

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Berkeley County
Stephanie P. McDonald, Circuit Court Judge

S.C. Supreme Court

GARY L. GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002306

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel by failing to interview the EMS worker who heard decedent's dying declarations and would have testified that decedent identified Jermaine Hartwell as the shooter?

STATEMENT OF THE FACTS

On August 2, 2006, Dexter Perry was seized by Kareem King, Petitioner, Kerry Hollins, and Jermaine Hartwell as he was leaving a friend, Tawana Deas', apartment. App. 411, ll. 2 – App. 412, ll. 24. Marquita Smith, Perry's cousin and Hollins' ex-girlfriend, had identified Perry to the four as a drug dealer who carried large amounts of cash. App. 404, ll. 6-23. On the night of the incident, Smith had dinner with Deas, Perry, and Perry's friend, Chris Nelson. App. 132, ll. 3 – App. 133, ll. 25.

After dinner, Deas told Smith that Perry was coming over to her apartment. App. 137, ll. 3-22. Smith invited herself over. *Id.* Smith contacted King, Hollins, Hartwell and Petitioner and told them where Perry would be. App. 138, ll. 5 – App. 139, ll. 21. Hollins drove the others to Deas' apartment, but waited in the car as Deas would recognize him and suspect Smith's involvement. App. 441, ll. 6 – App. 442, ll. 15. When Perry decided to leave the apartment, Smith and Deas accompanied him. App. 140, ll. 9-25. As the three reached the landing of Deas' apartment, Smith and Deas spotted King, Hartwell, and Petitioner hiding in the bushes nearby. App. 141, ll. 1-25.

All three ran back into Deas' apartment and locked the door. *Id.* Once inside the apartment, Deas ran into a back bedroom and jumped off a balcony. *Id.* The last thing she heard before jumping was her front door being kicked in. *Id.* Once Deas reached the main road, she called 911. *Id.* After abducting Perry, Petitioner, King and Hartwell, took him to a trailer in Berkeley County where Chris Nelson, Perry's friend, lived with his aunt and uncle, Birdie and Odner Cobb. App. 168, ll. 23 – App. 171, ll. 20. The Cobb's daughter, Amber, and Nelson's brother, Joe Husser, were also in the residence when Petitioner and Hartwell forced their way in with Perry. App. 172, ll. 11-23.

Perry, the Cobbs, and Husser were forced at gun point onto the floor. All three assailants were armed with pistols. App. 172, ll. 11 – App. 174, ll. 23. Odner Cobb recalled at trial that Perry

eventually admitted that money was hidden in a back bedroom. App. 175, ll. 14-24. After Perry retrieved the money, the gunmen beat him, since they did not believe he had handed over all of it. App. 177, ll. 1-10.

During the robbery, Nelson arrived at the Cobb residence. App. 239, ll. 4 – App. 242, ll. 24. He immediately heard shouting emanating from the trailer and saw Hartwell (none of the gunmen were wearing masks) interrogating Perry about the hidden money. *Id.* Nelson later claimed that he ran for help and found a group of his relatives, one of whom he took a gun from. App. 243, ll. 1 – App. 244, ll. 15; App. 266, ll. 8 – App. 267, ll. 10. Nelson returned to the Cobb residence and opened fire. App. 244, ll. 16 – App. 245, ll. 20

The gunmen returned fire. During the exchange of gunfire, Perry was shot five times. App. 111, ll. 15-22. The gunmen fled the scene. Nelson also fled, allegedly dropping the gun while running back his relatives for help. App. 246, ll. 2-24. Police never found Nelson's gun and Nelson never identified the relative whom he "took it from". App. 265, ll. 17-18. After the shooting, Nelson returned to the Cobb residence, without the gun, and spoke to Perry as he was dying. App. 250, ll. 3 – app. 251, ll. 23. Nelson head Perry allegedly identify "Manny" as the assailant who shot him. *Id.* Nelson knew Hartwell's nickname was "Manny". *Id.*

Approximately twenty minutes after the shooting, law enforcement arrived and called for an ambulance. App. 370, ll. 2 – App. 371, ll. 24. Perry, who was still conscious, told officers that, "Manny did it". App. 372, ll. 2-13. EMS workers were also present at the scene and transported Perry to the hospital. App. 370, ll. 2 – App. 371, ll. 24. A police search of the Cobb residence uncovered \$1,653 and forty eight grams of marijuana. App. 194, ll. 11-20.

