

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 25 2015

Certiorari to Sumter County

S.C. Supreme Court

George C. James, Jr., Circuit Court Judge

MARK MCCOY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO.2014-001253

JOHNSON PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
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

INDEX..... 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL..... 11

ISSUE PRESENTED

Whether the PCR judge erred by finding trial counsel provided effective representation where counsel failed to object to the curative instruction, thereby waiving his right to make the necessary mistrial motion, after the trial judge instructed the jury, as to circumstantial evidence, that it should find petitioner guilty even if it had a reasonable doubt as to his guilt, since the curative instruction was wholly inadequate to cure the prejudice?

STATEMENT OF THE FACTS

On September 11, 2008, the Sumter County Grand Jury indicted Petitioner for murder and possession of a weapon during a violent crime. App. 604 – 605. Petitioner’s case proceeded to a jury trial on September 22, 2008, before the Honorable Howard P. King and a jury. Supp App. 1. I.S. Leevy Johnson represented Petitioner. Catherine Fant represented the State. Supp App. 1.

After a four-day trial, the jury found Petitioner guilty of both charges. App. 211. Judge King sentenced Petitioner to consecutive sentences of life imprisonment for the murder and five years’ imprisonment for the possession of a weapon during a violent crime. App. 227. Petitioner appealed his convictions and sentences.

On direct appeal, a brief was filed by Joseph L. Savitz, III. pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967). See State v. McCoy, Op. No. 2011-UP-278 (Ct. App. filed June 8, 2011). Petitioner’s conviction and sentence were affirmed, and counsel was relieved pursuant to Anders.

On June 5, 2012, Petitioner filed a PCR application where he raised the issue that will be argued in this petition. App. 231. Respondent filed a return on November 30, 2012, requesting that an evidentiary hearing be held. App. 368 – 372. Petitioner filed an amended PCR application on February 11, 2013. App. 374. Petitioner filed additional amended PCR applications on September 24, 2013, and February 21, 2014. App. 396; App. 453.

A PCR hearing was held in Sumter County on February 27, 2014, before the Honorable George C. James, Jr. App. 454. Charles T. Brooks, III. represented Petitioner at the hearing. Daniel Gourley represented the State. App. 454.

On May 23, 2014, Judge James issued an order of dismissal. Petitioner appealed Judge James’ order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to object to the curative instruction, thereby waiving his right to make the necessary mistrial motion, after the trial judge instructed the jury, as to circumstantial evidence, that it should find petitioner guilty even if it had a reasonable doubt as to his guilt, since the curative instruction was wholly inadequate to cure the prejudice.

Relevant Facts

This case involved the June 4, 2004 shooting of Tyrone Pettis in Sumter, South Carolina. Several witnesses claimed to have witnessed the shooting. The “eyewitness” accounts varied greatly and did not offer confidence in the verdict.

There was a nexus between the shooting of Pettis and the May 2004 burglary of Ivan Sanders’ store in Sumter, where \$3,000.00 worth of merchandise and clothing were stolen. Supp App. 121, lines 3 – 20. Sanders stated that he received a phone call from Petitioner on June 4, 2004, stating that he “was close to” the person who broke into Sander’s store, Tyrone Pettis. Supp App. 125, line 8 – 126, line 5. Sanders alleged that Petitioner asked him what he wanted Petitioner to do with Pettis. Supp App. 125, line 8 – 126, line 5. Sanders claimed that he told Petitioner that he “was done with it.” Supp App. 126, lines 15 – 21. However, Sanders admitted that he did not give a statement to the police until November of 2007. Supp App. 2 – 13.

Joseph Sumter stated that on June 4, 2004, he went to the crack house on Blanding Street in Sumter, where the State alleged Petitioner sold drugs. Supp App. 155, lines 4 – 18. While at the house, Sumter saw Pettis there. Supp App. 161, lines 14 – 17. After getting high, Sumter and Pettis left the house and walked to the corner of Blanding and Bartlett streets. Supp App. 166, lines 17 – 21. Sumter left Pettis in the street talking to Robbie Dukes and claimed to hear gunshots after he

left. Supp App. 168, lines 4 – 10. However, on cross-examination, Sumter stated that the police “were supplying the information” to him as he was writing his statement. Supp App. 175, lines 7 – 12.

Latimore Holmes claimed that he was in his back yard on June 4, 2004 when he saw an altercation between Petitioner, who had on a mask, Robbie Dukes, and a “guy.” Supp App. 207. Holmes stated that he saw “swinging” and “the guy in dark colored clothing,” Petitioner, fired a gun. Supp App. 210 – 211.

Allen McConico asserted that he was in front of his house at the time of the shooting. McConico claimed to see two men grabbing and shaking a third man. Supp App. 241, lines 2 – 19. He recognized one of the attackers to be Dukes and observed the other attacker wearing “a camouflage jacket.” Supp App. 241, lines 2 – 19. While he could not see the face of the person wearing the camouflage jacket, McConico said he saw him pull out a gun and shoot. Supp App. 241, lines 19 – Supp App. 242, line 2. McConico called the police. Supp App. 242, line 23.

The police never located the murder weapon and there was no forensic evidence at the scene of the shooting. Petitioner chose to put the State to its burden of proof and did not offer a defense.

Jury Charge

During the circumstantial evidence jury charge, Judge King stated

“You should weigh all of the evidence in this case. And after weighing all of the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, **you would find the defendant guilty**. On the other hand, after weighing all the evidence, if you are convinced of the guilt of the defendant beyond a reasonable doubt, you would find the defendant guilty.”

