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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

JERMEL ANTHONY ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001315

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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

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QUESTION PRESENTED

Whether defense counsel was ineffective in failing to object to a jury charge on first degree lynching that did not allow the jury to make a finding of mercy?

STATEMENT

Petitioner was convicted of lynching, attempted armed robbery, possession of a firearm during the commission of a crime of violence, and possession of a pistol by one less than eighteen years of age at a jury trial held before the Honorable R. Ferrell Cothran, Jr. on April 22, 2009, in Sumter County. He was sentenced to thirty-seven (37) years for lynching, to twenty (20) years for attempted armed robbery, and to five (5) years for each gun charge. David Sullivan, Esquire, was trial counsel. Harry Connor, Esquire, was the assistant solicitor. (App. p. 1 – p. 508.)

Petitioner appealed his conviction and the appeal was affirmed by the Court of Appeals on October 11, 2011. State v. Robinson, Op. No. 2011-UP-435. (App. p. 509 – p. 531.)

Petitioner filed an application for post-conviction relief on April 3, 2012, followed by supporting documents. (App. p. 532 – p. 564.) Respondent filed a return dated July 16, 2012. (App. p. 565 – 570.) An evidentiary hearing was held on February 24, 2014, before the Honorable George C. James, Jr. Petitioner was present and was represented by Richard T. Jones, Esquire. Respondent was represented by Daniel F. Gourley, Esquire. Both petitioner and trial counsel testified at the hearing. (App. p. 591 – p. 638.) On April 16, 2014, Judge James issued an order denying and dismissing the application for post-conviction relief. (App. p. 639 – p. 651.)

Petitioner filed motions pursuant to Rules 59 and 60, SCRPC on May 4, 2014, which were denied by order dated May 16, 2014. (App. p. 652 – p. 667.)

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to object to a jury charge on first degree lynching that did not allow the jury to make a finding of mercy.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

The lynching statute that was in effect in 2007 when the crime was alleged to have been committed read as follows:

§ 16-3-210, Lynching in the first degree.

Any act of violence inflicted by a mob upon the body of
another person which results in the death of the person shall

constitute the crime of lynching in the first degree and shall be a felony. Any person found guilty of lynching in the first degree shall suffer death unless the jury shall recommend the defendant to the mercy of the court, in which event the defendant shall be confined at hard labor in the State Penitentiary for a term not exceeding forty years or less than five years at the discretion of the presiding judge.

The trial court gave the following jury charge on first degree lynching:

Now the defendants are also charged with lynching in the first degree. First degree lynching is defined as an act of violence inflicted by a mob upon the body of another person which results in the death of the person.

The elements of lynching in the first degree state – the State must prove beyond a reasonable doubt: One, an act of violence; two, inflicted by a mob; three, upon the body of another; and four, which resulted in death.

Mob is defined as the assemblage of two or more persons without color or authority of the law for the premeditated purpose and with the premeditated intent of committing an act of violence upon another person.

Common intent to do violence may be formed before or during the assemblage. However, to sustain a conviction for lynching, the State must produce at least some evidence of premeditation.

And premeditation connotes willful deliberation or planning
or conscious consideration preceding a particular act.

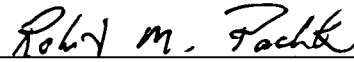
App. p. 473, lines 21 – p. 474, line 16.)

As can be seen, the jury was not told that petitioner shall suffer death unless they shall recommend the defendant to the mercy of the court. The trial court's failure to charge the statute violated due process of law. Defense counsel's failure to object constituted ineffective assistance of counsel.

CONCLUSION

Petitioner's conviction for first degree lynching should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

JERMEL ANTHONY ROBINSON,
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STATE OF SOUTH CAROLINA,
RESPONDENT

APPELLATE CASE NO. 2014-001315


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jermel Anthony Robinson 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 February 24, 2014. 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 Jermel Anthony Robinson.

Respectfully submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of January, 2015

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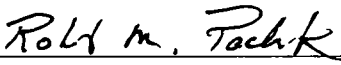
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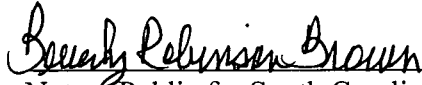
CERTIFICATE OF SERVICE

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 Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jermel Anthony Robinson, #334393, at Lee Correctional Institution this 23rd day of January, 2015.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of January, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.