

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC 31 2014

S.C. Supreme Court

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

TODD E. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001021

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel was ineffective for failing to call Sgt. Smothers as a witness to testify that he told Petitioner a robbery had just taken place, minutes before Petitioner was detained by Sgt. Culbreath, where the State used Petitioner's comment "Why, I didn't rob anybody?" as evidence of Petitioner's guilt because Sgt. Culbreath testified that he did not tell Petitioner about the robbery before he placed Petitioner in handcuffs.

STATEMENT OF THE CASE

Petitioner Todd Smith was indicted for strong arm robbery by a York County Grand Jury on August 18, 2011. App. 345 – 46. He was convicted during the August 2011 term of the York County General Sessions Court before Judge Lee. S. Alford and a jury. App. 283. Judge Alford sentenced Petitioner to fifteen years imprisonment. App. 281. Petitioner was represented by Phil Smith. Erin Joyner represented the State. App. 1.

Petitioner appealed, but his conviction and sentence were affirmed. See State v. Smith, Op. No. 2013-UP-237 (S.C. Ct. App. filed June 5, 2013). Kathrine H. Hudgins represented Petitioner on appeal.

On August 5, 2013, Petitioner filed a PCR application. App. 284 – 291. Respondent filed a return on March 24, 2014, requesting than an evidentiary hearing be held. App. 292 – 296. A PCR hearing was held on April 15, 2014 in York County before the Honorable John C. Hayes, III. App. 297 – 338. Leah B. Moody represented Petitioner at the hearing. Rutledge Johnson represented the State. App. 297.

On April 16, 2014, Judge Hayes issued an order of dismissal. App. 339 – 344. Petitioner appealed Judge Hayes' order. This petition follows.

ARGUMENT

Trial counsel was ineffective for failing to call Sgt. Smothers as a witness to testify that he told Petitioner a robbery had just taken place, minutes before Petitioner was detained by Sgt. Culbreath, where the State used Petitioner's comment "Why, I didn't rob anybody?" as evidence of Petitioner's guilt because Sgt. Culbreath testified that he did not tell Petitioner about the robbery before he placed Petitioner in handcuffs.

Relevant Facts at Trial

Minor testified that on February 13, 2011, she was sixteen years old and living with her grandfather, John Robertson. App. 121, lines 14 – 19. That night, after going grocery shopping with her boyfriend and his mother, Minor returned home at "around 9:10, 9:15ish." App. 125, lines 16 – 24.

She parked in the driveway close to the street and got out of the car. App. 126, lines 18 – 20. When she got out of her car, a man approached her and introduced himself. App. 128, lines 17 – 24. He asked Minor if she could help him out because he did not have kerosene to heat his house and he did not have anything to give his daughter for Valentine's Day. App. 129, lines 5 – 9. Minor gave him a bag of candy that she had in her arm and offered to give him the food that she had in her car. App. 129, lines 10 – 25. When she turned around to get the food from inside the car, the man saw a twenty-dollar bill sticking out of her back pocket and said, "I thought you didn't have any money." App. 130, lines 1 – 15.

According to Minor, she quickly responded that it was her lunch money for the week, but the man's demeanor changed from nice to aggressive. App. 131, line 4. He told her that "[she] just need (sic) to give [him] the money." App. 131, line 1. Minor stated that she reached into her back pocket and handed the man her money. He turned around and ran away in the same direction from

which he came. App. 133, lines 1 – 5. She went into her house and called her mom, who instructed her to call 911. App. 134, line 4 – App. 135, line 2.

Officer Tony Stewart with the Rock Hill Police Department was the first officer to arrive at the scene. App. 177, lines 7 – 13. Officer Stewart, Sgt. Harmon, Sgt. Smothers, and Sgt. Culbreath were among the officers present at the scene. App. 178, lines 1 – 3. The canine units were also called. App. 179, lines 5 – 8. While officers were setting up a perimeter in the area where Minor alleged she was robbed, Officer Stewart spoke to Minor and obtained a description of the suspect. App. 179, lines 9 – 14. Minor told Officer Stewart that the man who robbed her was a black male wearing a dark jacket, blue jeans, and a toboggan. App. 179, lines 18 – 25. Minor also told the officer that the robber was about 180 to 185 pounds and about five feet nine inches tall. App. 180, lines 1 – 6.

While speaking with Minor, Officer Stewart received a report from the other officers at the scene that they had stopped someone who they thought might be a suspect. App. 180, lines 7 – 19. After getting the report, Officer Stewart drove Minor three lots down to where three police officers had Petitioner in handcuffs. App. 181, lines 9 – 15. The officer told Minor that the police had someone who matched her description and he “wanted her to take a look at him to make a positive identification.” App. 182, lines 5 – 10. He parked the police car “about 20 or 30 feet” away from where Petitioner was standing and shined the spotlight on him. App. 182, lines 12 – 22. Around seventeen officers were at the scene. App. 184, lines 3 – 5. Minor identified Petitioner as the man who robbed her. App. 183, lines 3 – 15.

Sgt. Carlos Culbreath was the State’s last witness. App. 195. Sgt. Culbreath stated that once officers ensured that the scene was secure and the perimeter was in place, he and Sgt. Smothers were preparing to leave. App. 198, lines 4 – 25. Smothers spotted Petitioner walking

down the street and thought he matched the description Minor had given them. Both officers got into their cars, turned around, and blocked Petitioner's path. App. 199, lines 1 – 6. Smothers asked Petitioner for his identification. When Smothers walked to his patrol car to check Petitioner's driver's license, Culbreath told Petitioner that he was being detained and handcuffed him. Petitioner allegedly responded by saying "For what, I didn't rob anybody." App. 200, lines 10 – 21. Culbreath claimed that neither he nor Smothers questioned Petitioner or told him why he was being detained. App. 201, lines 7 – 11.

