 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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FEB 17 2015

S.C. Supreme Court

DESHAUD SAMEL LUCK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001762

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel erred by failing to give Petitioner notice of trial, where Petitioner's presence and testimony would have been crucial in a Jackson v. Denno hearing to suppress Petitioner's confession at trial, but because Petitioner was not present, he could not testify?

STATEMENT OF FACTS

On April 6, 2009, a Charleston County Grand Jury indicted Petitioner Dashaud Samuel Luck for armed robbery and possession of a weapon during a violent crime. App. 417 – 420. He was tried in his absence and convicted during the May 2011 term of the Charleston County General Sessions Court before the Honorable Deadra L. Jefferson and a jury. App. 302 – 303. Mark Archer represented Petitioner. App. 1. James Stack and Adam Young represented the State. App. 1.

On July 9, 2012, Petitioner was brought before Judge Jefferson and sentenced to ten years imprisonment. App. 320. He did not appeal his convictions or sentence.

On June 11, 2013, Petitioner filed a PCR application. App. 358 – 364. Respondent filed a return on December 4, 2013, requesting that an evidentiary hearing be held. App. 368 – 373. On March 27, 2014, Petitioner filed an amended PCR application. App. 365 – 367. A PCR hearing was held on April 16, 2014 in Charleston County before the Honorable R. Markley Dennis. App. 374. Rodney Davis represented Petitioner at the hearing. Ashleigh Wilson represented the State. App. 374.

On July 16, 2014, Judge Dennis issued an order of dismissal. App. 408 – 416. Petitioner appealed Judge Dennis' order. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel erred by failing to give Petitioner notice of trial, where Petitioner's presence and testimony would have been crucial in a Jackson v. Denno hearing to suppress Petitioner's confession at trial, but because Petitioner was not present, he could not testify.

Relevant Facts

Prior to trial, defense counsel moved for a continuance because Petitioner was not present. App. 4. Counsel argued that Petitioner's location was unknown and that he did not have actual notice of his trial. App. 4, line 24 – App. 5, line 2. Counsel explained that he had contacted Petitioner's mother, who contacted family members in and out of South Carolina to see where Petitioner could be at the time. App. 17, lines 6 – 10. However, neither defense counsel nor Petitioner's mother could locate him. App. 17, lines 9 – 10. Counsel argued that because armed robbery is “an extremely serious charge” and the bench warrant for his arrest had been outstanding for only a short period of time, a trial *in absentia* was premature. App. 5, line 6.

The solicitor argued that Petitioner's absence was willful and that his case had been on previous trial dockets. App. 12, lines 16 – 18. Further, the solicitor argued, each time Petitioner's case was scheduled for trial, notice was mailed to the address on his arrest warrant and driver's license, 308 Royal Palm Boulevard in Charleston. App. 14, lines 20 – 24.

Judge Jefferson explained that Petitioner's case was first called for trial during the week of February 28, 2014. App. 21, lines 1 – 2. On March 3, 2014, she issued a bench warrant for Petitioner's arrest. App. 21, lines 2 – 3. Petitioner's trial was also placed on the docket for the weeks of April 4, 2014 and April 25, 2014. App. 21, lines 3 – 5.

Judge Jefferson also explained that bond was set for Petitioner in October 17, 2008 and at that time, Petitioner signed the bond form acknowledging that he had a right and obligation to be

present at trial. App. 13, lines 23 – 25. Further, if Petitioner failed to attend, trial will proceed in his absence. App. 14, lines 2 – 8. Judge Jefferson entered Petitioner’s bond form as a court’s exhibit and denied defense counsel’s motion for a continuance. App. 23, lines 2 – 8.

Motion to Suppress Petitioner’s Confession

Prior to trial, defense counsel moved the suppress Petitioner’s confession pursuant to Jackson v. Denno, 378 U.S. 368 (1964). App. 102. On October 6, 2008, two men robbed the Pantry at 2572 Ashley River in Charleston. App. 103, lines 9 – 15. Detective Wagner of the Charleston County Sheriff’s Office was the lead investigator in the case. Wagner responded to the convenience store and interviewed witnesses who were present during the robbery. App. 103, lines 21 – 23.

Two witnesses said that one of the robbers talked to them. App. 104, lines 5. Both witnesses told Wagner that they knew Petitioner from grade school and were sure that he was one of the robbers. App. 104, lines 1 – 3. The witnesses claimed that they “knew his voice and the way he walked and they knew his body.” App. 104, lines 3 – 4.

After speaking with the two witnesses, Wagner obtained Petitioner’s driver’s license photo. App. 104, lines 7 – 9. Both witnesses positively identified Petitioner as being involved in the armed robbery of the Pantry. App. 104, lines 10 – 13. Wagner arrested Petitioner and transported him to the sheriff’s office. App. 105, line 1. Petitioner gave a written statement confessing to the robbery. App. 111 – 113.

Det. Wagner was the only witness to testify during the suppression hearing. Judge Jefferson admitted Petitioner’s confession into evidence. App. 113, lines 24 – 25.

