STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

JERENE HAYWARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000633

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel where a juror indicated during trial that he was a member of the country club where the homeowner whose house was burglarized works and where the homeowner's domestic employee, who was assaulted, and her husband used to work, and trial counsel failed to object to the Court's further inquiry of the juror outside the presence of Petitioner and his counsel?

STATEMENT

Procedural History

On June 15, 2005, the Richland County Grand Jury indicted Petitioner for burglary in the first degree, petit larceny, kidnapping, assault and battery with intent to kill, pointing and presenting a firearm, and possession of marijuana. App. 983-84, 986-87, 990-91, 994-95, 998-99, 1000-01.

On March 13-17, 2006, Petitioner appeared before the Honorable James W. Johnson, Jr. and was tried by a jury for the offenses listed in the indictments. App. 1 – 824. Petitioner was represented by Jeanette Van Ginhoven and Lauren Mobley, and the State was represented by Assistant Solicitors Aaron Jophlin and Vanessa Cooper. App. 1. Judge Johnson granted Petitioner's Motion for Directed Verdict as to the indictment for pointing and presenting a firearm. App. 731, 15 - 732, 8. The jury found the Petitioner not guilty of kidnapping, but found Petitioner guilty of burglary in the first degree, petit larceny, the lesser included offense of assault and battery of a high and aggravated nature, and possession of marijuana. App. 817, 13 – 818, 2. Judge Johnson sentenced Petitioner to thirty years imprisonment for burglary in the first degree, ten years imprisonment for assault and battery of a high and aggravated nature, to be served consecutively, and two concurrent terms of thirty days for the larceny and possession charges. App. 823, 1-11; App. 988, 992, 996, 1002 (Sentencing Sheets).

On direct appeal, Appellate Defender Aileen Clare filed a brief on the merits on behalf of Petitioner. The State was represented by Salley W. Elliott. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Hayward, No, 2008-UP-088 (Ct. App. Feb. 8, 2008); App. 825. The Remittitur was issued on February 26, 2008. App. 985.

First PCR Application and Hearing (2008-CP-40-780)

On February 1, 2008, Petitioner filed his application for post-conviction relief ("PCR") alleging ineffective assistance of counsel. App. 830-840. The State filed its Return and Motion to Dismiss on February 7, 2008, citing the pendency of Petitioner's direct appeal on the date that he filed. App. 841-43. Petitioner filed a second application for PCR on May 29, 2008. App. 844-49. The State filed its Return to the second petition and a Motion for Merger on March 25, 2009. App. 850-58; 859-60. The Court granted the Motion for Merger, retaining the docket number of the later petition, 2008-CP-40-03854, as the surviving file and dismissing the original docket number upon the merger.[1] App. 861-62.

On May 13, 2009, an evidentiary hearing was held before the Honorable Alison Renee Lee. App. 863. Petitioner was represented by Charlie J. Johnson, Jr., and the State was represented by Assistant Attorney General Brian Petrano. App. 863. The only witness at the hearing was Petitioner. App. 868-87. Neither of Petitioner's original trial attorneys were available to testify at the hearing because they were both living outside of the United States. App. 866, 22 – 868, 1.

At the PCR hearing, Petitioner testified that his trial attorneys failed to object or move for a mistrial after a juror sent a note to the judge during the trial indicating that he was a member of the same country club as one of the alleged victims, Jeffrey Connell. App. 874, 2 – 876, 6. Petitioner also argued that trial counsel failed to effectively argue the insufficiency of the photo array shown to the alleged assault victim, in which he was the only individual in prison clothes and the

[1] Despite the prior order of merger, in Judge Lee's subsequent Order of Dismissal on March 9, 2010, she merged the second PCR Application into the original PCR Application and ordered that the surviving case number is 2008-CP-40-00780.

complexion of the individuals in the array differed. App. 876, 9-14. Petitioner also testified that that there was insufficient physical evidence to connect him to the crime scene. App. 877, 16 – 13. Finally, Petitioner alleged that trial counsel was unprepared. App. 870, 18 – 871, 6; 879, 17-25; 880, 16-18; 881, 20-23.

