

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

George C. James, Jr., Circuit Court Judge

RECEIVED

NOV 19 2014

THOMAS EARNEST WEBB,

S.C. Supreme Court
PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001381

JOHNSON PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Whether petitioner's Sixth Amendment right to effective assistance of counsel was violated when his attorney acquiesced in the trial judge's limitation of his cross-examination of a co-defendant who identified him as the perpetrator of a robbery?

STATEMENT

On January 26, 2006, an Horry County grand jury indicted petitioner for first-degree burglary, two counts of kidnapping, and two counts of armed robbery. App. 361-70. On March 3, 2008, petitioner was tried before the Honorable Edward B. Cottingham and a jury. App. 1. Bradley Coy Richardson represented the State. App. 1. Stuart Axelrod and Joshua Bailey represented petitioner. App. 1. The jury convicted petitioner. App. 280, l. 7 – 281, l. 16. Judge Cottingham sentenced petitioner to thirty years' imprisonment for burglary and a consecutive term of fifteen years' imprisonment for armed robbery, App. 290, l. 10 – 291, l. 4. Judge Cottingham gave petitioner concurrent terms of fifteen years' imprisonment on the other armed robbery conviction and thirty years' imprisonment on the kidnapping convictions. App. 290, l. 10 – 291, l. 4. On March 6, 2008, after petitioner was sentenced, the trial court held a hearing pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), and found petitioner was competent to have stood trial. App. 294, l. 1 – 304, l. 20.

Petitioner appealed. On July 7, 2010, the Court of Appeals affirmed petitioner's convictions. State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (2010). On November 3, 2011, this Court denied certiorari. Id.

On October 11, 2011, petitioner filed a PCR application. App. 307. On March 17, 2014, a hearing was held before the Honorable George C. James. App. 321. Joshua L. Thomas represented the State. App. 321. Daniel Selwa represented petitioner. App. 321. This petition follows.

ARGUMENT

Petitioner's Sixth Amendment right to effective assistance of counsel was violated when his attorney acquiesced in the trial judge's limitation of his cross-examination of a co-defendant who identified him as the perpetrator of a robbery.

On the night of October 21-22, 2005, an elderly couple from Pennsylvania had their sleep in a Myrtle Beach hotel room interrupted by "banging on the door." App. 70, l. 1 – 73, l. 2. Ellis Price answered the door and was told that maintenance needed to check their room because of a leak. App. 72, l. 23 – 73, l. 18. Mr. Ellis opened the door. App. 73, ll. 21 – 23. Two white males entered the room and "looked around." App. 74, ll. 1 – 23. One was thin and the other was "chunky, heavy-set." App. 74, ll. 1 – 4. The heavier man left the room momentarily and returned with a gun. App. 74, ll. 21 – 25. They demanded money. App. 75, ll. 12 – 17. They took wallets, jewelry, and a camera. App. 76, l. 19 – 78, l. 2. Mr. Price could not identify petitioner as one of the assailants. App. 82, l. 9 – 84, l. 21.

Mr. Price did not remember whether the "chunky" man with the gun had a tattoo. App. 86, l. 6 – 87, l. 11. The gunman was more muscular than the other intruder. App. 88, ll. 16 – 18. Mr. Price admitted that in a prior statement he told the police that the man with the gun's "hair wasn't short but it didn't hang down his back." App. 88, ll. 21 – 24.

Despite the lack of a Neil v. Biggers, 409 U.S. 188 (1972) hearing, Mrs. Price claimed petitioner was "the one with the gun. I recognized the detective [sic] as soon as we got here. She can vouch for that." App. 93, ll. 16 – 18. Contrary to Mr. Price, she said the gunman had a tattoo. App. 93, ll. 19 – 20. In her initial statement to police, she said the gunman's hair "wasn't really long." App. 100, l. 19 – 101, l. 10.

