 ORIGINAL.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

J. Michael Baxley, Circuit Court Judge

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S.C. Supreme Court

DOUGLAS HALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000712

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief 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

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ISSUE PRESENTED

Trial counsel erred in making an untimely Batson¹ motion in petitioner's case, which the PCR judge ruled was arguably ineffective legal assistance, because the challenge to the seating of the juror in question was not raised until after the jury venirepersons had been dismissed.

¹ Batson v. Kentucky, 476 U.S. 79 (1986)

STATEMENT

Douglas Hall was convicted of simple possession of crack cocaine, third offense, per jury trial held during the April 2010 term of the Union County General Sessions Court before Judge John C. Hayes, III. Petitioner was sentenced to imprisonment for a period of ten years. App. 1 – 309. Melinda Butler represented petitioner at trial and Assistant Solicitor John Anthony appeared on behalf of the state at trial. Petitioner appealed his conviction and sentence, but the appeal was subsequently dismissed.

On March 22, 2013, petitioner filed a PCR application with the Union County Office of the Clerk of Court. App. 310 – 320. The respondent filed a return dated June 26, 2013, requesting that a PCR hearing be held in response to petitioner's PCR action. App. 321 – 324.

A PCR hearing was convened on January 21, 2014, at the Union County Courthouse before Judge J. Michael Baxley. App. 376 – 377. Petitioner was present at the hearing and represented by Leah B. Moody, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state. On March 6, 2014, Judge Baxley issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel raised in the case. App. 379 – 389.

Petitioner appealed Judge Baxley's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in making an untimely Batson² motion in petitioner's case, which the PCR judge ruled was arguably ineffective legal assistance, because the challenge to the seating of the juror in question was not raised until after the venirepersons had been dismissed.

At trial, Melvin DuBois testified that he met and talked with petitioner on May 18, 2009, in the town of Union, South Carolina, in order to purchase crack cocaine, and that he (DuBois) was stopped for questioning by Police Officer Sherfield after petitioner departed. DuBois stated that Officer Sherfield searched him and found crack cocaine on him, but promised not to press charges if he would arrange a drug buy from petitioner. DuBois agreed and met with petitioner later on that same day to purchase more crack cocaine. DuBois offered petitioner money for drugs, but before any transaction was completed, petitioner saw Officer Brian Bailey, who was assisting in the undercover drug buy in question, and fled. App. 118, l. 5 – p. 126, l. 18; App. 136, l. 8 – p. 145, l. 1.

Officer Brian Bailey stated that he gave chase and followed petitioner, and that during that time he saw petitioner's hands make a throwing motion, and that he found crack cocaine on the ground near that area (Hamlet Street). App. 175, l. 8 - p. 179, l. 4. Petitioner was arrested shortly thereafter.

Petitioner testified at trial and explained that he met with DuBois on the date in question to recover a debt (money) owed to him and that he did not meet with DuBois to sell crack cocaine. App. 222, l. 15 – p. 228, l. 17; App. 231, l. 14 – 16; App. 238, l. 1 – p. 240, l. 3. Petitioner's defense was that there was no intent to sell drugs to DuBois prior to the arrest. App. 362, lines 4-7.

² Batson v. Kentucky, 476 U.S. 79 (1986)

After the jury was selected in this case, one juror was excused for medical reasons. App. 54, lines 3-24. Then, when alternate #74 was called as a substitute for placement on the petit jury panel, counsel argued that he should not occupy a seat on the petit jury since he was a white male with a gun conviction because Moore (#184), who was black, was struck from serving on the petit jury due to his prior conviction. App. 56, l. 24 – p. 58, l. 25; App. 364, l. 16 – p. 368, l. 12.

With respect to counsel's Batson motion regarding the seating of alternate juror #74 as a member of the petit jury, the trial judge in effect denied the motion on the following grounds:

Trial judge: Well, part of, part of the problem now is we don't have a jury to draw. We already let everybody go home...I find that the proper time to raise it has passed. The proper time to raise it was [during the initial Batson hearing]...[and that the matter was raised]... belatedly. App. 59, lines 1-7; App. 60, lines 4-24.