Order of Dismissal (2008-CP-40-780)

Judge Lee's Order of Dismissal denying Petitioner's PCR application was filed March 9, 2010. App. 893-99. Judge Lee ruled that trial counsel's representation was not deficient, finding that the note from the juror did not warrant an objection or motion for mistrial, that the photographic line-up was sufficiently challenged by trial counsel, and that trial counsel "thoroughly challenged" the blood evidence. Id.

Petitioner did not file a timely Notice of Appeal.

Second PCR Application and Hearing (2013-CP-40-4135)

Petitioner filed a subsequent PCR application on July 17, 2013, asserting that his PCR counsel, Charlie J. Johnson, Jr., was ineffective in failing to file a timely notice of appeal. App. 946-62. The State filed its Return on September 26, 2013. App. 963-70. An evidentiary hearing was held on November 20, 2013 before the Honorable Robert E. Hood. App. 971. Petitioner was represented by Kristi G. Goldberg and Tara D. Shurling, and the State was represented by Megan E. Harrigan. Id. The parties placed a consent agreement on the record in light of that fact that, through inadvertence, neglect, or mistake, Judge Lee's Order was not sent to PCR counsel, Charlie J. Johnson, Jr. and was never forwarded on to the Petitioner. App. 974, 9 – 976, 2. The parties agreed that based on the circumstances, Petitioner should be given an opportunity to appeal from Judge Lee's Order. Id.

Consent Order Granting Belated PCR Appeal Pursuant to Austin (2013-CP-40-4135)

On March 4, 2014, Judge Hood entered a Consent Order finding that Petitioner did not voluntarily waive his right to appeal PCR court's denial and dismissal of his application for PCR and granting Petitioner an appeal. App. 978-82.

Petitioner filed a Notice of Appeal of the Consent Order on March 21, 2014, and it serving his Petition for Writ of Certiorari pursuant to Austin v. State at the same time as this Petition.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner was denied his Sixth Amendment right to effective assistance of counsel where a juror indicated during trial that he was a member of the country club where the homeowner whose house was burglarized works and where the homeowner's domestic employee, who was assaulted, and her husband used to work, and trial counsel failed to object to the Court's further inquiry of the juror outside the presence of Petitioner and his counsel.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, 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). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citation omitted). Counsel's strategy is reviewed under "an objective standard of reasonableness." Id.

Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings

would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Deficiency of Trial Counsel's Representation

The process of jury selection is within the expertise and experience of trial counsel and falls under the "ambit of trial strategy". Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). "A criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. at 617, 606 S.E.2d at 765 (citing Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). However, a defendant has a constitutional right to be present at every state of the criminal proceeding against him. State v. Rivers, 294 S.C. 123, 125, 363 S.E.2d 105, 196 (1987) (citing State v. Whaley, 290 S.C. 463, 351 S.E.2d 340 (1986). This Court held in Rivers that "this right applies when a trial judge conducts *voir dire* during the course of the trial to determine the jury's continued impartiality." Id.

At the PCR hearing, Petitioner testified that one of the jurors was a member of the same country club as the owner of the house that was allegedly burglarized. In discussing how Petitioner became aware of this, he stated: "We didn't see that note. That was just going off the judge's word but at the same token, she [trial counsel] didn't object to it whether it was – she [trial counsel] didn't ask to see it, request to see it or nothing. She [trial counsel] just went off face value as far as word wise." App. 874, 20-24. Petitioner further stated that trial counsel did not object, even when the Court asked her specifically if there was anything that she wanted to put on the record. App. 875, 8-18.

