

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

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S.C. Supreme Court

ADRIAN DARBY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000711

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding that counsel provided effective assistance of counsel where counsel's professed trial strategy was not objectively reasonable in light of counsel's failure to call Angela Raysor as a witness at trial where her testimony would have impeached a key State's witness?

STATEMENT

On May 10, 2010, Petitioner Adrian Darby was indicted by the Orangeburg County Grand Jury for: burglary in the first degree and Assault and Battery of a High and Aggravated Nature. App. 375 – 380. On August 10-11, 2010, Petitioner proceeded to trial before the Honorable R. Ferrell Cothran, Jr. and a jury. App. 1 – 274.

Petitioner was represented by Everett K. Chandler and the State was represented by Assistant Solicitor Donald Sorenson. App. 1. The jury convicted the Petitioner as indicted. App. 256, ll. 1-17. Judge Cothran sentenced Petitioner to fifteen years imprisonment for Burglary in the First Degree and five years for Assault and Battery of a High and Aggravated Nature, with sentences to be served concurrently. App. 269, ll. 16-25. On August 5, 2011, an Order of Dismissal was issued from the South Carolina Court of Appeals following Petitioner's notification of his desire to withdraw his appeal. App. 276.

On May 30, 2012, Petitioner filed an application for post-conviction relief. App. 278 – 287. Respondent filed a Return to Petitioner's application on November 28, 2012. App. 288-292. On October 31, 2013, an evidentiary hearing was held before the Honorable Diane S. Goodstein. App. 293 – 358. Petitioner was represented by Glenn Walters, Sr., and Respondent was represented by Assistant Attorney General Megan E. Harrigan. *Id.* By an order filed on February 23, 2014, Judge Goodstein denied Petitioner's PCR application. App. 359 – 374. Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that counsel provided effective assistance of counsel where counsel's professed trial strategy was not objectively reasonable in light of counsel's failure to call Angela Raysor as a witness at trial where her testimony would have impeached a key State's witness.

Relevant Facts

On September 29, 2009, Petitioner and another individual, Quinton Green, went to the residence of Cruz and Tiffany Moorer in Cope, South Carolina. App. 67, ll. 1 – App. 99, ll. 20. Petitioner knew the Moorers and had previously babysat their minor daughter. App. 315, ll. 22 – App. 316, ll. 19. Petitioner believed that the Moorers had arranged to have he and Green robbed the previous day after they purchased marijuana from Mr. Moore. App. 56, ll. 12-20. Counsel argued at trial that Petitioner was invited into the house and that Green, who was being sought by police at the time of trial, acted independently to burglarize the victims without Petitioner's knowledge. App. 348, ll. 1-14. Also present in the home at the time of the incident were the Mr. Moorer's minor daughter and Ms. Moorer's brother, Jonathon Raysor. App. 85, ll. 3-20.

The Moorers and Jonathon Raysor all denied involvement in robbing Petitioner when testifying at trial. They further denied that Petitioner had been let into the residence. App. 101, ll. 4-13. However, the minor daughter testified that Petitioner was let in by her father. App. 136, ll. 10-11. Additionally, defense counsel cross-examined Tiffany Moorer about statements she made to her sister, Angela Raysor, bragging that she and Mr. Moorer had arranged for Petitioner and Green to be robbed. App. 90, ll. 18 – App. 91, ll. 8. Moorer denied ever speaking to her sister and counsel ended his cross-examination. *Id.* Raysor was designated a defense witness and counsel had prepared a subpoena. Counsel never served the subpoena for her. Raysor was never called to testify on Ms. Moorer's prior inconsistent statement claiming to have arranged Petitioner's robbery. App. 347, ll. 14 – App. 348, ll. 14. Petitioner did not testify at trial. App. 201, ll. 16.

PCR and Evidentiary Hearing

Petitioner testified at the evidentiary hearing, that counsel did not call Angela Raysor despite Petitioner's belief that her testimony would be helpful to the defense. App. 318, ll. 11-19. Petitioner explained at the hearing that, "[Raysor's] testimony would have been very substantial to me not breaking in the house and the conversation that [Tiffany Moorer] would have with her own sister about me." App. 320, ll. 5-11. Petitioner further testified that Raysor had a recorded conversation with Tiffany Moorer. *Id.* at ll. 19-21.

Petitioner testified that counsel had been provided with a statement by Raysor and had been given her address and phone number. *Id.* at 1-20. No copy of Raysor's statement was found in counsel's records. *Id.* at 17-20. Counsel testified that he had prepared subpoenas for Raysor and another witness. App. 347, ll. 23 – App. 348, ll. 2. Counsel further testified that he did not serve the subpoenas because he believed that the witnesses' testimony, "didn't fit within our theory. I can't remember why that's not the reason now, I cannot remember why." *Id.* Counsel confirmed that the defense's theory was to blame the robbery on Green and stress that the Petitioner was as surprised by Green's actions as the residents. *Id.* at ll. 6-14.

When asked about Raysor, counsel struggled to recall her relationship to the parties and what she was prepared to testify about. *Id.* at 15 – App. 349, ll. 10. Counsel did not remember why he cross-examined Tiffany Moorer on what she may have said to Raysor. App. 349, ll. 11-22. Counsel did recall that his general objective in cross-examining Ms. Moorer was to show that the residents of the house were not sympathetic people, that they were involved with drugs, and to impeach Ms. Moorer's credibility with her convictions on crimes of dishonesty and her role in robbing Petitioner. App. 350, ll. 2-18.

