

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

MAR 27 2015

\_\_\_\_\_  
Certiorari to Horry County  
Benjamin H. Culbertson, Circuit Court Judge

**S.C. Supreme Court**

THOMAS A. SMART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001808

\_\_\_\_\_  
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**

INDEX..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 5

CONCLUSION ..... 7

**ISSUE PRESENTED**

Whether the record supports the PCR court's conclusion that trial counsel provided effective assistance where in preparing for trial, he sought and used input from his wife, an assistant solicitor in the office prosecuting Petitioner.

## STATEMENT

At Petitioner Thomas Allen Smart's post-conviction relief (PCR) hearing, his trial counsel informed the court that he sought input from his wife, an assistant solicitor also in Horry County, about issues in Petitioner's trial on the following day. App. 352, line 21—App. 353, line 10.

I don't specifically remember talking to her about the case, but I will say this, my wife and I are very close, and it would not surprise me if we discussed, as we do—I, I discuss her cases. She discusses my case[s]. I'm sure we had a discussion about this case and the fact it was a trial. So I don't want to say, you know, if I was confronted with evidence that said that I told my wife or talked to my wife about the indictment, I couldn't deny it, but I don't recall doing it.

App. 315, line 21—App. 316, line 4.

I'm pretty sure I discussed it. . . . [T]o be, you know, perfectly candid with everyone, you know, when it came down to trials, my wife and I would discuss. I don't know that we discussed in great detail or anything like that, but if I had, you know, an idea of something that I thought would work or if she was trying a case that I wasn't involved in, I believe she would do the same with me.

App. 325, lines 14-22. Petitioner testified that on the day of his trial, trial counsel told him that he and his wife were “up [until] two o'clock in the morning, that she was an attorney and that she helped him prepare [the] case.” App. 346, lines 8-11. Petitioner did not find out until he was in prison that counsel's wife was in the Horry County solicitor's office. App. 346, lines 11-13.

On February 18, 2010, the Horry County Grand Jury had indicted Petitioner for resisting arrest, threatening a public official, and throwing bodily fluids on a correctional facility employee or local law enforcement officer. App. 379-384. The State alleged that on December 26, 2009, Petitioner accidentally ran a red light on a highway in Conway. A local police officer attempted a traffic stop, but Petitioner led the officer on a chase until he wrecked his car. When officers apprehended him, Petitioner was hostile and wrestled with, spit on, and threatened the officers. App. 83, line 23—App. 89, line 20.

On July 19, 2010, Petitioner proceeded to trial before The Honorable William H. Seals and a jury. App. 1. William Bertram Von Herrmann represented Petitioner and Robert B. Bryan represented the State. App. 2. The jury found Petitioner guilty as charged, and the trial judge sentenced him to consecutive sentences of ten years' incarceration for the bodily fluid charge, three years for the threatening an officer charge, and six months for the resisting arrest charge. App. 243, line 18—App. 244, line 8; App. 256, line 12—App. 257, line 3.<sup>1</sup> On July 21, 2010, Petitioner appeared before Judge Seals for a motion to reconsider Petitioner's sentence. App. 258, line 1—App. 259, line 12. Judge Seals denied the motion. App. 274, line 24—App. 275, line 1.

On April 4, 2013, Petitioner filed an application for PCR claiming ineffective assistance of counsel. App. 277-288. The State filed a return on October 24, 2013. App. 289-293. On June 18, 2013, Petitioner appeared at an evidentiary hearing before The Honorable Benjamin H. Culbertson. Tristan M. Shaffer represented Petitioner and Joshua L. Thomas represented the State. App. 294. The PCR court issued an order of dismissal on August 1, 2014 concluding Petitioner failed to establish ineffective assistance. App. 365-378. Specifically, the order stated no constitutional violations resulted from trial counsel's discussion of the case with his wife because trial counsel "specifically recalled . . . she did not actively assist in preparing this case for trial" and because no evidence showed trial counsel or his wife shared sensitive information with the lawyers prosecuting the case. App. 376-377.