Petitioner, King, and Hartwell fled the shooting on foot and were picked up by Hollins at a nearby shopping center. App. 414, ll. 1 – App. 415, ll. 14. Hartwell was shot in the chest. *Id.* Hollins

dropped the three off at a house in North Charleston. App. 418, ll. 6-25. Later that night, Hollins was pulled over by a state trooper because his car matched the description of a vehicle believed to be involved in Perry's kidnapping. *Id.* After being interrogated, Hollins provided police with a written statement implicating the defendants. App 419, ll. 3 - App. 420

Hollins' statement identified Smith as the moving force behind the robbery. *Id.* Police interviewed Smith and she agreed to give a statement detailing her involvement. App. 540, ll. 4-8. During law enforcement's investigation, Nelson admitted that he was the shooter outside the residence. App. 193, ll. 1-7. Nelson was never charged with any crime.

The police conducted several photographic lineups of the defendants. On the night of the shooting, Husser identified Hartwell in a six-person photographic lineup. App. 527, ll. 5 – App. 529, ll. 22. Birdie Cobb identified Petitioner as one of the gunmen in another photo lineup. App. 530, ll. 4 – App. 16. Oddly, Husser and Odner Cobb identified Hollins as having been in the residence, despite Hollins testifying for the State that he was never in the residence. App. 532, ll. 2-12.

Indictments

On February 7, 2007, the Berkeley County Grand Jury indicted Petitioner for one count of armed robbery, four counts of kidnapping, one count of murder, and one count of burglary. App. 871 – App. 886. Michael T. Bolus was appointed to represent Petitioner. The State would be represented by Assistant Solicitors Blair Jennings and Scarlet Wilson.

Trial

On August 27, 2007, Petitioner, Smith, and Hartwell proceeded to trial before the Honorable Deadra Jefferson and a jury. Prior to the start of the trial, Hollins agreed to cooperate with the State and he testified against his co-defendants.¹ App. 396, ll. 1 – App. 397, ll. 8. Defendants' motion to sever the joint trial was denied and the defendants declined to challenge the admissibility of Smith's statements. App. 40, ll. 40 – App. 41, ll. 21.

The Cobbs (Odner, Birdie, and Amber) all testified that three men broke into their trailer armed with pistols, ordered the residents on to the floor, demanded money, and then beat Perry and Husser for failing to hand over all of the money. The Cobbs also identified Hartwell, Hollins, and Petitioner as the three gunmen. Husser testified about being forced to look for money in his room and being pistol whipped by "Manny." App. 334, ll. 2-20. Deas testified about Smith efforts to track Perry's movements on the night of the incident. App. 126, ll. 20 – App. 156, ll. 15.

Nelson, who started the shootout, was also a witness for the prosecution. Nelson claimed that he feared for Perry and the Cobbs because the defendants were not wearing masks; leading him to believe that they were not "going to leave any witnesses". App. 285, ll. 22 – App. 286, ll. 15. It was this overwhelming concern for their well-being that led him to fire into the Cobb residence. *Id.*

On cross-examination, Nelson admitted that he did not call the police. App. 291, ll. 2-12. Instead he claimed that he was relying on the relatives from whom he took the gun to call the police because they "saw my actions." *Id.* Nelson conceded that he stored several thousand dollars and a substantial quantity of marijuana at the Cobb's residence, but denied that was a consideration in not calling the police or in firing blindly into the residence. App. 285, ll. 1-11.

Hollins testified about the defendants' plan to rob Perry after Smith identified him as a potential "lick." App. 403, ll. 10 – App. 406, ll. 12. Despite being the only link between Petitioner, King, and Hartwell and Smith; Hollins carefully minimized his role, claiming that he never entered Deas' apartment or the Cobb residence. App. 411, ll. 20 – App. 414, ll. 21.

