

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-001303

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S.C. Supreme Court

Nathaniel Charles Teamer, Respondent

V.

The State Petitioner-

BRIEF OF RESPONDENT

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Statement of the Case

The Statement of the Case as set forth by the Petitioner adequately sets forth the procedural history of this case.

Question I

Did the Post Conviction Relief judge err in granting post conviction relief based upon counsel's failure to move for a continuance when Nathaniel Teamer's alibi witness became ill during the trial?

During the first few days of the trial, Daisy Elaine Feaster, an alibi witness for the applicant, was present for the trial. During the trial, she became ill and was confined to her house. App. at 645, ll 21-24. Mrs. Feaster had testified at the previous burglary trial of the applicant. The alleged burglary in that case had occurred on the same day as the murder. She testified that Mr. Teamer called her about 8 pm while she was taking a bath. App. at 1473, ll 18-23. When she got out of the tub, she saw Mr. Teamer in her house. App. at 1473, ll 3-4. She then testified that she left for the Wal-Mart to purchase a television about 9 pm. App. at 1473, ll 24-25 to 1474, ll 1-4. This testimony would provide an alibi for Mr. Teamer in this murder case. If Mr. Teamer were in Mrs. Feaster's presence until 9 pm, he could not have committed the murder.

The responding officer arrived at the scene of the murder at 8:49. App. at 99, ll 10-11. The call from dispatch occurred at 8:46. App. at 102, ll 19-22. Mr. David Proctor, who survived the shooting, ran from the truck and knocked on several doors before someone let him call 911. App. at 111, ll 4-11. After he picked up the shooter, he took about two minutes to get to highway 29, which is near where the shooting occurred. App. at 109, ll 13-14. Assuming Mr. Proctor spent only one minute fleeing the scene and finding someone who would call 911, the testimony would establish that the shooter was picked up about 8:42 pm. When Mrs. Feaster testified at the burglary trial that she saw Mr. Teamer at her house when she left for Wal-Mart at

9 pm , she has provided Mr. Teamer with an alibi as he could not have been the person Mr. Proctor picked up. She also confirmed the testimony of Osia Feaster, her daughter. App. at 396, ll 24-25 to 403, ll 1-16.

The cases relied upon by the Petitioner do not support their position. In *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) this court reversed the granting of a Post Conviction Relief petition on the ground that a witness who place the defendant in Florida twelve hours before the armed robbery occurred was not an alibi witness. Testimony at the Post Conviction Relief hearing established that Williamsburg County was only six and a half hours from the location in Florida. Clearly that testimony did not establish an alibi. The jury in this case should have been permitted to determine if the testimony of Mrs. Feaster established Mr. Teamer with an alibi.

Under any evidence standard by which this Court must review the evidence, the Post Conviction Relief Judge had probative evidence by which he made his determination that trial counsel was not effective. Based upon the testimony of Mrs. Feaster, the record establishes that competent evidence exists which supports the factual finding of the Post Conviction Relief Judge as to the failure to call an alibi witness. "This Court will uphold factual findings of the Post Conviction Relief court if there is any evidence of probative value to support them." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The post conviction relief judge viewed the witness and found that she would have supported the applicant's alibi.

The testimony of Mrs. Feaster is also important to Mr. Teamer's defense. The only other alibi witness was his girlfriend. Mrs. Feaster's daughter. By not calling Mrs. Feaster the jury was led to believe that no one else could confirm the testimony of the girlfriend of the

applicant, Osia Feaster.

The Petitioner further argues that the burden of proof is upon Mr. Teamer to establish prejudice from the failure to call Mrs. Feaster. The petitioner says Mr. Teamer established no prejudice because the trial judge may not have granted a continuance to permit Mrs. Feaster to testify. Unless this Court is to rule as a matter of law that a brief continuance should never be granted during a trial to permit an important defense witness to testify, prejudice has been proven. The Post Conviction Relief Judge found prejudice and the error is not an error of law. The record establishes prejudice. Ample evidence supports the finding of the Post Conviction Relief Judge.

Question II

Did the Post Conviction Relief court err in granting relief when trial counsel did not request a jury charge on third party guilt which was the theory of the defense of the applicant?

The United States Supreme Court has held “As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988). This Court has also recognized the need for a specific jury charge explaining the exact theory of defense for the defendant. *See, State v. Day*, 341 S.C. 410, 418, 535 S.E.2d 431, 435(2000) (“A self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.”) *State v. Hewitt*, 205 S.C. 207, ___, 31 S.E.2d 257, 259 (1944)(“An instruction that a man has the right of self defense

as to any member of his family, without telling the jury what constitutes the elements of that defense, does not enlighten, but is calculated to befog the jury.”).