Officer Selena Mann investigated the robbery. App. 177, l. 22 – 181, l. 7. She admitted that petitioner had longer hair than his co-defendant, Randy Gaunt (“Gaunt”).¹ App. 197, l. 18 - 198, l. 3. Petitioner had a mullet that was short in the front and “longer in the back.” App. 198, ll. 1 – 3. Both petitioner and Gaunt had tattoos. App. 198, ll. 11 – 12. Petitioner was a “right good bit” bigger than Gaunt. App. 198, ll. 13 – 16. Joy Hines (“Hines”), petitioner’s co-defendant who testified for the State, agreed that petitioner’s mullet went “half-way down his back.” App. 146, ll. 15 – 23.

Hines was petitioner’s ex-girlfriend. App. 119, ll. 3 – 9. She testified that on the day of the robbery, she “was under the influence of cocaine.” App. 120, l. 25 – 121, l. 4. Hines admitted her “perception was not quite what it should have been due to the cocaine.” App. 122, l. 22 – 123, l. 1. She testified that petitioner and Gaunt went into the motel and returned with a wallet and a camera. App. 122, l. 14 – 124, l. 12. Petitioner had a gun. App. 124, ll. 13 – 19.

Hines tried to minimize her role in the robbery. She claimed to ask petitioner “What the hell they had done” when they returned from the hotel. App. 124, ll. 13 – 17. Petitioner pointed a gun at Hines and told her, “Don’t worry about what we did. Just drive.” App. 124, ll. 13 – 17. Hines also made the interesting claim that when she, Gaunt, and petitioner were at Walmart with the victims’ credit cards, that she “was trying to spend more than was on the card so the store would keep them.” App. 145, ll. 3 – 5.

When Officer Mann testified, trial counsel attempted to discredit Hines’ claim that she played no part in the planning of the robbery. App. 205, l. 14 – 210, l. 19. Trial counsel asked Officer Mann whether she learned from Gaunt that Hines wanted to do the robberies. App. 206, l. 1 – 207, l. 12. The trial judge prompted the solicitor to object: “Solicitor, he apparently is

¹ Gaunt did not testify at trial.

referring to an interview with Randy Gaunt. Now, you have no objection to him testifying what Randy Gaunt said without you having an opportunity to cross-examine him?” App. 207, ll. 7 – 12. After prompting, the solicitor objected stating “but it would be hearsay. He could have subpoenaed Randy Gaunt. He could have arranged to call the witness.” App. 207, ll. 15 – 17. The trial judge then ruled, “Well, let’s see where he’s going, and you may or may not object but I’m not going to permit Randy Gaunt’s testimony... to come in through this witness.” App. 207, ll. 18 – 22. After further attempts to question Hines, the trial judge ultimately ruled, “I will not permit [Gaunt’s] testimony through this witness. That is rank hearsay.” App. 210, l. 17 – 18. Instead of making any argument concerning the hearsay rules, trial counsel replied, “Absolutely.” App. 210, l. 19.

Petitioner raised the issue of the trial court’s limitation of his cross-examination of Officer Mann on direct appeal. Webb at 182 – 84, 697 S.E.2d at 667-68. The Court of Appeals held, “We find Webb’s argument is not preserved for our review. Defense counsel did not object to the trial court’s limitation on cross-examination, and therefore Webb’s argument is not preserved for our review.” Id. at 183, 697 S.E.2d at 667. The Court of Appeals cited State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) with a parenthetical for the proposition that “where counsel acquiesces in judge’s limitation of his cross-examination and makes no further objection, appellate review of the issue is procedurally barred.” Id. at 184, 697 S.E.2d at 667.