PCR Hearing

Petitioner testified during the PCR hearing. App. 376. Petitioner stated that he did not receive any notice to be present at his trial on May 9, 2014. App. 381, lines 18 – 20. He did not receive any documentation from the solicitor’s office. App. 381, lines 21 – 23. He also did not receive documentation from defense counsel’s office. App. 381, line 24 – App. 382, line 2.

Petitioner explained that if he had been present at trial, he would have requested that defense counsel make a motion to suppress Petitioner’s statement. App. 383, lines 9 – 15. Petitioner stated that he gave the confession involuntarily and was under duress. App. 384, lines 5 – 6. He explained that the detective threatened to have his mother arrested and threatened to ask the judge to set a high bond. App. 383, lines 18 – 24.

Defense counsel admitted that he did not give actual notice to Petitioner. App. 389, lines 24. Although counsel contacted Petitioner’s mother, he did not contact Petitioner’s bondsman. App. 399, lines 15 – 19. Counsel also admitted that during the hearing, he did not require any documentation showing that Petitioner was aware of the trial date of May 9th. App. 390, lines 13 – 19. Counsel also did not require any testimony from the Clerk of Court. App. 390, lines 20 – 24.

Order of Dismissal

Judge Dennis found that counsel provided credible testimony that he attempted to contact Petitioner to notify him of trial. App. 413. The PCR judge also found that the State “presented adequate proof of notice of trial to [Petitioner]” prior to proceeding in the Applicant’s absence. App. 414. The PCR judge also found that the trial judge made the requisite findings on the record before proceeding in Petitioner’s absence. App. 414.

Discussion

It is well established that the Sixth Amendment of the United States Constitution guarantees the right of a criminal defendant to be present at every stage of his trial. U.S. Const. amend. VI. Because Petitioner's presence and testimony was crucial in the Jackson v. Denno hearing to suppress Petitioner's confession, trial counsel erred by failing to give Petitioner notice of trial.

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).

Before a defendant can be tried in absentia, he must voluntarily waive the right to be present at trial. State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010); State v. Patterson, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006). Notice of the term of court in which a defendant will be tried is considered sufficient notice to enable a defendant to voluntarily waive that right. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976). However, if the record is devoid of evidence to support a finding that the defendant was given notice of his trial, “the resulting conviction *in absentia* cannot stand.” State v. Jackson, 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986). Defense counsel must exercise reasonable diligence in providing notice to the defendant. See Rule 1.3, RPC, Rule 407, SCACR.

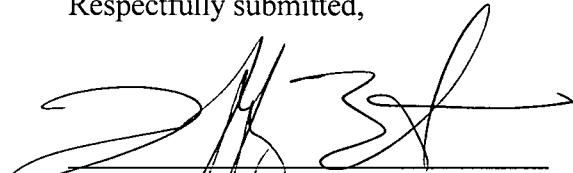
Here, defense counsel admitted that he did not contact Petitioner’s bondsman in his efforts to locate Petitioner. There was also no testimony that counsel hired an investigator to aid in locating Petitioner. While the solicitor informed the trial judge that he mailed a notice of trial to Petitioner’s last known address, defense counsel admitted that he did not give Petitioner actual notice of his trial date. In addition, at the PCR hearing, counsel informed the PCR judge that he did not give notice. Petitioner testified that he did not received notice.

Petitioner explained that had he been present at trial, he would have testified in the suppression hearing that his confession was coerced and given involuntarily. Had the trial judge heard Petitioner’s testimony, there is a reasonable probability that Petitioner’s confession would have been suppressed and the jury would have found him not guilty. Therefore, being tried *in absentia* prejudiced Petitioner, denying him a fair trial.

CONCLUSION

For the reasons argued, Petitioner Dashaud Samuel Luck respectfully requests this Court to grant his petition with the ultimate relief of a new trial on the charges of armed robbery and possession of a weapon during a violent crime.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
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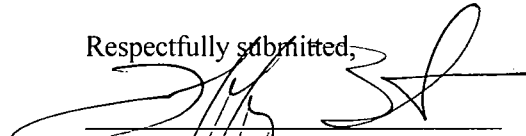
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dashaud S. Luck 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 16, 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 Dashaud S. Luck.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of February, 2015

STATE OF SOUTH CAROLINA
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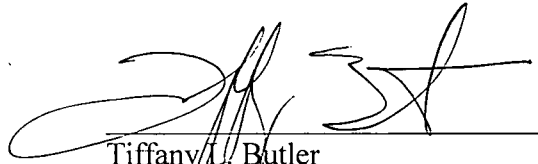
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APPELLATE CASE NO. 2014-001762

CERTIFICATE OF SERVICE

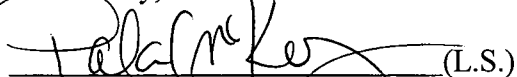
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dashaud S. Luck, #351475, at Macdougall Correctional Institution, this 17th day of February, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of February, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.