

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 20 2015

Certiorari to Greenville County
D. Garrison Hill, Circuit Court Judge

S.C. Supreme Court

ALBERT SANTANIO KELLY ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001864

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

I N D E X

INDEX 1

ARGUMENT IN REPLY

In violation of Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel, trial counsel failed to request an alibi instruction concerning alibi despite having presented evidence of an alibi and arguing to the jury that Petitioner should not be convicted based upon his alibi where the evidence strongly pointed to the guilt of another. 2

CONCLUSION 7

ARGUMENT IN REPLY

In violation of Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, trial counsel failed to request an alibi instruction concerning alibi despite having presented evidence of an alibi and arguing to the jury that Petitioner should not be convicted based upon his alibi where the evidence strongly pointed to the guilt of another.

Introduction

Two points presented in the state's return require a response from Petitioner. First, the state contended that an Atlanta Braves jacket allegedly worn by Petitioner at the time of the shooting tested positive for gunshot residue. This is not correct. Second, the state contended that a firearm found in Petitioner's car when he was arrested was determined to be the murder weapon. This is not correct.

Braves Jacket and Gunshot Residue

In its return, the state claimed "[a] SLED agent testified as an expert in collection and analysis of trace evidence and stated there was gunshot residue on a Braves jacket." Ret. 7. To support this proposition, the state cited to page 468 of the Appendix. Ret. 7. Additionally, the state included the following footnote concerning the Braves jacket: "Parks and Edwards had previously testified this was Edwards' jacket but that the Petitioner had borrowed it, worn it during the murder, and then returned it." Ret. 7 n.4. Finally, the state claimed "[t]he jacket Petitioner was wearing during the murder testified [sic] positive for gunshot residue." Ret. 11. An examination of the record, including the citation offered by the state, reveals the state's contention that a SLED agent testified there was gunshot residue on the Braves jacket is not correct. By the same token, the record reveals the state's contention that the jacket allegedly worn by Petitioner during the murder tested positive for gunshot residue is not correct.

SLED Agent Ila Simmons tested the red and blue Atlanta Braves jacket for gunshot residue. According to Simmons, she received “an inconclusive result on the right sleeve.” App. 468, lines 12-17. This point was later reinforced:

Q. And so you - - if somebody had a jacket and fired this gun, would you expect to find residue on the jacket?

A. Gunshot residue could have gotten on the jacket, yes. Could have gotten on the lower sleeves.

Q. And you tested the red and white Atlanta Braves jacket?

A. It’s red and blue jacket.

Q. Red and blue, and it was inconclusive?

A. Yes.

App. 469, line 25 – App. 470, line 7. When the prosecutor cross-examined Simmons, he confirmed the GSR test results on the Atlanta Braves jacket were inconclusive during the following exchange occurred:

Q. Now, your testing of the blue - - of the Atlanta Braves jacket was inconclusive?

A. Correct.

Q. So you weren’t able to say either way - - you couldn’t give it a positive test?

A. Correct.

App. 472, lines 16-21.

During the closing argument, Petitioner’s trial counsel reiterated to the jury that the expert testified that the testing on the red and blue Braves jacket was inconclusive for gunshot residue. App. 534, line 18 – App. 535, line 3. Again in his closing argument, Petitioner’s trial counsel noted that “[t]he Braves jacket doesn’t have anything on it” when referring to gunshot residue. App. 535, lines 21-25; see also App. 537, lines 5-6 (trial counsel argued to the jury that “[t]he red and blue

Braves jacket that he allegedly wore, none” when referring to gunshot residue). During the prosecutor’s closing argument, he told the jury the following regarding the gunshot residue test on the Braves jacket: “Think about this. It was inconclusive on the jacket, on the Braves jacket.” App. 543, lines 18-19.

The trial transcript is clear that the gunshot residue testing conducted on the Braves jacket resulted in inconclusive results. An examination of the entire testimony of Simmons reveals no equivocation on this point. Further, an examination of the entire record reveals no evidence that the Braves jacket tested positive for gunshot residue. Thus, the state’s contention in its return that the jacket tested positive for gunshot residue is incorrect.

The Murder Weapon

The state claimed “[t]he .380 Highpoint pistol recovered in Petitioner’s car in Dekalb County was examined and determined to be the murder weapon.” Ret. 11. This is not correct. The murder weapon was a .380 Highpoint pistol that was found under the couch in the apartment of Shaundrecus Edwards.