None of the defendants presented any witnesses. However, the State successfully argued that it was still entitled to final argument because Hartwell introduced a series of unsuccessful photographic lineups where Husser failed to identify him. App. 336, ll. 1 – App. 341, ll. 11. The jury found Petitioner guilty of all charges. App. 740, ll. 24 – App. 741, ll. 23. All of the co-defendants were found guilty of all of the charges they faced. App. 742, ll. 13 – App. 745, ll. 2.

The trial court sentenced petitioner to life imprisonment for murder, and sentences of thirty years imprisonment for the remaining four counts of kidnapping, one count of armed robbery, and one count of first degree burglary. App. 775, ll. 19 – App. 776, ll. 22. On appeal, the South Carolina Court of Appeals vacated Petitioner's conviction for Perry's kidnapping since Petitioner was also convicted of killing Perry. *State v. Grant*, Op. No. 2012-UP-406 (S.C. Ct. App. filed July 11, 2012); *see also* S.C. Code Ann § 16-3-910 (2003).

PCR Application

On August 6, 2012, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel for, among other grounds, failing to call the EMS worker who responded to incident as a witness." App. 781 – App. 787. On February 21, 2013, the State filed a Return. App. 806 – App. 810. On September 13, 2013, Petitioner submitted an amended

¹ Hollins is serving two eighteen year sentences for voluntary manslaughter and armed robbery. South Carolina Department of Corrections, "Inmate Search Detail Report: Hollins, Kerry (00307596)" (May 5, 2014), available at <http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000307596>.

application. App. 795 – App. 805. On November 18, 2013, the State filed an amended return. App. 806 – App. 811.

Evidentiary Hearing

An evidentiary hearing was held on November 18, 2013 before the Honorable Stephanie P. McDonald. App. 811 – App. 860. Petitioner was represented by Charles Brooks, III. The State was represented by Assistant Attorney General Ashleigh R. Wilson.

Testimony of Petitioner

Petitioner testified that he and trial counsel only met twice. App. 822, ll. 5 – App. 823, ll. 12. Petitioner further stated that trial counsel failed to call the first EMS responder to testify as a potential witness to Perry’s dying declaration identifying Hartwell as the shooter. App. 824, ll. 7-23. During PCR counsel’s questioning of Petitioner, the State objected that the potential testimony of the EMS responder claiming the issue was not raised in the PCR Application. App. 825, ll. 16 – App. 827, ll. 12. PCR counsel responded that he had made a motion for a continuance so that he could secure the funds for an investigator, but that he never “got a motion or order back.”

The court stated that it had no such motion on file. App. 816, ll. 5-8. PCR counsel then justified the omission, stating that he did not believe the EMS worker’s testimony would be beneficial to the Petitioner, but that if the court wanted him to ask for a continuance he would so. App. 826, ll. 14 – App. 827.

Testimony of Trial Counsel

Bolus was appointed to Petitioner’s case and decided to undertake representation despite being exempt from appointments due to his age. App. 832, ll. 14 – App. 833, ll. 7. Bolus claimed that the State had a strong, straightforward case that was being handled by two very experienced solicitors. App. 834, ll. 12 – App. 844, ll. 17. Oddly, Bolus stated incorrectly that he believed an

anonymous tipster had identified Petitioner as a suspect, but that he was unable to discover the tipster's identity. App. 844, ll. 20-24. Bolus claimed he was prepared for trial, but that there were simply "way too many eyewitnesses" placing Petitioner at the kidnapping, burglary, and shooting. App. 844, ll. 9-17; App. 847, ll. 24 – App. 848, ll. 11.

With respect to the eve-of-trial revelation that Hollins would be a State's witness, Bolus alleged that the defense attorneys in Petitioner's case "knew exactly where this case was going, that somebody was going to cut a deal and . . . the public defender there, cut a deal for her client, which is Mr. Hollins . . ." App. 843, ll. 22 – App. 844, ll. 6.

Order of Dismissal

The PCR Court denied Petitioner's application in an Order of Dismissal dated October 27, 2014. App. 870 – App. 861. The PCR court held that Petitioner failed to demonstrate how trial counsel's failure to object to "a last minute witness by presented by the State" constituted deficient performance. App. 867. The PCR court also held that counsel was not ineffective for failing to call an EMS worker as a witness at trial as Petitioner again failed to produce the testimony of the worker or show how such testimony would have been favorable to the Petitioner. *Id.*

ARGUMENT

Trial counsel provided ineffective assistance of counsel by failing to interview the EMS worker who heard decedent's dying declarations and would have testified that decedent identified Jermaine Hartwell as the shooter.