Order of Dismissal

In denying Petitioner's application, Judge Goodstein held that counsel was not ineffective for failing to call any defense witnesses. App. 369. The decision not to call witnesses was part of the defense's "valid and prudent trial strategy" to preserve the last argument. *Id.* Furthermore, Judge Goodstein held that Petitioner failed to establish any resulting prejudice because neither Ms. Raysor nor any other defense potential witness testified at the PCR hearing. App. 370.

Discussion

Defense counsel rendered effective assistance of counsel because his professed trial strategy was not objectively reasonable in light of his failure to call Angela Raysor to testify at trial where her testimony would have impeached a key State's witness.

To establish a claim for ineffective assistance of counsel, a PCR applicant must satisfy the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "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. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon 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 692).

Deficient Performance

Counsel’s performance was deficient because his failure to call Angela Raysor as a witness fell below an objective standard of reasonableness in light of the defense’s theory of the case. *See Strickland*, 466 U.S. at 687-88. Specifically, counsel testified that his trial strategy was to “scapegoat” a possible co-conspirator, highlight inconsistencies in the Moorers’s testimony, and emphasize that they were “drug dealers, that [the Moorers] were undesirable [sic] people who basically set [Petitioner] up in the past”. App. 348, ll. 1-14. To help execute this strategy, Petitioner provided counsel with the name, contact information, and a statement from Angela Raysor that Ms. Moorers had told her about arranging for Petitioner to be robbed. App. 320, ll. 5-24.

Counsel has the authority to make certain tactical decisions involving trial strategy, but counsel’s professed strategy must be objectively reasonable. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness”); *see also Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding PCR Petitioner showed uncalled witness would have made a difference in trial because it would have cast doubt on victim’s identification of Petitioner).

At the evidentiary hearing, counsel testified that he prepared a subpoena for Raysor, but stated that it was not served because her testimony did not fit the theory of the case. App. 348, ll. 1-14. Counsel was unable to state why her testimony would not fit in the theory of case. At trial, counsel even cross-examined Tiffany Moorers about her statements to Raysor, but did not call Raysor to impeach her. App. 90, ll. 18-25. Counsel made no other effort to develop evidence about the Moorers’s involvement in drug sales or in robbing Petitioner. Finally, counsel could not recall

whether he had ever spoken with Raysor or investigated her potential testimony prior to trial, despite having her contact information. App. 331, ll. 13-20.

Accordingly, the PCR court erred in finding that counsel decision not to call Angela Raysor as a witness was a valid trial strategy because counsel's performance was not reasonable "under prevailing professional norms." See *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. 115, 386 S.E.2d 624

Prejudice

Petitioner was prejudiced by counsel's unprofessional failure because the Moorers were the most important witnesses for the State and there were serious questions about their credibility. Mere speculation by the Petitioner as to what witness's testimony would have been had the witness been called at trial cannot, by itself, satisfy applicant's burden of showing prejudice resulting from counsel's failure to call such witness at trial. U.S.C.A. Const.Amend. 6; *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998); See *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (counsel ineffective for failing to call person who could cast doubt on sole witness's identification of the petitioner). However, in the present case, there is sufficient evidence and corroboration from the trial record and the testimony of Petitioner and counsel in the evidentiary hearing for the court to evaluate the prejudicial impact that counsel's failure to call Angela Raysor had on the outcome of Petitioner's trial.

Impeaching Ms. Moorer and discrediting her testimony was crucial to the defense's trial strategy. Counsel elicited from Mr. Moorer's minor child that the Petitioner was let into the residence. App. 136, ll. 10-12. The child's testimony supported defense's theory that Petitioner had no intention of burglarizing the residence. In contrast, Ms. Moorer testified that Petitioner forced his way into the residence. App. 73, ll. 5-24. Entering a dwelling without consent of the people

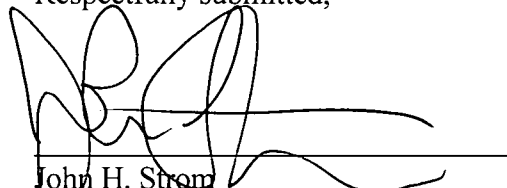
lawfully in possession of it is a substantive element of burglary. S.C. Code Ann. § 16-11-311; *State v. Brooks*, 277 S.C. 112, 283 S.E.2d 830, 830-31 (1981) (state must prove all elements of a crime and burglary requires some proof of an entry without consent). Raysor's testimony would have would have discredited Ms. Moorer and supported the defense's theory of the case attacking one of the elements of burglary.

Petitioner was prejudiced because counsel's failure to call Angela Raysor as a witness "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reasons, Adrian Darby's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

ADRIAN DARBY,

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STATE OF SOUTH CAROLINA,

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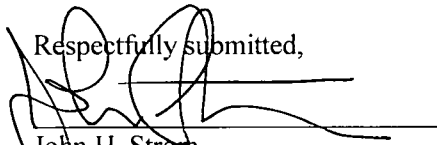
APPELLATE CASE NO. 2014-000711

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Adrian Darby 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 October 31, 2013. 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 Adrian Darby.

Respectfully submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of November, 2014

STATE OF SOUTH CAROLINA

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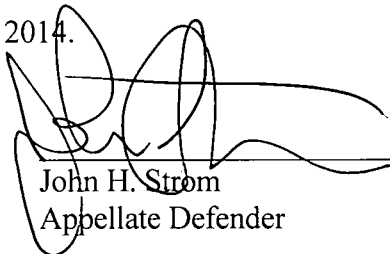
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APPELLATE CASE NO. 2014-000711

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 Megan Harrigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Adrian Darby, #342254, at Allendale Correctional Institution this 26th day of November, 2014.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

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



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