During Petitioner's trial, Jeffrey Connell, who's home was alleged burglarized and his domestic worker assaulted, testified that is a golf course superintendent at Columbia Country

Club. App. 195, 8-9; App. 196, 12-13 – 197, 11. The domestic worker, Lourdes Antonio, and her husband also worked at the golf club for a period of six years. App. 196, 12-13; 244, 21-24. The following took place on the record after the State's direct examination of Jeffrey Connell:

> The Court: Counsel, the note that I had from the juror, I made inquiry and he said that would not in any way effect his ability to be fair and impartial in this case. The fellow said he was a member of the country club, he doesn't know that witness. Anything else that needs to go on the record concerning that? I will make this a Court Exhibit in the Case.
>
> Trial Counsel: No, your Honor....

App. 222, 11-18; App. 1005 (Court's Exhibit 5). There is no indication that the attorneys were present for any follow-up questions from the judge to the juror. Id. In fact, the record indicates that the judge made an independent, off-the-record inquiry of the juror and was relaying that to counsel. Id. There is also no indication that the trial judge inquired as to how long the juror had been a member, relevant to whether he knew Mrs. Antonio or her husband.

Trial counsel failed to exercise any expertise or strategy regarding the juror issue. In Magazine, the trial judge granted the state's Batson[2] motion and the jury was re-drawn. 61 S.C. at 617, 606 S.E.2d at 764. During the second round of jury selection, trial counsel used only two peremptory strikes, as opposed to seven used in the first round. Id. At the PCR hearing, trial counsel testified that he did not use additional strikes "because he had 'just gotten shot down on the first jury selection' and he felt 'like [he] was boxed in.'" Id. at 618, 606 S.E.2d at 765. He also admitted that his original focus was on the racial composition of the jury – he was trying to select black females. Id. The PCR judge found that in addition to the use of a mere two of the

[2] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

ten available strikes, trial counsel's testimony revealed that he "did not intelligently evaluate each juror and did not have a plan or theory in striking the jury." Id. This Court agreed with the PCR judge's findings of fact, but noted that the PCR judge failed to make a determination as to how counsel's errors "resulted in a violation of Respondent's right to a trial by a competent and impartial jury." Id.

Unlike in Magazine, where there was no direct evidence of any juror's impartiality, this case involves a direct issue of impartiality of the juror. 361 S.C. 610, 606 S.E.2d 761 (2004). This is not resolved by the juror's private statement to the trial judge that he can remain fair and impartial. App. 222, 11-17. There are often times in jury selection when a juror may indicate that they can remain fair and impartial despite their affirmative response to a question during *voir dire*, but trial counsel moves to strike the juror for cause or peremptorily in light of their expertise and experience in jury selection.[3] See Morgan v. Illinois, 504 U.S. 719, 735, 112 S.Ct. 2222, 2233 (1992) ("As to general questions of fairness and impartiality, ... jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed."). In the present case, trial counsel relied solely on the trial judge's assessment of the juror. App. 222, 18. She made no effort to have the juror questioned on the record, which is the only way she could ensure the *voir dire* was sufficient to probe potential impartiality and have an opportunity to personally assess the juror's credibility during his responses. Thus, trial counsel employed no trial strategy at all with respect to the juror issue.

Additionally, trial counsel failed to advise Petitioner of his right to be present during the additional *voir dire* of the juror. In Rivers, the forelady requested that the judge come into the jury room because of an allegation that one of the jurors had been contacted by a third party regarding the case. 294 S.C. at 124, 363 S.E.2d at 106. The judge first discussed the matter with the jury in the jury room and then interviewed each juror individually in his chambers. Id. While the individual inquiries regarding impartiality in chambers were on the record, neither the defendant nor his counsel was present. Id. This Court agreed that this procedure violated the defendant's constitutional right to be present. Id. In the present case, trial counsel did not advise Petitioner of his constitutional right to be present during the additional *voir dire* of the juror and made no objection or motion regarding same in order to protect Petitioner's constitutional right.