At the PCR hearing, trial counsel testified that the likely reason he did not call Gaunt to testify was because he “could have taken the Fifth or something.” App. 336, ll. 7 – 10. Trial counsel further testified that he was trying to impeach Hines’ claim that she did not participate in planning the robberies with what Officer Mann learned through interviewing Gaunt. App. 343, l. 22 – 344, l. 5. Trial counsel admitted that he “made a mistake thereby not preserving that argument

that I had been limited in cross-examination.” App. 342, ll. 12 – 19. App. 343, ll. 8 – 17. He was not “able to effectively cross-examine” Hines. App. 343, ll. 11 – 13.

The PCR court held that trial counsel was not ineffective in his cross-examination of Officer Mann, stating that it found the Court of Appeals’ holding that the issue was unpreserved “curious.” App. 357. The PCR court ultimately concluded that petitioner suffered no prejudice because “trial counsel accomplished his goal of getting those conflicting accounts in front of the jury” and that he “thoroughly” impeached Hines. App. 357-58.

The PCR court erred in holding petitioner could not prove deficient performance or prejudice under the two-pronged approach of Strickland v. Washington, 466 U.S. 668 (1984). Had trial counsel not acquiesced in the trial judge’s rulings, made the correct argument that his questions would have elicited admissible evidence, and preserved those arguments for appeal, there is a reasonable probability the outcome of this case would have been different. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

Trial counsel’s questions did not violate the hearsay rule, but no argument was made to the trial judge. Gaunt was “unavailable” for hearsay purposes because he would have asserted his Fifth Amendment privilege against self-incrimination. See SCRE 804(a)(1); State v. Doctor, 306 S.C. 527, 530, 413 S.E.2d 36, 38 (1992). His statements that he planned the robbery with Hines would have been admissible as a statement against penal interest because it would have implicated him in conspiracy. SCRE 804(b)(3); see also State v. Anders, 331 S.C. 474, 477, 503 S.E.2d 443, 444 (1998). Trial counsel failed to make any argument that Gaunt’s statements fell under this hearsay exception.

The failure to preserve an issue for appeal constitutes ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475-76, 746 S.E.2d 41, 46-47 (2013). In McHam, trial counsel

failed to make a contemporaneous objection after losing a motion in limine. Id. Appellate counsel filed an Anders brief. Id. The State attempted to argue that no prejudice existed because of the Anders review. Id. This Court rejected that argument, stating that under the Anders procedure, the court reviews the entire record “for any *preserved* issues with potential merit.” Id. (emphasis in original). The McHam Court held that trial counsel’s performance was deficient. Id. Just as in McHam, trial counsel’s failure to preserve this issue for appeal constitutes deficient performance.

Petitioner can also demonstrate prejudice. Hines was the key witness against petitioner at trial. She was the only witness who definitively identified petitioner as participating in the robbery. She had a motive to lie to reduce her own sentence. Had trial counsel impeached her testimony that she did not know in advance about the robbery, it would have shown that Hines was willing to perjure herself. With Hines discredited, the other evidence would not have been sufficient to convict petitioner and the outcome of his case would have been different.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of reversing petitioner's convictions and granting him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

THOMAS EARNEST WEBB,

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STATE OF SOUTH CAROLINA,

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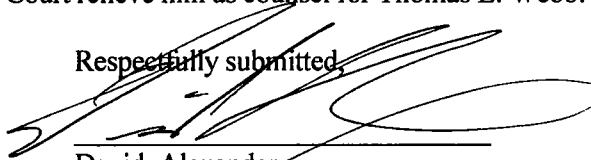
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas E. Webb states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on March 17, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Thomas E. Webb.

Respectfully submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of November, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
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THOMAS EARNEST WEBB,

PETITIONER,

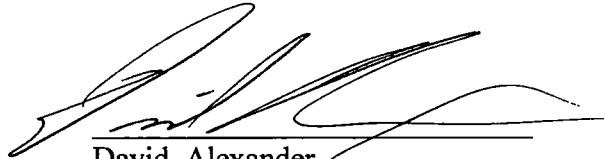
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Thomas E. Webb #291521, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of November, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of November, 2014.

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