

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
Robin B. Stilwell, Circuit Court Judge

MYKEL WATKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000964

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to object to the solicitor's adverse inference comments regarding petitioner's failure to present any alibi witnesses at trial because this shifted the burden to petitioner to prove alibi when it was the duty of the prosecution to disprove petitioner's alibi defense.

STATEMENT

Petitioner Mykel Watkins was convicted of armed robbery during the May 2010 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole and sentenced to imprisonment for a period of twenty-one years. App. 1 – 164. J. Patricia Anderson represented petitioner at trial and Assistant Solicitor Danny N. Fulmer appeared on behalf of the state. Petitioner appealed, but his conviction and sentence were affirmed. See State v. Watkins, Op. No. 12-UP-268 (S.C. filed May 2, 2012).

On June 15, 2011, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 169 – 175. The respondent filed a return dated July 13, 2012 requesting that a hearing be held in response to petitioner’s PCR action. App. 178-181.

A PCR hearing was convened on November 15, 2013, before Judge Robin B. Stilwell. Petitioner was present at the hearing and represented by Joseph E. Hill, and Assistant Attorney General Suzanne H. White appeared on behalf of the state. App. 183 – 205.

On March 5, 2014, Judge Stilwell signed an Order of Dismissal denying petitioner’s claims of ineffective assistance of counsel in his case. App. 207 – 213.

Petitioner appealed Judge Stilwell’s Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the solicitor's adverse inference comments regarding petitioner's failure to present any alibi witnesses at trial because this shifted the burden to petitioner to prove alibi when it was the duty of the prosecution to disprove petitioner's alibi defense.

At trial, Asma Wasim testified that she was working as a cashier at a Dollar Value Store in Spartanburg County on September 11, 2007, around 8:30 to 9:00 p.m. when two males entered, one of whom held "a gun" on [her], and demanded money. Wasim explained that after she opened the register, the taller male who held the gun reached over and pulled out the money, and that both men fled thereafter. App. 42, l. 7 – p. 45, l. 22.

Tavarise Leon Ferguson testified that he and petitioner entered this store on the day in question, but that it was petitioner who "took it upon himself to rob the store;" and that petitioner, who had a gun, went "behind the counter and got money out of the register" before they left the store. Tr. p. 63, l. 11 – p. 66, l. 15.

Petitioner testified at trial and explained that he was with his girlfriend on September 11, 2007, when the armed robbery occurred and that his girlfriend and her aunt could testify to that effect. App. p. 116, l. 8 – p. 119, l. 20.

During the PCR hearing, trial counsel admitted in effect that she erred in failing to object to the solicitor's improper alibi adverse inference questions and statements concerning the alibi during closing arguments. App. 9, l. 7-11. The solicitor's questions asked of petitioner in response to his (petitioner's) testimony that he was with his girlfriend when the armed robbery occurred and that his girlfriend's aunt could verify this (See App. 118, l. 25 – p. 119, l. 3) follow:

Q. Why didn't you call either one of those [alibi] witnesses?

A. Well I talkedthe last time---I talked to [my girlfriend], me and her boyfriend got into it because he's from Park Hills and he don't really approve of her coming up here defending me in this situation and as for her aunt, I haven't talked to her in almost eight/nine months and the number that she gave me I can't reach her at no more. App. 119, l. 4-10

Q. Is this [trial] a big deal for you?

A. Yes it is...how can it not be a big day?

Q. But it wasn't big enough to subpoena those two witnesses?

A. If you can't get in touch with 'em, you can't get in touch with em. All I got is my word. I know I'm not lying. App. 119, lines 13 – 20.

Additionally, at closing the solicitor stated that “[petitioner] had plenty of opportunity to have alibi witnesses here [and] if he had an alibi witness....nobody showed. App. 138, lines 10-12. The PCR judge ruled that petitioner failed to present any PCR testimony that trial counsel was ineffective with regard to his alibi defense in the case. App. 211.

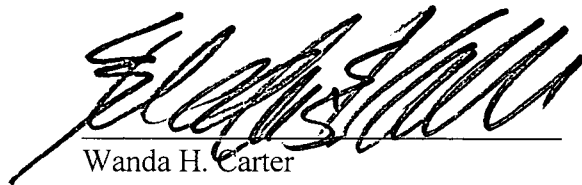
It is error for a solicitor to elicit an adverse inference from a defendant's failure to call a witness at trial. Statev. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002), overruled on other grounds in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The solicitor's comments regarding petitioner's failure to prove alibi shifted the burden to the defense to prove alibi, which the defendant has no duty to prove. It is the State's duty to disprove alibi. State v. Mayfield 235 S.C.11, 109 S.E.2d 716 (1959). The solicitor's use of this adverse inference connected to petitioner's failure to call alibi witnesses at trial to disprove the alibi defense was a burden shifting proof error, and trial counsel's failure to object to the same constituted deficient representation of petitioner at trial in violation of the Sixth Amendment to the United States

Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Prejudice resulted because but for counsel's failure to object to these errors in question, a reasonable probability exists that the outcome of petitioner's trial or appeal might have been different.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

MYKEL WATKINS,

PETITIONER,

V.

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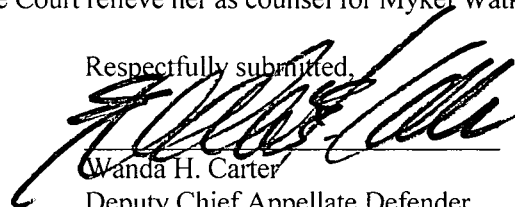
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mykel Watkins states:

1. She is Deputy Chief 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 November 15, 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 Mykel Watkins.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of December, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Robin B. Stilwell, Circuit Court Judge

MYKEL WATKINS,

PETITIONER,

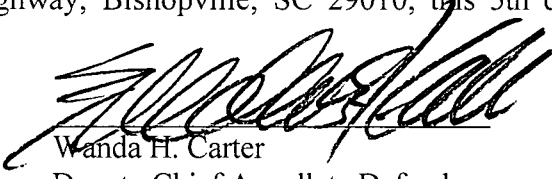
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

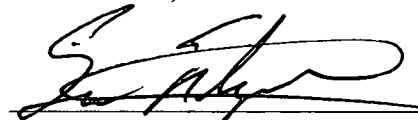
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mykel Watkins, #340783, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 5th day of December, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of December, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.