

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Brian M. Gibbons, Circuit Court Judge

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OCT 15 2014

S.C. Supreme Court

GEORGE T. MIDDLETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000656

PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
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INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

Trial counsel erred in failing to make a motion to exclude and to
object to evidence of the video surveillance system located in
Petitioner’s residence because this evidence invited a verdict on the
improper basis that Petitioner was a dangerous drug dealer.4

CONCLUSION10

ISSUE PRESENTED

Whether trial counsel erred in failing to make a motion to exclude and to object to evidence of the video surveillance system located in Petitioner's residence because this evidence invited a verdict on the improper basis that Petitioner was a dangerous drug dealer?

STATEMENT

Petitioner George Thomas Middleton was convicted of distribution of crack cocaine, third or subsequent offense, during the May 2009 term of the Lexington County General Sessions Court before Judge R. Knox McMahon. App. 1 – 428. Petitioner received a sentence of twenty-one years and a fine of \$50,000.00. App. 428 – 436. Petitioner was represented by Wayne Floyd. Assistant Solicitors Emily Howard and David Stumbo represented the State. App. 1.

Petitioner appealed, but his conviction and sentence were affirmed. See State v. Middleton, Op. No. 2011-UP-373 (S.C. Ct. App. filed July 21, 2011). Petitioner was represented by Benjamin Allen Stitely on appeal.

On March 21, 2012, Petitioner filed a PCR application with the Lexington County Clerk of Court. App. 439 – 447. Respondent filed a return, dated December 12, 2012, requesting that a hearing be held. App. 462 – 466. On August 21, 2013, Petitioner filed an amended PCR application. App. 448 – 461. A PCR hearing was held on January 21, 2014 in Lexington County before Judge Brian M. Gibbons. App. 467 – 492. Petitioner was represented by Charles Brooks at the hearing. Assistant Attorney General Walter Whitmire represented the State. App. 467.

On March 13, 2014, Judge Gibbons issued an order of dismissal. App. 493 – 500. Petitioner appealed Judge Gibbons' order of dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to make a motion to exclude and to object to evidence of the video surveillance system located in Petitioner's residence because this evidence invited a verdict on the improper basis that Petitioner was a dangerous drug dealer.

Relevant Facts

The State's case consisted of six witnesses. The defense did not present a case.

The first two witnesses for the State were Detective Eric Kirkland, of the Lexington County Sheriff's Department, and SLED Agent Todd Strange. Kirkland testified that he and Strange conducted a controlled drug buy using confidential informant, Freda Broach. App. 230, line 19 – p. 241, line 7. Kirkland stated that he and Agent Strange met Broach at a church off of Highway 6 on July 15, 2008. App. 237, lines 13 – 17. Kirkland searched Broach's person for weapons, drugs, and money. App. 239, line 13 – p. 240, line 15. Kirkland then placed two wires on her body, an antenna and a body recording device. App. 240, lines 16 – 23. Kirkland explained to the jury that after he placed the recording device on Broach's body and Agent Strange searched Broach's car, they followed Broach from the meeting location to the entrance of Austin Court, the "dirt road" where Petitioner lived at that time. App. 241, line 4 – p. 242, line 10.

The assistant solicitor then asked Kirkland why he and Agent Strange did not follow Broach into Austin Court. App. 242, lines 23 – 24. Kirkland explained that because of "counter surveillance," it would not have been safe for Broach if he and Agent Strange followed Broach. App. 243, lines 3 – 4. Kirkland further stated that "[they] had received information that there might or might not be surveillance cameras . . . so they didn't take the risk of following her in." App. 243, lines 13 – 16.

Freda Broach, the confidential informant and final witness for the state, testified that after she was searched by Kirkland and Agent Strange, she drove into Austin Court and turned into Petitioner's driveway. App. 314, line 15 – p. 326, line 15. Broach related that she could talk to Detective Kirkland on the wires that were placed on her body. App. 327, lines 2 – 7. Broach stated that she walked into the back of the house, went inside, and purchased crack cocaine from petitioner. App. 328, line 10 – p. 332, line 5.

The assistant solicitor then asked Broach what Petitioner was doing when Broach walked into the house. App. 328, line 14. Broach responded that Petitioner was "watching a monitor." App. 328, line 15. Broach further testified she could see "the surroundings of the outside" and "across the street into the neighbor's yard." App. 328, lines 16 – 21. Later in her testimony, Broach offered that Petitioner "pours [the crack] on the counter in front of the monitor." App. 331, line 1.

During closing argument, the assistant solicitor argued that Kirkland and Agent Strange could not follow Broach into Austin Court because "George Middleton has cameras." App. 401, lines 5 – 6. She further argued that "he's sitting there in his kitchen, ready to sell that dope, and watches his cameras for who is coming down his road." App. 401, lines 6 – 8.

PCR Hearing

During the PCR hearing, Petitioner testified that trial counsel failed to move to exclude any reference to the surveillance equipment that he had in his house. App. 472, lines 4-18. Specifically, the cameras that Broach, the confidential informant, testified to at trial. App. 479, line 20 – p. 480, line 1.