During the PCR hearing, petitioner testified in effect that trial counsel erred in the handling of the Batson motion made in the case. Petitioner explained that one black male (#184) was struck by the solicitor due to his prior DUS conviction, but that the solicitor failed to strike a white male (#74), who had a prior conviction (gun violation) also and was ultimately seated on the petit jury panel in his case. Petitioner added in effect that counsel did not bring the Batson issue to the trial judge's attention until juror #74 was pulled from his alternate status and placed on the petit jury panel, which was too late as the trial judge denied relief on the Batson motion on the ground that the matter was untimely raised since the venirepersons had already been dismissed. App. 343, l. 21 – p. 347, l. 14.

Trial counsel testified at the PCR hearing and explained that she presented a Batson challenge with respect to juror #184 (Terry Moore) and argued that he was struck by the solicitor on the basis of race. The solicitor responded that Moore was struck because his criminal record

contained a 1995 DUS conviction. Subsequently, the trial judge denied the Batson motion. App. 23, l. 3 – p. 25, l. 4; App. 26, l. 1 – 8.

The PCR judge ruled on the Batson issue as follows:

In the case, counsel made a Batson motion during [the] jury selection and the trial judge denied it. Later, when a juror was excused due to medical reasons, counsel challenged alternate # 74 being seated [on Batson grounds because]...a similarly situated juror had been struck during the selection process. The trial judge denied this challenge as untimely [and] this [PCR] Court finds that [petitioner] has failed to meet either prong of the Strickland test as to this allegation...[a]lthough counsel was arguably ineffective for not challenging Juror #74 during the [jury] selection process. Applicant provided no evidence whatsoever that he was prejudiced by the seating of Juror #74. App. 387.

A venireperson may not be struck from a seat on the petit jury on the basis of race or gender. Batson v. Kentucky, 476 U.S. 79 (1986). If a party requests a Batson hearing based on discrimination with respect of the selection of the jury, then a hearing must be held in order for the non-moving party to articulate a reason (race-neutral) for the strike, and then a showing must follow to establish that the explanation was pretextual, and finally, the trial judge must rule on whether the explanation for the strike was race-neutral or pretextual in nature. See Purkett v. Elem, 514 U.S. 765 (1995). Pretext can be established by showing that similarly situated members of another race were seated on the jury. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999).

Here, counsel made the case that juror #184 and juror # 74 were similarly situated as they were both males who had prior convictions, but yet Moore, who is black, was struck because of his prior, but juror number 74, who is white, was not struck when he also, like Moore, had a prior record. Therefore, the strike of juror #184 (Moore) was discriminatory. Counsel's Batson case regarding jurors #184 and #74 was well made, but not well-preserved since counsel's Batson

motion regarding the two jurors was not made until after the venirepersons had been dismissed. Thus, petitioner's Batson motion was neither ruled upon nor reviewed on appeal. This prejudiced petitioner's case. Moreover, the untimeliness of counsel's Batson motion prejudiced petitioner in that he was denied his right to a fair trial by a jury that was not discriminatorily selected to the extent that each venireperson had a right not to be excluded from the petit jury via the Fourteenth Amendment Equal Protection Clause. More specifically, petitioner had a right not to have juror #184 excluded from the petit jury in his case, or in the alternate to have juror #74 struck from the jury in the case.

Many courts require that Batson challenges must be raised before the venirepersons are dismissed. United States v. Parham, 16 F3d 844 (8th Cir. 1994). Hence, petitioner's Batson issue was not entertained at trial or on appeal due to counsel's failure to raise the Batson issue in question in a timely manner. Counsel's error with respect to the untimeliness in raising this Batson motion constituted performance below the level of competence required of criminal attorneys per the Sixth Amendment (See also Strickland v. Washington, 466 U.S. 668 (1984)), such that but for the error, a reasonable probability exists that petitioner's trial might have ended differently.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

J. Michael Baxley, Circuit Court Judge

DOUGLAS HALL,

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CERTIFICATE OF SERVICE

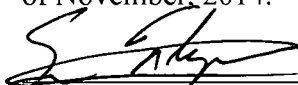
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Douglas Hall #144917, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 2935, this 12th day of November, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of November, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.