After Minor identified Petitioner as the robber, he was placed under arrest and transported to the detention center. App. 203, lines 8 – 18. At the jail, according to Culbreath, Petitioner continued to protest his innocence, saying "Officer, I'm telling you, I didn't do anything. I'm innocent. . . [t]he lady called me over there to give me some candy to give to my daughter for Valentine's Day." App. 204, line 21 – App. 205, line 8. Culbreath did not memorialize any of Petitioner's alleged statements. App. 211, lines 22 – 25.

In her closing argument, the assistant solicitor took advantage of Petitioner's statement "Why, I didn't rob anybody?" She emphasized that "nobody told him anything about robbing anybody." App. 231, line 23 – App. 232, line 2. She argued that the only way Petitioner could have known that a robbery took place was if he was the one who committed it. App. 239, line 23 – App. 240, line 9.

PCR Hearing

At the PCR hearing, Petitioner explained that Sgt. Smothers was actually the first officer that he came in contact with on the night he was arrested. Petitioner stated that he was walking down the sidewalk when Smothers stopped him and asked for his identification. App. 304, lines 18 – 23. When he gave Smothers his license, Smothers went to his patrol car to check whether

Petitioner had open warrants. He returned Petitioner's license and explained to Petitioner that he was stopped because there had just been a strong armed robbery. App. 304, line 23 – App. 305, line 1. Smothers told Petitioner that he could go because he had no open warrants. However, as Petitioner walked away, Sgt. Culbreath walked up and handcuffed him. Petitioner exclaimed "I haven't robbed anybody" in response to being handcuffed. App. 305, lines 1 – 8. Petitioner stated that he told defense counsel about this exchange with Sgt. Smothers and asked to have the officer subpoenaed. App. 312, lines 21 – 24.

Counsel testified that he could not recall Petitioner's encounter with Sgt. Smothers being an issue. Counsel also could not recall whether he even contemplated calling Sgt. Smothers to the stand. App. 335, lines 19 – 23. Sgt. Smothers did not testify at the PCR hearing.

Order of Dismissal

Judge Hayes dismissed Petitioner's claim of ineffective assistance of counsel. He ruled that because Sgt. Smothers did not testify in the PCR hearing, Petitioner could not establish prejudice from Smothers' failure to testify at trial. App. 342. Further, Smothers could not substantiate Petitioner's allegation. App. 342. The judge explained that "the Court cannot rely on hearsay or mere speculation as to what" the officer's testimony would have been at trial. App. 342.

Discussion

Trial counsel was ineffective for failing to call Sgt. Smothers as a witness to testify that he told Petitioner a robbery had just taken place, minutes before Petitioner was detained by Sgt. Culbreath. The State used Petitioner's comment "Why, I didn't rob anybody?" as evidence of Petitioner's guilt, because Sgt. Culbreath testified that he did not tell Petitioner about the robbery before he placed Petitioner in handcuffs.

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). See Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) (Where victim was sole witness to rape, her identification of defendant was integral to the State’s case, and she claimed to recognize him as her attacker, trial counsel’s failure to call emergency medical personnel who responded to the scene and would have testified that the victim stated she did not know who attacked her was ineffective assistance of counsel.); see also Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) (If additional witnesses

had confirmed defendant's testimony as to his version of events where there was a reasonable likelihood that result of the trial would have been different, defendant was prejudiced by counsel's failure to subpoena and call those witnesses.).

Here, trial counsel was ineffective for failing to subpoena and call Sgt. Smothers to testify that he was the first officer to communicate with Petitioner on the night of the alleged robbery. Because Smothers did not testify, the jury did not hear any evidence that Petitioner had already been informed of the robbery before he was detained by Sgt. Culbreath. The jury did not hear why Petitioner made the comment "Why, I didn't rob anybody." In fact, counsel did not recall what Petitioner had disclosed to him about his initial encounter with Sgt. Smothers. If the jury had heard testimony that Smothers had already told him about the robbery before Sgt. Culbreath detained him only minutes later, the jury would have understood why Petitioner responded the way he did. Once the jury understood Petitioner's comment, there is a strong probability the jury would have considered it a declaration of his innocence and would have found him not guilty. Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

For the reasons argued, Petitioner Todd E. Smith respectfully requests this Court to grant his petition with the ultimate relief of a new trial on his conviction of strong arm robbery.

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 31st day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
JOHN C. HAYES, III; CIRCUIT COURT JUDGE

TODD E. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001021

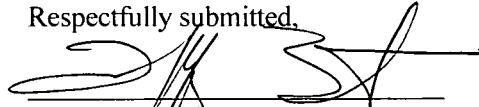
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Todd E. Smith states:

1. She is an 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 April 15, 2014. 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 Todd E. Smith.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of December, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
John C. Hayes, III, Circuit Court Judge

TODD E. SMITH,

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V.


STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-001021

CERTIFICATE OF SERVICE

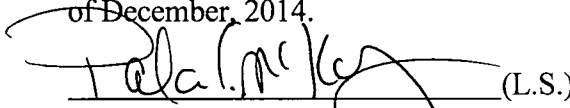
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Todd E. Smith, #346915, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 31st day of December, 2014.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day
of December, 2014.



(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.