The third party guilt defense was brought to the forefront when the United States Supreme Court decided *Holmes v. South Carolina*, 547 U.S. 319 (2006), almost two years before this trial started. Since that decision any reasonably competent criminal defense counsel should have been aware of the importance of third party guilt and been prepared to provide the court with a proper charge. The requested charge should have been:

There has been evidence that a third party, not the defendant, committed the crimes with which the defendant is charged. This evidence is not intended to prove the guilt of the third party, but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt.

It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect a third party to the crimes with which the defendant is charged. If after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that the alleged third party, Kevin McKinney, may be responsible for the crimes the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to Nathaniel Teamer.

In *State v. Arroya*, 284 Conn. 597, 935 A.2d 975 (2007) the Connecticut Supreme Court approved such a charge where a defendant has established evidence of third party guilt. If a jury hears evidence of third party guilt they may well believe that they must find the third party guilty beyond a reasonable doubt in order to acquit the defendant. This is simply not correct. Without a proper instruction to the jury as to how to use the evidence, the evidence could easily be improperly analyzed by the jury. Simply put, the defendant would have lost his right to present a defense.

The third party guilt defense in this is a very substantial defense. First, Mr.

Teamer had no reason to shoot the victim because the victim had never identified Mr. Teamer as being part of the original shooting incident on January 14, 2006. Mr. McKinney was in fact identified as being part of the previous shooting. App. at 278, ll 14-25 to 279, ll 1-12. In addition Mr. Teamer presented testimony that Mr. McKinney had in fact admitted to the shooting with which Mr. Teamer had been charged. App. at 405, ll 13-25 to 407, ll 1-9. Mr. McKinney fled the state because Tony Hunter, the victim in this case and a witness in a previous case, “had asked me what was my real name.” App. at 245, ll 12-14. Had the jury been properly instructed how to use all this evidence, the result in the trial would have been substantially different.

Trial counsel did not understand this case as being about third party guilt. When the testimony of Keith Letmon was proffered, the trial court asked “And it does relate to third party guilt?” App. at 382, ll 1-2. Trial counsel responded “Your honor, for the purpose of this, I believe it closely relates to a prior inconsistent statement. That’s what I’m putting up the witness for.” App. at 382, ll 3-5. As defense counsel never thought of using third party guilt as a defense he obviously never considered a charge on third party guilt.

If trial counsel had requested a third party guilt charge and the trial judge had refused such a request, the issue would have been preserved for Mr. Teamer’s appeal. Trial counsel did ask the trial court if he had a third party guilt charge. App at 420, ll 5-10. When the trial court said no, counsel dropped the issue. Unless this Court were now to rule as a matter of law a third party guilt instruction is never required, then ineffective assistance of counsel has been shown and the decision of the Post Conviction Relief Judge should be upheld.

Question III

Did the Post Conviction Relief Judge err in granting relief to the applicant when trial counsel failed to object to the charge that “your sole objective is to simply reach the truth of the matter” and “simply give both the State and the defendant a fair trial” when the charge was an improper statement of the law?

In *State v. Daniel*, 401 S.C. 251, 264, 737 S.E.2d 473, 480 (2012) Justice Toal in her concurring opinion said “ Thus, I join the Justice Pleicones's admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.” In holding charges that ask the jury to find the truth to be improper, this Court did not reverse prior precedent nor did it state a new principle of law not previously established. The case simply stated what had been known for a long time. Since *Sandstrom v. Montana*, 442 U.S. 510 (1979) criminal defense lawyers have known they should look carefully at charges to the jury concerning burden shifting charges. This is exactly what the charge in this case does.

The trial judge in this case told the jury their “sole objective . . . is simply to reach the truth in the matter.” App. at 454, ll 19-22. What the trial court did not tell the jury, nor does any other charge so inform the jury, is that if they are unable to determine the truth, then they should acquit the defendant as the state has failed in its burden of proof. A “tie” was not given as an option for the jury. The jury was told to find the facts that are the truth.

As said by one court “The jury's role was to determine whether the State had proven its case against this defendant beyond a reasonable doubt.” *State v. Buscham*, 360 N.J. Super. 346; 365, 823 A.2d 71, 82 (App. Div. 2003). The jury's role is not to “simply reach the

truth.” In this case the Post Conviction Relief Judge had adequate facts to conclude that the failure of trial counsel to object to the charge was ineffective assistance of counsel.

