. He specifically told Petitioner that "there's a good chance the [trial] judge is gonna let it in and we have to depend on the appellate courts to . . . right that wrong." App. 244, line 18—App. 245, line 9. Counsel testified that he did not call Officer Hrycaj to testify about the first lineup because he decided that a better strategy was to present no evidence and have the final argument. App. 251, line 6—App. 252, line 12.

On November 26, 2013, the PCR court issued its order of dismissal. App. 273-279. The court found Petitioner did not establish "that Counsel failed to . . . effectively bring out particular issues to the jury" because Petitioner did not "offer any testimony or evidence as to anything that Counsel could have . . . used to assist at trial had more investigation been completed." App. 276-277.

ARGUMENT

The record does not support the PCR court's finding that Counsel effectively raised defenses to the jury because Counsel unreasonably neglected multiple strategies to discredit Geter and create a reasonable doubt that were apparent in the record.

The record does not support the PCR court's finding that Counsel effectively raised defenses to the jury because Counsel unreasonably neglected multiple strategies to discredit Geter and create a reasonable doubt that were apparent in the record. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR

applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

"The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002)). "[A]n attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'" *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)). Counsel must be found deficient when "the trial transcript and . . . PCR testimony inescapably point to the conclusion that [counsel] simply had not adequately prepared the defense case." *Lounds* at 462, 670 S.E.2d at 650.

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In this case, the State's only evidence implicating Petitioner was Geter's testimony. Naturally, Counsel's primary strategy in front of the jury was to discredit Geter. In particular, he focused solely on the possibility that Geter was mistaken in identifying Petitioner based on the inclusion of his picture in both lineups. Thus, in closing, he reiterated how Officer Porter testified about the first lineup with Petitioner's photo, and he pointed out how the State did not introduce

evidence surrounding it. He repeatedly told the jury that Geter obviously indicated Petitioner because he had genuinely convinced himself that Petitioner was involved.

First, Counsel never argued that Geter was untrustworthy because he was lying about being involved in a drug deal gone bad. Neglecting this argument was highly suspect considering the evidence and circumstances supporting it. From his first meeting with Petitioner, Counsel suspected Geter was indeed present at a drug deal and that all three men were acquainted with each other. Petitioner admitted he was present but said he had no other involvement. Further, Geter's story was shady. He was up at 5:00 a.m. walking the streets to provide generic help to an unidentified relative. Though alone during dark hours, he shook the hand of a stranger who randomly accosted him. The robber specifically asked for "the" money, and Geter happened to be carrying $250 in cash.

Second, Counsel did not expose to the jury how Geter had just given sworn testimony that directly contravened the sworn testimony of a police officer. In the suppression hearing, Geter three times stated he pointed to a photo in the first lineup, and he twice stated that Officer Hrycaj said, "that's not him." Geter said he was "absolutely certain" that he indicated Petitioner. However, Officer Hrycaj then averred six times over that Geter never indicated to her in any manner or with any degree of possibility, and she was "very certain" of it.

Third, Counsel did not offer into evidence Geter's inconsistent written statements to police. At trial, Geter testified that Petitioner went into his pockets. On cross-examination, Counsel elicited from Geter that on the day of the robbery, he told Officer Hrycaj that the man with the gun searched his pockets and took his money. Neither party offered the written statements into evidence.

Counsel's failure to pursue these three strategies in establishing reasonable doubt of Geter's account was objectively unreasonable. In addition to Counsel's contention—that Geter was

genuinely mistaken—a reasonable and simple view of the evidence and argument presented permitted other, equally apparent inferences: Geter was rattled immediately after the robbery and was not prepared to make an identification at that moment; the photo of Petitioner was unclear or Petitioner otherwise appeared atypical; or one or more photos looked very similar. Alternatively, the theory that Geter was involved in a drug deal in which he was wronged and lost money was more sensible. It explained Geter's doubtable account of his actions that morning as well as his ostensibly misleading accounts to police. It also provided strong impeachment value as grounds for bias. Additionally, arguing the theory would have allowed Counsel to forcefully confront Geter in front of the jury with a transcript of his ostensible lying under oath about indicating a picture in the first lineup and with his signed and self-confirmed statement making a conflicting representation to police about the robbery.

At the PCR hearing, Counsel testified that he did not call Officer Hrycaj to testify about the first lineup because he decided with Petitioner a better strategy was to present no evidence and have the final argument. The record contains no explanation or evidence of an evaluation on his part of whether the two other strategies were worth pursuing. Thus he could not have intelligently weighed the risk of pursuing them in making reasonable decision of whether to present evidence. Moreover, considering that Counsel's singular strategy did not dispel alternate explanations for Geter's inconsistencies that were consistent with Petitioner's guilt, neglecting these strategies solely to secure the final argument to the jury was not objectively reasonable.

The unreasonableness of Counsel's strategy is bolstered by evidence showing he had inadequately investigated these defense possibilites, and he was therefore simply unprepared for trial. Counsel testified that his concern in the case was the admissibility of the photo identification under *Neil v. Biggers*. He specifically told Petitioner that "there's a good chance the [trial] judge is

gonna let it in and we have to depend on the appellate courts to . . . right that wrong." In closing, he acknowledged to jury that evidence of first lineup would be helpful, but "[u]nfortunately, we don't have that lineup for you to look at, at this point in evidence." According to the record, Counsel had martialed no evidence prior to the day of the hearing to present even if he had decided to put up a case. The record strongly suggests his intent was only to prepare and argue the *Neil v. Biggers* issue, and he treated the jury trial as a lost or unworthy cause.

Finally, a reasonable probability exists that, but for Counsel's failures, the result of the proceeding would have been different. Again, the State's only evidence implicating Petitioner was Geter's identification. In closing, both the State and Counsel stressed to the jury the importance of evaluating Geter's credibility. The Solicitor for the State repeated to the jurors the phrases one hundred percent sure and without a doubt. The jury's requested to re-examine Geter's conflicting statements to police. The evidence begged the question of whether Geter was involved in a drug transaction with the other individual. The theory dovetailed with the impeachment evidence of Geter's changed statement and his controverted claim that he indicated Petitioner at the first lineup. And critically, accepting the theory would leave unanswered the question whether Petitioner was merely a bystander who became the easy target of Geter's vindictiveness when the investigation dragged on with no other leads. At the least, it would sufficiently mar Geter's credibility to create reasonable doubt and is therefore sufficient to undermine confidence in the guilty verdict.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

RONNIE GOGGINS,

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of August, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day of August, 2014.

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