During his opening statement, the prosecutor informed the jury that the police recovered the murder weapon, which had been wrapped in a hat, from under the couch in Edwards’ apartment. App. 73, lines 11-14; App. 81, lines 17-22. Marcus Parks, a co-defendant, testified that Petitioner used a .380 Highpoint on the night of the murder. App. 130, lines 2-5; see also, App. 326, lines 6-11. He identified the .380 Highpoint pistol in evidence (State’s Exhibit #18) as the one carried by Petitioner on that night. App. 130, lines 6-18. Parks claimed that after the shooting, Petitioner placed the gun used in the shooting under the couch in Edwards’ apartment. App. 140, lines 8-16. Edwards, another co-defendant, also testified that Petitioner had a .380 Highpoint on the night of the

shooting. He identified the pistol in evidence (State's Exhibit #18) as the one allegedly carried by Petitioner. App. 158, line 23 – App. 159, line 8.

Officer Matthew Hamby participated in the search of Edwards' apartment. App. 314, line 7 – App. 315, line 19. He was "looking for a .380 caliber handgun that ... was located under a sofa inside the living room area." App. 315, lines 20-25. Under the sofa in Edwards' apartment, Hamby found a black hat with a firearm inside. App. 316, lines 18-24. The firearm was unloaded, but a box of ammunition was in the hat as well. App. 317, lines 1-12.

According to Hamby, the gun found under the couch was sent to SLED Agent Paaval for testing. App. 318, lines 9-14. Paaval received the gun that was found under Edwards' couch (State's Exhibit #18). App. 306, lines 1-9. He identified the gun as "a model CF. 380," "a .380 automatic caliber," and made by Highpoint Firearms. App. 307, lines 1-6. Paavel compared the bullet test-fired from the gun found under the couch with the bullet recovered from the deceased at the autopsy. He also compared the cartridge casing test-fired from the gun found under the couch with the cartridge case found at the shooting scene. After these comparisons, he concluded the bullet recovered from the deceased during the autopsy was fired by the gun found under Edwards' couch (State's Exhibit #18). App. 310, line 1 – App. 312, line 21 ("In this particular case I did microscopic comparison and I did conclude that this particular bullet, which is State's Exhibit No. 22, was fired by this particular pistol, which is State's Exhibit No. 18."). Additionally, he concluded the cartridge case found at the shooting scene was fired by the gun found under Edwards' couch (State's Exhibit #18). App. 312, line 22 – App. 313, line 4 ("I concluded that this particular cartridge case, which is State's No. 23, was fired by this particular Highpoint pistol."). Thus, the gun found under Edwards' couch was the murder weapon.

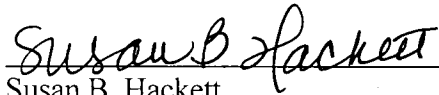
When Petitioner was stopped in Atlanta, there was a .380 Lorcin pistol in the car. App. 246, lines 2-11. This pistol was not the murder weapon and the record reveals no contention that it was. The solicitor informed the jury in opening that Petitioner was arrested in Atlanta “with another .380-pistol pistol in his possession. App. 83, lines 2-4. During closing argument, Petitioner’s trial counsel argued to the jury that the shooter “had the Highpoint .380.” App. 523, lines 15-16. Additionally, trial counsel informed the jury that “all the weapons were found in Edwards’ apartment” and specified “[t]he gun was found under his sofa.” App. 535, lines 17-18; App. 536, lines 1-2.

The record is clear that the gun found under Edwards’ couch was the murder weapon. The gun found in Petitioner’s car was not made by the same manufacturer, was not introduced into evidence, and any forensic testing on the gun was not introduced during the trial or the post-conviction relief proceeding. Therefore, the contention by the state in its return that the murder weapon was found in Petitioner’s car when he was stopped in Atlanta is incorrect.

CONCLUSION

For these additional reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

ALBERT SANTANIO KELLY ,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

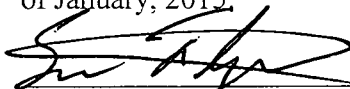
CERTIFICATE OF SERVICE

I certify that a true copy of the reply to return to petition for writ of certiorari in this case have been served on Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Albert Santanio Kelly #277334, at the Gilliam Psychiatric Unit, 4344 Broad River Road, Columbia, SC 29210, this 20th day of January, 2015.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of January, 2015.


(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.