The applicant is not asking his defense counsel to be clairvoyant. To the contrary the applicant is simply asking that his defense counsel be reasonably proficient in keeping up with the current law. As this Court said nine years before the trial of his case “We again take this opportunity to strongly urge the trial courts to avoid using any ‘seek’ language, or any of the other offending terms described above, when charging jurors on either reasonable doubt or circumstantial evidence. Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant.” *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-868 (1998) *modified on other grounds*, *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). If trial counsel had paid even basic attention to the law in this area he would have known that such a charge was improper. In addition the improper charge in this case was given at the beginning of the charge as part of the opening statement as to the jurors duties.¹

As said by one court “The jury’s role was to determine whether the State had proven its case against this defendant beyond a reasonable doubt.” *State v Buscham*, 360 N..J. Super. 346, 365, 823, A.2d 71, 82 (App. Div. 2003). The jury’s role is not to “simply reach the truth.” In this case the Post Conviction Relief Judge had adequate facts to conclude that the failure of the trial counsel to object to the charge was ineffective assistance of counsel The law was established and trial counsel failed to object.

¹ While not raised at the Post Conviction Relief hearing below, the trial judge also instructed the jury in his opening charge “After you 12 jurors carefully considered all the evidence in the case, and from the evidence you decided what you believe to be the true facts” App. at 81, ll 16-18.

Even considering the charge as a whole, what in the charge clarifies the charge to the extent there is no prejudice? The comment was made at the beginning of the jury instructions and not when the credibility of witnesses was being discussed. The comment applied to the case as a whole and not just the testimony of witnesses. Even when the charge is repeated in the context of witness credibility, the prejudice is enhanced. App. at 462, ll 9-12. The charge as given forced the jury to draw the line between finding that the witnesses were either lying or telling the truth. They were again told they must find “the truth.” They were not left with the option of finding they did not know what the truth was and therefore the defendant should have been found not guilty. As such, the burden on the state was lessened in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the 14th Amendment to the Constitution of the United States of America.

This Court has admonished trial courts on several occasions not to tell the jury to “seek the truth” or use words to that effect. Notwithstanding those admonitions, the practice continues.² A definitive ruling in this case may finally stop the practice.

Additional Sustaining Grounds

Should this Court affirm the decision of the Post Conviction Relief Judge under the cumulative error theory?

Whether cumulative error should entitle an applicant to relief “is an unsettled question in South Carolina.” *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006). Mr. Teamer contends that the cumulative errors in this case should affirm the decision of the post

² See, <http://www.judicial.state.sc.us/juryCharges/GS%20InstructionsJune2013.pdf>, visited April 10, 2015 at 7,20.

conviction relief judge even if this court finds each assignment of error individually is not sufficient to affirm the decision below.

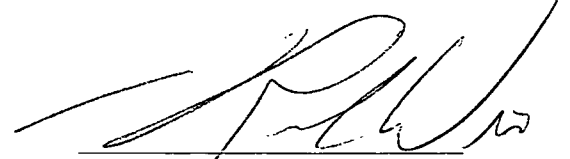
In *Kyles v. Whitley*, 514 U.S. 419 (1995) the United States Supreme Court held in evaluating a *Brady* violation, “the prejudice must be considered collectively, not item by item.” *Id.* at 436. See, also, *Williams v. Taylor*, 529 U.S. 362, 398-399 (2000) (“In our judgment, the state trial Judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire post conviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised ‘a reasonable probability that the result of the sentencing proceeding would have been different’ if competent counsel had presented and explained the significance of all the available evidence.”)(emphasis added); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) (“cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial”); and *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (cumulative effect of prosecutor's closing argument when coupled with improper exclusion of evidence warranted reversal).

Taken as a whole, the errors by trial counsel demonstrate that Mr. Teamer was not adequately represented in his defense of the murder and assault and battery with intent to kill charge. While the state may argue that any one of the errors by trial counsel may not have changed the verdict, one cannot rationally argue that the errors by counsel taken as a whole, would not have had an impact on the jury.

CONCLUSION

As the testimony before the post conviction relief judge supports the findings of the post conviction relief judge the petition for Writ of Certiorari should be denied.

April 14, 2015



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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the assistant for C. Rauch Wise, Attorney for the Respondent in the above entitled case. That on April 14, 2015, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Brief of Respondent in the above case addressed to Suzanne White, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 14 day

of April, 2015.

Mary Jane Harten (L.S.)
Notary Public for South Carolina

My Commission expires: 11/30/22