ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

BUDDY ARIZONA HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001232

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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

INDEX

ISSUE PRESENTED

Whether the record supports the PCR court's finding that trial counsel properly investigated Petitioner's case where Petitioner testified without contradiction that trial counsel only met with him twice—once to discuss taking the case and once three days before trial; where Petitioner testified without contradiction that he informed trial counsel more than once about exculpatory witnesses but that trial counsel did not investigate them; and where the State's only direct evidence was the story of a co-defendant who had marijuana, Lortabs, and an outstanding warrant when police pulled the two over in a vehicle shortly after the car break-ins at issue.

STATEMENT

On the night of February 4, 2010, two employees at the Flatrock Grille in Cherrydale had the windows of their vehicles broken while in the restaurant's parking lot. One employee had a purse taken from her vehicle, and the other was missing a set of jumper cables. App. 23, line 12—29, line 14; App. 32, line 7—App. 36, line 14. Around the time of the break-ins, an officer with the Greenville County Sheriff's Office responded to a call about two suspicious men in a Dodge Durango at a Publix parking lot within walking distance of the Flatrock Grille. App. 42, lines 2-22; App. 81, lines 1-4. Upon approaching the parking lot, the officer saw the Durango driving in the area and pulled it over at a gas station. Petitioner Buddy Arizona Harris and another man, Joshua Humphrey, were the occupants of the vehicle. When Humphrey saw the police pulling over, he ate some Lortabs he had so police would not find them. App. 56, line 1—App. 62, line 22.

The officer searched the vehicle and found a change purse belonging to one of the Flatrock Grille employees. App. 44, line 8—App. 46, line 17. The officer then searched Humphrey and found marijuana. He also discovered Humphrey had a warrant out for his arrest. The officer transported Humphrey back to his station for questioning. Petitioner followed voluntarily to cooperate with law enforcement. App. 47, line 1—App. 51, line 5.

Humphrey, seeking to exculpate himself, told the story that he knew Petitioner as a neighbor, and on the morning of the break-ins, the two went for a ride in Petitioner's Durango. He claimed when they pulled into the Flatrock Grille, Petitioner got out of the vehicle and broke into the adjacent car. App. 56, line 1—App. 62, line 22. He showed the police where the discarded purse was in the same area. App. 81, lines 1-4; App. 162, lines 7-13.

At Petitioner's trial, Humphrey claimed that while the two were at the police station, he overheard Petitioner telling someone on the telephone that Humphrey was solely responsible for the

break-ins, and Petitioner was in the wrong place at the wrong time. App. 63, lines 20-24. However, the officer who interrogated Humphrey at the police station testified that while interviewing Humphrey, he could not overhear Petitioner talking. App. 82, lines 2-14.

On April 12, 2011, the Greenville County Grand Jury indicted Petitioner on two counts each of breaking and entering a motor vehicle and petite larceny. App. 207-214. On May 18, 2011, Petitioner proceeded to trial before The Honorable Victor Pyle and a jury. Randy Chambers represented Petitioner and Elizabeth Major represented the State. App. 1.

The jury found Petitioner guilty on all four counts. App. 112, lines 14-25. Judge Pyle sentenced Petitioner to five years' incarceration for one of the auto breaking charges; five years consecutive suspended to three years with five years of probation for the second auto breaking charge; and thirty days' concurrent incarceration for each of the larceny charges. App. 115, line 22—App. 116, line 7.

On October 9, 2012, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 139—App. 149. The State filed a return on May 15, 2013. App. 150—App. 154. On February 19, 2014, Petitioner appeared at an evidentiary hearing before The Honorable G. Edward Welmaker. David Harrison represented Petitioner and Karen Ratigan represented the State. App. 155.

At the hearing, Petitioner testified that he met with trial counsel when he initially hired him and not again until fourteen or fifteen months later, just three days before trial. App. 160, lines 13-19; App. 174, lines 5-18. He testified that at both meetings, he informed trial counsel that he had two witnesses who could contradict Humphrey and aver that Petitioner was not at the Flatrock Grill when Humphrey claimed. He even secured affidavits from the two. However, trial counsel never subpoenaed or interviewed either witness. In fact, Petitioner brought both to court for trial, but trial

counsel refused to avail their testimony, saying instead, "I think I've got this" and "This is open and shut." App. 164, line 22—App. 166, line 10; App. 169, lines 13-22; App. 175, lines 10-17; App. 175, line 24—App. 176, line 4. Petitioner also asked trial counsel to investigate tapes from security cameras at the exterior of Flatrock Grille and inside a nearbyJack-in-the-Box, where Petitioner was during the crimes contrary to Humphrey's story, but trial counsel never did, telling him the evidence "wouldn't matter anyway." App. 166, line 11—App. 167, line 21.

Trial counsel appeared but could not testify to any particular recollection of handling Petitioner's case. At the outset of his testimony, trial counsel told the court he had a mix-up and did not pull his file for Petitioner's case. App. 180, line 23—App. 181, line 1. He said that based on his standard practices, he was only sure that he first met with Petitioner during a free consultation; saw Petitioner for a moment when Petitioner came to his office without an appointment to pay a retainer fee; and met with him just before trial as Petitioner had testified. App. 180, line 22—App. 183, line 5. When asked whether he recalled Petitioner giving him the names of two witnesses willing to testify, trial counsel stated, "I don't remember any witnesses that he mentioned to me," and when asked whether his standard practices would have led to him investigating such witnesses, he simply said, "[I]f there are witnesses that could have contradicted what the story was . . . , then I would have wanted to talk to them." App. 184, lines 1-14. When asked whether he recalled Petitioner telling him at trial that he had witnesses present to testify, trial counsel responded, "If he did I don't remember it." App. 184, lines 15-17.