Trial counsel could not remember whether he made a suppression motion regarding the equipment. App. 488, lines 5-12. However, the record shows he did not object to the surveillance equipment testified to at trial, App. 482, line 10 – p. 489, line 8, and made no objection to the

monitor testified to at trial. App. 482, line 10 – p. 489, line 8. He did not make a motion *in limine* to exclude the evidence of the surveillance equipment used and found in Petitioner’s home from trial. App. 482, line 10 – p. 489, line 8.

Order of Dismissal

The PCR judge ruled that “[t]he record clearly shows that the [petitioner] invited the informant into his home for the narcotics transaction.” App. 499. The PCR judge further ruled that “[Petitioner’s] arrest and conviction were supported by a standard controlled buy procedure utilized by law enforcement” and “relevant observations made by trial witnesses were reasonable.” App. 499. Finally, the PCR judge ruled that a “criminal defense attorney is under no duty to make frivolous objections just for the sake of protecting himself from a subsequent PCR action.” App. 499.

Discussion

Counsel was ineffective for failing to move to exclude and to object to evidence of the video surveillance equipment found in Petitioner’s home. This evidence invited the jury to make an impermissible, spurious assumption that Petitioner was a dangerous drug dealer.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will

conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. Id. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel's "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, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

This Court has held that counsel's failure to object to impermissible evidence at trial constituted ineffective assistance. In Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989), this Court found trial counsel ineffective when he failed to object to the admission of character evidence elicited from witnesses for the State. Id. at 188, 379 S.E.2d at 125. Trial counsel also failed to object to references to this evidence during the State's closing argument. Id. This Court found "a reasonable probability that, had defendant's character not been improperly placed into issue, the outcome would have been different" and, therefore, reversed the PCR judge's decision denying relief. Mitchell, 298 S.C. at 189, 379 S.E.2d at 125.

In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), this Court also found counsel ineffective for failing to object. This Court found that "prejudice clearly flowed from counsel's erroneous failure to object to state's opening statement vouching for . . . witness's credibility." Id.

at 228, 565 S.E.2d at 285. In that case, the State's case-in-chief of placing the applicant at the scene of the crime, rested on the credibility of this witness. Id. at 229, 565 S.E.2d at 285. Holding that the State improperly vouched for the witness's credibility and trial counsel was deficient in failing to object, this Court reversed the PCR judge's ruling denying relief to the applicant. Id. at 228, 565 S.E.2d at 285. See also Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (Trial counsel's failure to object to the forensic interviewer's testimony, which was improper hearsay and bolstered the victim's testimony, was deficient and prejudiced the applicant.)

Petitioner's counsel made no attempt to have evidence of surveillance equipment, monitors, or cameras excluded from trial. He made no motion *in limine* to exclude this evidence. When Detective Kirkland testified about counter-surveillance and petitioner possibly having cameras, which was the reason why he did not follow Broach onto the road, counsel made no objection. App. 243, lines 3 – 4. When Broach testified that Petitioner had a monitor in his home and could see across the street, Petitioner's counsel made no objection. App. 328, line 15. When the assistant solicitor gave her closing argument and talked about Petitioner watching his cameras and selling drugs, counsel, again, made no objection. App. 401, lines 6 – 8.

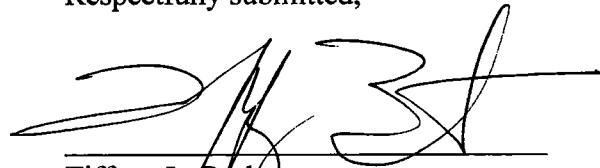
Counsel's failure to make a motion to exclude the surveillance evidence and failure to object to the admission of the surveillance evidence prejudiced Petitioner. The State's case rested on the credibility of one witness---Freda Broach, the confidential informant who bought drugs from Petitioner. Kirkland and Agent Strange did not observe the drug buy. Kirkland testifying that it would have been dangerous to follow Broach into Austin Court because of Petitioner's cameras, in addition to Broach's testimony that Petitioner was watching a monitor that showed his yard and across the street, allowed the jury to infer that Petitioner was a dangerous drug dealer based on that fact alone. The assistant solicitor commenting on Petitioner watching his cameras to see who is

coming down road invited the jury to make the impermissible, spurious leap that Petitioner was a dangerous drug dealer based on that fact. That invited a verdict on an improper basis rather than deciding the limited issue of whether Petitioner sold drugs in **this case**. But for trial counsel's deficient performance, there is a reasonable probability that the outcome of Petitioner's trial would have been different.

CONCLUSION

For the reasons argued, Petitioner George Thomas Middleton respectfully requests that this Court grant his petition with the ultimate relief of a new trial on his conviction of distribution of cocaine base, third or subsequent offense.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Brian M. Gibbons, Circuit Court Judge

GEORGE T. MIDDLETON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

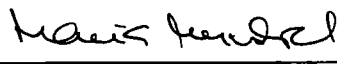
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. George T. Middleton, #307245, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 15th day of October, 2014.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of October, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.