---

<sup>1</sup> Petitioner was also found guilty of failure to stop for a blue light and sentenced to three years' incarceration concurrent to the other sentences. App. 243, line 18—App. 244, line 8; App. 256,

## ARGUMENT

### **NO EVIDENCE IN THE RECORD SUPPORTS THE PCR COURT'S DETERMINATION THAT TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE BECAUSE HE PREPARED FOR TRIAL BY DISCUSSING THE ISSUES WITH AN ASSISTANT SOLICITOR FROM THE COUNTY.**

No evidence in the record supports the PCR court's determination that trial counsel provided effective assistance because he prepared for trial by discussing the issues with an assistant solicitor from the county. 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). A defendant claiming ineffective assistance of counsel must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686.

When a conflict of interest forms the basis for a claim of ineffective assistance, "a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001).

[A]n actual conflict of interest occurs . . . when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists.

*Jordan v. State*, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). A conflict of interest arising from defense counsel's personal relationship with an attorney in the office of the prosecutor can be sufficient to establish ineffectiveness under the Sixth Amendment. *C.f. Abney v. State*, 240 Ga. App. 280, 282-83, 523

---

line 12—App. 257, line 3. Counsel for Petitioner conceded his guilt to this charge in his opening statement. App. 92, lines 15-17.

S.E.2d 362, 365-66 (1999) (holding requisite “special circumstances” preventing adequate representation based on conflict of interest were not shown to exist where defense counsel’s wife was a lawyer in district attorney’s office but where she was not involved in the case and did not discuss it with him); *Norris v. State*, 2013 Ark. 205, 8, 427 S.W.3d 626, 634 (2013) (holding evidence did not support actual conflict of interest for claim of ineffectiveness where defense counsel’s wife was a manager in prosecutor’s office but where she previously signed statement that she would abide by rules pertaining to conflicts of interest and need for confidentiality and would recuse herself if defense counsel had a request for information from the case file).

“[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief.” *Staggs v. State*, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007).

In this case, both trial counsel and Petitioner testified that trial counsel prepared for trial by discussing the issues with his wife. While trial counsel at first did not specifically recall the discussion, he stated that as a matter of course, the two discuss their cases because they are very close. After this reflection, he averred, “I’m sure we had a discussion about this case and the fact it was a trial.” Thus, trial counsel testified that he talked about the fact that the case was at trial *in addition to* the substance of the case. Later, he reiterated, “ I’m pretty sure I discussed it.” He then specified that whenever he had a trial in particular, he would discuss his ideas about the issues with his wife. Similarly, Petitioner testified that trial counsel told him that the two were up late together on the eve of trial while she helped trial counsel prepare.

From trial counsel’s position, seeking and using input from an assistant solicitor from the office prosecuting Petitioner put himself in a situation inherently conducive to divided loyalties. In one sense, trial counsel adopted the advice and advocacy of an attorney serving the interests of the

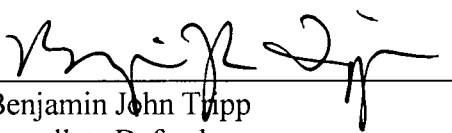
opposing party. In another sense, trial counsel turned himself into a mere conduit for the advice and advocacy of an attorney serving the interests of the opposing party. No evidence in the record rebutted this factual conclusion, such as an affirmation by trial counsel that he understood the conflict and was mindful of the risks in preparing his own thoughts for trial. Without such evidence, the PCR court could only conclude that trial counsel's seeking and using input from his wife was categorically a breakdown in the proper functioning of the adversarial process warranting no presumption of a just result.

The PCR court's order of dismissal incorrectly relied on evidence from the position of trial counsel's wife in determining no actual conflict existed. The extent of her efforts from her point of view and whether she relayed sensitive information constituted a separate matter from whether trial counsel sought and used her input in preparing Petitioner's trial in a manner impermissible under the Sixth Amendment.

### CONCLUSION

For the foregoing reasons, Petitioner requests that the 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 27th day of March, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Horry County  
Benjamin H. Culbertson, Circuit Court Judge

---

THOMAS A. SMART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT


APPELLATE CASE NO. 2014-001808

---

CERTIFICATE OF SERVICE

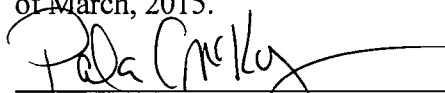
---

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of March, 2015.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day  
of March, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.