On April 4, 2014, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 199-206. Specifically, the order stated the evidence did not establish that trial counsel failed to properly prepare and investigate Petitioner's case because trial counsel testified that he "had several meetings with [Petitioner], provided

discovery materials, would have investigated any witnesses Petitioner referred to, and was reasonable in not investigating the Jack in the Box security tapes because "there was little value in such evidence, as the Jack in the Box was located very close to the crime scene." App. 203-204.

ARGUMENT

Trial counsel's testimony does not support the PCR court's finding that trial counsel adequately prepared the defense case.

Trial counsel's testimony does not support the PCR court's finding that trial counsel adequately prepared the defense case. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

"The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002)). "[A]n attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'" *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)). Counsel must be found deficient when "the trial transcript and . . . PCR testimony inescapably point to the conclusion that [counsel] simply had not adequately prepared the defense case." *Lounds* at 462, 670 S.E.2d at 650.

"The second prong of the *Strickland* test requires a showing that the 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, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In this case, trial counsel's testimony did not support the PCR court's conclusion about his level of preparation in the case. The order of dismissal stated counsel had several meetings with Petitioner. However, Petitioner testified that he met with trial counsel when he initially hired him and not again until fourteen or fifteen months later, which was also three days before trial. Trial counsel did not contradict this testimony. He merely said that based on his standard practices, he met with Petitioner during a free consultation, saw him momentarily when Petitioner came to his office without an appointment to pay a retainer fee, and met with him just before trial. Thus, the two only had two meetings of any substance.

The order of dismissal also stated that trial counsel would have investigated any witnesses Petitioner referred to. However, trial counsel could not recollect anything specific about Petitioner's witnesses despite Petitioner's account that he repeatedly raised the issue to him in significant ways, including by obtaining affidavits and bringing them to trial. Indeed, trial counsel specifically left open the possibility that he did not investigate the witnesses when he gave the evasive answer that "if there are witnesses that could have contradicted what the story was . . . , then I would have wanted to talk to them."

The order of dismissal also stated trial counsel was reasonable in not investigating the Jack in the Box security tapes because "there was little value in such evidence, as the Jack in the Box was located very close to the crime scene." The order did not account for the possibility of security tapes outside the Flatrock Grille. Contrary to the PCR court's conclusion, a videotape

showing Petitioner separated from Humphrey during the crimes would have seriously impeached his credibility and established that Humphrey had an opportunity to commit the crimes alone.

Ultimately, the record shows trial counsel was deficient because he simply did not prepare for trial. His attitude toward the case, shown through comments that "I think I've got this" and "This is open and shut," was that it did not warrant investigating beyond the information already in front of him. Trial counsel could not testify to any particular recollection of handling Petitioner's case, showing he did not invest any significant thought in the matter when the time was ripe for preparation. His testimony lacked any probative value as he could remember no specifics and never even reviewed his file for Petitioner's case prior to the PCR hearing.

The record also shows Petitioner was prejudiced by the deficient investigation because trial counsel failed to focus the jury's attention on facts and circumstances showing Humphrey was not credible in the least and had a strong motive for pinning the crimes on Petitioner. First, Humphrey's story was not believable. He said he only knew Petitioner as a neighbor, yet he went on an apparently aimless ride in Petitioner's vehicle, and Petitioner, without prior indication, randomly broke into cars next to his own in a crowded parking lot and in front of Humphrey. Additionally, Humphrey's character was not trustworthy. He admitted he ingested ate a quantity of Lortabs pills putting his health at serious risk so the police would not find them. He was also carrying marijuana, and he had a warrant out for his arrest. Last, he testified that he turned on Petitioner after hearing his phone conversation at the police station. However, the interviewing officer contradicted this account, saying he could not overhear Petitioner talking in that location.

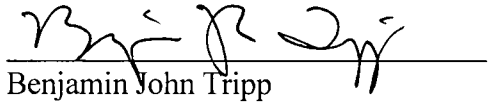
Based on Humphrey's lack of credibility, a very likely explanation for the crimes was that Humphrey committed them apart from Petitioner, got caught, and sought a way to exculpate himself or curry favor with the police by blaming Petitioner. Petitioner, whose story made more sense

insofar as he claimed not to be around Humphrey when the crimes were committed and actually cooperated with the police after the traffic stop, was only guilty of keeping bad company. Unfortunately for Petitioner, trial counsel's deficient investigation prevented him from conveying such important considerations to the jury, and he was therefore ineffective in investigating and presenting Petitioner's case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

BUDDY ARIZONA HARRIS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001232

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Buddy Arizona Harris states:

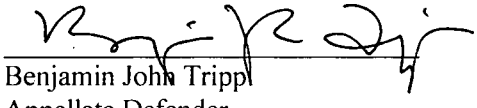
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 19, 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 Buddy Arizona Harris.

Respectfully submitted,



Benjamin John Tripp
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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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Buddy Arizona Harris, #191201, at Allendale Correctional Institution, this 26th day of January, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of January, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.