Trial counsel was ineffective for failing to call the responding emergency service worker (EMS) as a witness at trial. App. 824, ll. 5-19. The EMS worker would have provided valuable testimony that Perry identified Hartwell as his killer. *Id.* Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel.; *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims: a PCR applicant must show that counsel's performance was constitutionally deficient and that trial counsel's deficiency prejudiced the outcome of the proceedings).

Discussion

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "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.

The defendant is required to overcome the presumption that counsel was effective in order to receive relief. *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove 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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692). The United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. This Court has also held that trial counsel has a duty “to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Deficient Performance

In this case, trial counsel’s performance was deficient, as it fell below an objective standard of reasonableness. App. 345, l. 1 – 349, l. 8; *See Strickland*, 466 U.S. at 687-88. Specifically, trial counsel should have interviewed the EMS worker as a potential witness for the defense because he or she was the last person to speak with Perry before his death. App. 825, ll. 12-15; *see Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the case; *see also Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992)(failure to call medical personnel who would have cast doubt on the identification of Petitioner constituted deficient performance).

Accordingly, the PCR court erred in finding that trial counsel’s representation was reasonable under “under prevailing professional norms” where counsel failed to interview the EMS worker in preparation for Petitioner’s case. App. 251 – 253; *See Strickland*, 466 U.S. at 687-88; *see also Cherry*, 300 S.C. 115, 386 S.E.2d 624.

Prejudice

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Petitioner testified, "I had an EMS driver that talked to the victim, the victim that died. The EMS driver talked to him and stated that the victim said that this person, the one who shot him . . . the EMS driver was a potential witness in my trial and [trial counsel] wouldn't call him on the stand on my behalf". App. 824, ll. 11-17.

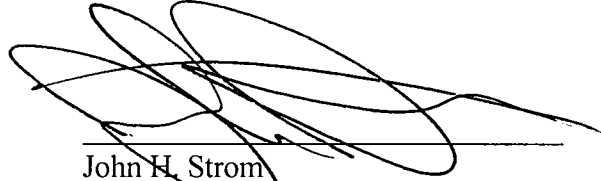
Based on Petitioner's testimony at the evidentiary hearing, trial counsel's deficient performance adversely affected his right to a fair trial because trial counsel's failure to interview one of the key witnesses to Perry's dying declarations limited the scope of cross-examination of the witnesses called by the State and prevented Petitioner from presenting potentially exculpatory testimony that co-defendant Jermaine Hartwell shot Perry. App. 824, ll. 11 – App. 825, ll. 15; *see also Thomas*, 308 S.C. at 124, 417 S.E.2d at 532 (identification of Petitioner by complainant was critical to the case, Petitioner was prejudiced by counsel's failure to call medical personnel who would have cast doubt on complainant's identification).

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

For the foregoing reason, this Court should grant the petition with the ultimate relief of a new trial for Petitioner, Gary Grant.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
STEPHANIE P. MCDONALD, CIRCUIT COURT JUDGE

GARY L. GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002306

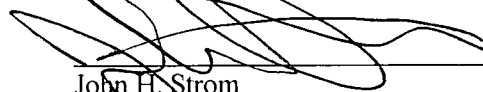
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gary L. Grant 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 November 18, 2013. 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 Gary L. Grant.

Respectfully submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of May, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Stephanie P. McDonald, Circuit Court Judge

GARY L. GRANT,

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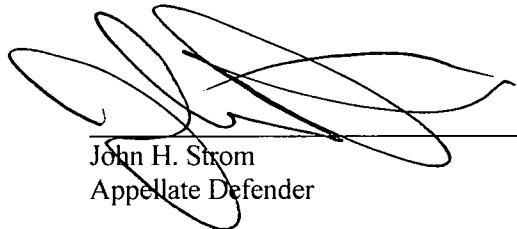
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002306

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 and Gary L. Grant, #280988, at Broad River Correctional Institution this 4th day of May, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of May, 2015.

Heavis Jones (L.S.)
Notary Public for South Carolina

My Commission Expires: July 3, 2023.