App. 198, lines 9 – 15. (emphasis added)

After the judge finished charging the jury and the jury retired to the jury room, defense counsel informed the judge that he gave the jury two options to find Petitioner guilty. App. 202.

Counsel also requested the judge to recharge the jury on circumstantial evidence. App. 204. Judge King recharged the jury on circumstantial evidence. App. 204, line 21 – App. 206, line 3. Specifically, the judge stated

“After weighing all of the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you would find the defendant not guilty. After weighing all of the evidence, if you are convinced of the guilt of the defendant beyond a reasonable doubt, you would find the defendant guilty.”

App. 205, lines 20 – 25.

Defense counsel did not object to the curative instruction, thus waiving the mistrial motion he should have made. App. 206.

PCR Hearing

Petitioner and defense counsel both testified during the PCR hearing. Petitioner explained that during the jury charge, “the judge told the jury to find [him] guilty no matter what.” App. 505. Petitioner stated that defense counsel did not object to the charge, but if he had objected to it, “the appellate court would have gotten an opportunity to look at that.” App. 506. Petitioner stated that counsel should have objected to the charge and moved for a mistrial. App. 509.

Defense counsel explained that he did object to the trial judge’s charge. App. 523, lines 15 – 20. However, the judge gave a curative instruction that counsel thought was beneficial to Petitioner. App. 523, lines 21 – 24. Counsel admitted that he did not object to the curative instruction or move for a mistrial.

Order of Dismissal

The PCR judge denied Petitioner’s PCR application. The PCR judge stated that “[a] mistrial would not have been granted in any event, in light of the curative charge.” App. 597. The PCR

judge wrote that he agreed with counsel that the recharge to the jury was helpful and that Petitioner failed to meet his burden of proof. App. 598.

Discussion

The PCR judge erred by finding defense counsel provided effective representation. The trial judge told the jury, during the circumstantial evidence jury charge, that it should find Petitioner guilty even if there is reasonable doubt. The curative instruction given to the jury was insufficient because the judge's error grievously prejudiced Petitioner. Further, defense counsel failed to object to the judge's curative instruction, thereby, waiving his right to make the necessary mistrial motion since the prejudice to Petitioner could not be cured.

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).

A trial judge should grant a mistrial only when absolutely necessary. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000); State v. Elgin, 398 S.C. 39, 45, 726 S.E.2d 231, 234 (Ct. App. 2012); State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002). In order to be entitled to a mistrial, a defendant must show error and prejudice resulting from the error. Harris, 340 S.C. at 63, 530 S.E.2d at 628; Simmons, 352 S.C. at 354, 573 S.E.2d at 862. Such an error must be so grievous that its prejudicial effect cannot be removed in any other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999); State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009).

Therefore, "the less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Whether a mistrial is warranted by manifest necessity is a fact – specific inquiry. State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct. App. 2000).

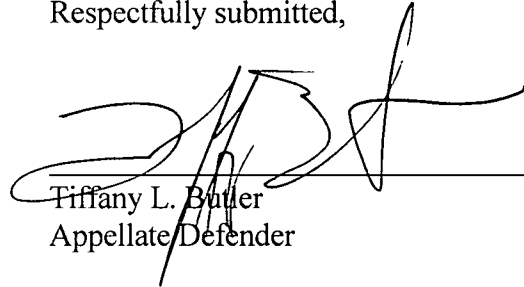
Here, defense counsel was ineffective for failing to object to the trial judge's curative instruction. Because counsel did not object, he waived his right to move for a mistrial. After the judge told the jury to find Petitioner guilty even if there is reasonable doubt, the damage had already been done. The jury had already sat through and listened to the judge's entire charge before counsel notified the judge of his error. Further, the jury had been allowed to go back into the jury room before the judge recharged them. There is a possibility that the jurors began discussing the case while in the jury room.

Since counsel did not object to the curative instruction and waived his mistrial motion, the issue of whether Petitioner was grievously prejudiced by the judge's error was not preserved for appellate review. Had defense counsel objected to the curative instruction and moved for a mistrial, Petitioner would have had the opportunity to address the issue in his direct appeal, which could have resulted in a new trial.

CONCLUSION

For the grounds argued, Petitioner Mark McCoy respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tiffany L. Butler', is written over a horizontal line. The signature is stylized and cursive.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

MARK MCCOY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO.2014-001253

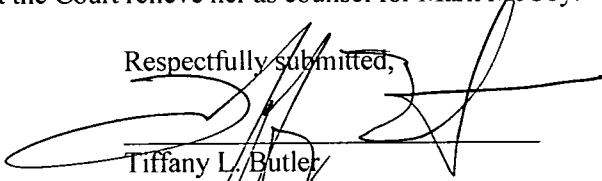
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark McCoy 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 February 27, 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 Mark McCoy.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of March, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
George C. James, Jr., Circuit Court Judge

MARK MCCOY,

PETITIONER,

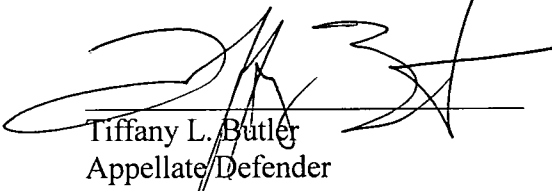
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

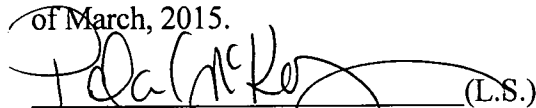
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mark McCoy, #210705, at Broad River Correctional Institution this 25th day of March, 2015.


Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of March, 2015.


(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.