Trial counsel's failure to ensure a sufficient inquiry was made into the potential bias and basis of knowledge of the juror and to make a personal assessment of the credibility of the juror's responses was a failure to "intelligently evaluate" the situation. See Magazine, 361 S.C. at 618, 606 S.E.2d at 765. Further, there is no evidence that trial counsel advised Petitioner of his right to be present during the additional *voir dire* of the juror or that Petitioner ever knowingly, voluntarily, and intelligently waived that right. Trial counsel was not present at the PCR hearing, thus she could not articulate any valid reason for her failure to ask that the inquiry be made on the record or her failure to advise Petitioner of his constitutional right to be present during the additional *voir dire*. See Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402

[3] While the juror indicated that he did not know the victim directly to the trial judge, his close connection in the community raises a valid issue of impartiality that would have supported a challenge for cause, or at the very least supported a preemptory challenge, had that information come out during the initial *voir dire*.

(2002) ("Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness."). Therefore, trial counsel's representation of Petitioner was objectively deficient.

Prejudice Resulting from Deficient Representation

The second step in the analysis focuses on whether Petitioner was prejudiced by the deficient representation such that there is a reasonable probability that the outcome would have been different had the deficiency not occurred. Strickland, 466 U.S. at 694. Petitioner testified at the PCR hearing that he was prejudiced because the failure to object prevented Petitioner from raising the issue on appeal and affected his decision whether to testify. App. 875, 22 – 876, 6.

Like Rivers, Petitioner's exclusion during the additional *voir dire* to determine the continued impartiality of the juror "deprived him of the means to challenge the sufficiency of the trial judge's inquiry before the determination of impartiality." *Id.* This failure likewise crippled Petitioner's ability to specifically show that his constitutional right to a fair and impartial jury was violated. Additionally, the failure of trial counsel to object to the exclusion of Petitioner during *voir dire* precluded Petitioner from raising the violation of this constitutional right on direct appeal. In Rivers, which also involved mid-trial *voir dire* regarding impartiality, this Court reversed appellant's conviction and remanded for a new trial. 294 S.C. at 125, 363 S.E.2d at 106.

Petitioner also indicated that had the juror been excused and replaced, then he would have testified on his own behalf. App. 876, 4-6. Petitioner testified: "That also prevented me from taking the stand because I ain't – I kind of felt there was some type of conflict of interest or some type of inside work going on or entrapment. That's how I know of – that's how I felt. I

would have took [sic] the stand." App. 875, 24 – 876, 3. This case depended in large part on the jurors' assessment of the witnesses' credibility. Thus, had Petitioner testified and the jurors had an opportunity to hear Petitioner's explanation of how he came into possession of the stolen firearm, the jury certainly could have found Petitioner's story credible.

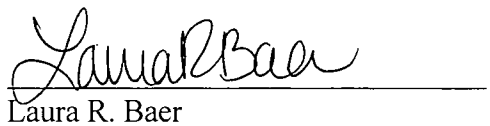
Additionally, because there was only one alternate juror, had trial counsel successfully moved to excuse the juror, this case would likely have resulted in a mistrial since the alternate was used to replace another juror who had to attend to a sick child later in the trial. App. 668, 19-23.

Petitioner is accordingly entitled to the grant of post-conviction relief because his trial counsel should have requested that the *voir dire* of the juror occur in the presence of both trial counsel and Petitioner so that she could assess the credibility of the juror and to protect Petitioner's right to be present at every stage of the proceeding, when a juror indicated during trial that he was a member of the same country club where the homeowner whose house was burglarized works and where the homeowner's domestic employee, who was assaulted, and her husband used to work.

CONCLUSION

For the reasons set forth herein, Petitioner Jerene Hayward respectfully request this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2015.

STATE OF SOUTH CAROLINA

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APPELLATE CASE NO. 2014-000633

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. Clayton Mitchell, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, and Jerene Hayward, #314451, at McCormick Correctional Institution this 7th day of January, 2015.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.