STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

SAMMY LEE SCOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000748

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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

Did the PCR judge err in refusing to find trial counsel ineffective in failing to continue to object to hearsay statements that Petitioner's sister told witnesses that they did not know or see anything in an attempt dissuade the witnesses from cooperating with the police?

STATEMENT

In November of 2006, the Anderson County Grand Jury indicted Petitioner Scott for murder and four counts of assault and battery with intent to kill and five counts possession of a weapon during the commission of a violent crime, indictments #2006-GS-04-3261, 3262, 3263, 3264, 3265. On September 8, 2008, Scott proceeded to jury trial before the Honorable J.C. Nicholson. Andrew Potter represented Scott at trial. Catherine Huey prosecuted the case. The jury returned verdicts of guilty as charged. Judge Nicholson sentenced Scott to an aggregate sentence of fifty five (55) years. A timely notice of intent to appeal was filed and the appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Scott, 2011-UP-518, filed November 30, 2011).

Scott filed an application for post conviction relief on December 4, 2012. The State filed a return on June 5, 2013. On September 17, 2014, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. Hugh Welborn represented Scott at the PCR hearing. John H. Whitmire was present on behalf of the State. In a written order filed April 3, 2014, Judge McIntosh dismissed the application and denied relief. A timely notice of intent to appeal was served on April 7, 2014. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to continue to object to hearsay statements that Petitioner's sister told witnesses that they did not know or see anything in an attempt dissuade the witnesses from cooperating with the police.

During the PCR hearing Petitioner submitted that trial counsel was ineffective in failing to object to hearsay testimony as to statements attributed to his sister, Nicki Scott. (App. pp. 619-623). Nicki Scott did not testify at trial. Trial counsel failed to object when the prosecutor asked Markesha Smith what Nicki said and the witness testified, ""She said, 'Y'all didn't see nothing.'" (App. p. 136, lines 7-16; p. 620, lines 1-20). Trial counsel failed to object when the prosecutor asked Whitney Keasler what Nicki said and the witness testified, "You don't know nothing, You didn't see nothing." (App. p. 148, line 23 – p. 149, lines 1-2; p. 620, line 21 – p. 621, lines 1-8). Trial counsel failed to object when the prosecutor asked Patrice Gaines, "Is that what she told you: Nicki told us all not to say anything, we all said okay?" (App. p. 155, lines 7-21; p. 621, line 19 – p. 622, lines 1-2). The witness answered, "Yes, Ma'am." (App. p 155, line 21). Trial counsel failed to object when the prosecutor asked Patricia Durham what Nicki told her and the witness testified, "She was saying in general, 'You didn't see anything,' but I didn't see anything so I didn't know what she was talking about." (App. p. 164, lines 6-14; p. 622, line 22 – p. 623, lines 1-2).

Earlier in the trial counsel objected on hearsay grounds when the prosecutor asked Kyle Duncan what Nicki said to him. (App. p. 121, lines 3-8). The judge held a discussion at sidebar and then the questioning continued. A few questions later the prosecutor again asked Kyle Durham what Nicki said to him. (App. p. 122, line 1). Trial counsel again objected and the judge overruled the objection. (App. p. 122, lines 2-3). The witness testified, "She told me not to say anything." (App. p. 122, line 4). When asked to specifically read what she told him the witness testified, "She said, 'You didn't see shit.'" (App. p. 122, lines 6-8).

On direct appeal Petitioner argued that the trial judge erred in allowing Kyle Duncan to testify about what Nicki Scott said. In an unpublished opinion the Court of Appeals wrote:

> We find the trial court did not err by allowing witness Kyle Duncan to testify that shortly after the shooting Nicki Scott told him "you didn't see shit," and Troy Verner described the shooting as "some real gangster shit." Neither statement constitutes hearsay evidence because the statements were not offered to prove the truth of the matter asserted. See Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Furthermore, even if the statements did constitute impermissible hearsay evidence, the trial court's admission of the evidence did not prejudice Scott because the statements were cumulative to other evidence presented at trial. See State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) ("Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." (internal quotation marks omitted)); State v. Vick, 384 S.C. 189, 199-200, 682 S.E.2d 275, 280 (Ct. App. 2009) ("[T]he admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence.").

State v. Scott, 2011-UP-518, filed November 30, 2011).

In the order of dismissal the PCR judge wrote:

> This Court finds Applicant failed to meet his burden to prove counsel ineffective for not renewing objections to Markesha, Brandon,[1] and Patricia's testimonies that Applicant's sister directive [sic] and them to not cooperate with police and her conduct as a co-conspirator. (Trial Transcript p. 130; pp. 142-43; p. 158). Counsel provided no valid reason why he abandoned the object [sic] after objecting on the matter during Kyle's testimony. (Trial Transcript p. 115). As a result of counsel [sic] failure to renew the objection to this particular testimony throughout the trial, the issue was found to be unpreserved on appeal. Regardless Applicant has not met his burden to prove that he would have succeeded on the appeal had the issue been properly preserved. Additionally, any detrimental aspect was cumulative after the trial judge sustained counsel's original objection. Therefore, these allegations are denied and dismissed.

(App. pp. 670-671). The PCR judge erred.

The trial judge overruled the objection to Kyle Duncan's testimony. Petitioner challenged that ruling on direct appeal. The Court of Appeals first found that that Kyle Duncan's testimony was not hearsay because not offered for the truth of the matter

[1] This may be a scrivener's error as the other witnesses were Whitney and Patrice not Brandon.

asserted. The Court of Appeals, however, found that even if Kyle Duncan's testimony constituted impermissible hearsay, there was no prejudice because the testimony was cumulative to the un- objected to testimony of Markesha Smith, Whitney Keasler, Patrice Gaines and Patricia Durham. If trial counsel had objected to all of the impermissible hearsay testimony, the Court of Appeals would not have been able to hold that there was no resulting prejudice. Without the no resulting prejudice finding, there is a reasonable probability that appellate counsel would have challenged the Court of Appeals' finding that the testimony did not constitute hearsay because it was not offered for the truth of the matter asserted.

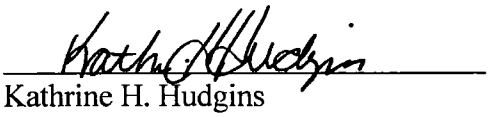
A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to continue to object on hearsay grounds to the testimony of four separate witnesses about what Nicki Scott told them. There is a reasonable probability that but for counsel's deficient performance the result of the proceedings would have been different. Appellate counsel could have challenged the finding by the Court of Appeals that the testimony did not constitute hearsay as it was not offered for the truth of the matter asserted. As the testimony constitutes hearsay, there is a reasonable probability that the case could have been reversed on appeal.

CONCLUSION

Based on the above argument the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

SAMMY LEE SCOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000748

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sammy Lee Scott 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 September 17, 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 Sammy Lee Scott.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of October, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

SAMMY LEE SCOTT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000748

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 Donald J. Zelenka, Esquire and Sammy Lee Scott, #330564, at Lee Correctional Institution this7th day of October, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .