

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Frank R. Addy, Circuit Court Judge

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MAY 19 2015

S.C. Supreme Court

STANLEY GOLSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000446.

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BRIEF OF PETITIONER

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ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether trial counsel was ineffective in failing to object to the trial judge providing audio equipment that allowed the jury to listen to the tape of the controlled buy with the confidential informant, when that unduly emphasized that portion of the State's case?

## STATEMENT

Petitioner was convicted of distribution of crack cocaine and distribution of the same within proximity of a school after a jury trial held before the Honorable R. Knox McMahon in Lexington County on April 3, 2007. Petitioner was sentenced to life imprisonment without the possibility of parole. Josh Kendrick, Esquire, was trial counsel. Samuel R. Hubbard, III, Esquire, and M. Kent Collins, II, Esquire were the solicitors. (App. P. 1- p. 222).

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on July 6, 2010. State v. Golson, 2010-UP-347.

Petitioner filed an application for post-conviction relief on September 2, 2010. (App. p. 223- p. 238). Respondent filed a return dated December 30, 2010. (App. P. 239 -p.244). An evidentiary hearing was held on April 17, 2013, before the Honorable Frank R. Addy, Jr. Petitioner was present and was represented by Charles Brooks, Esquire. Respondent was represented by J. Walt Whitmire, Esquire. Both petitioner and trial counsel testified at the hearing. (App. P. 245- p. 319). On February 17, 2014, Judge Addy issued an order denying and dismissing petitioner's application for post-conviction relief. (App. P. 320-p. 330)

A Johnson petition for writ of certiorari was filed on April 18, 2014. On October 7, 2014, this Court issued an order directing the parties to address the issue that was presented in the Johnson petition. A petition for writ of certiorari was submitted on October 29, 2014. On April 22, 2015, the Court issued an order granting certiorari and directing the parties to submit briefs.

The brief of petitioner follows.

## ARGUMENT

Trial counsel was ineffective in failing to object to the trial judge providing audio equipment that allowed the jury to listen to the tape of the controlled buy with the confidential informant.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, hearsay, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006). Failing to properly investigate may lead to a claim of ineffective assistance of counsel. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009). And counsel may be alleged ineffective for failing to fully cross-examine a witness. State v. Nance, 393 S.C. 289, 712 S.E. 2d 446(2011); Kirkpatrick v. State, 306 S.C. 359, 412 S.E. 2d 389(1991).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E. 2d 878 (2006).

During opening argument in petitioner's case, the assistant solicitor referenced the fact that the police had to use a paid informant, Jannie Wiseman, with a prior record to see if she could buy some crack cocaine from petitioner. The assistant solicitor also told the jury that the police put a wire on the informant so they could listen to people who she was talking to and so they could make an audio recording. The jury would be able to hear the recording on a C.D. (App. p. 45, lines 16 – p. 49, line 25). The jury was also told that there was a lot of garble and static on the recording and it would be played in the courtroom. They could also hear it during deliberations. They could play it over and over. (App. p. 50, lines 2 – 17; app. p. 53, lines 2 – 7).

Defense counsel's argument stressed that the paid informant with the prior record was not credible. (App. p. 56, lines 17 – 23). And, she would not be credible about what was on the audio C.D. (App. p. 57, line 9 – p. 58, line 8).

The first witness for the State, Detective Burke, testified that he worked with the informant on this case. He identified State's Exhibit 3 as the C.D. recording of the buy. (App. p. 65, lines 13 – 20; app. p. 71, lines 1 – 10). The informant, Jannie Wiseman, testified next and the C.D. recording was played to the jury. (App. p. 99, line 17 – p. 100, line 7).


During closing argument, the assistant solicitor told the jury they would get to take the C.D. back with them. He said they will set up a way for them to play it. He urged the jury to play the C.D. Then he played excerpts for them to hear. (App. p. 169, line 20 – p. 170, line 16). He again urged them to listen to the tape. (App. p. 172, lines 1 – 2). Just prior to deliberations, equipment was taken into the jury room for them to play the C.D. (App. p. 201, line 21 – p. 203, line 23).

At the evidentiary hearing, trial counsel testified that he did not object to the tape going into the jury room because it was an exhibit. (App. p. 286, lines 21 – 23). In the order of dismissal, the PCR judge wrote that petitioner’s allegation concerning the jury having access to the C.D. during deliberations was “wholly without merit.” The order then cited State v. Steadman, 257 S.C. 528, 542, 186 S.E.2d 712, 717 (1972). The order of dismissal in this respect was in error. In State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), the Court held that the trial judge abused his discretion in allowing the jury to take into the jury room a transcript of a tape between a highway patrolman who had been shot and a patrolman who received the call, because it unduly emphasized that evidence. The audio tape in petitioner’s case was cumulative to the State’s case and sending it into the jury room unduly emphasized it. In Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), the Court wrote that improper corroboration evidence cannot be harmless because it is the “cumulative effect which enhances the devastating impact of improper corroboration.”

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19<sup>th</sup> day of May, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County  
Frank R. Addy, Circuit Court Judge

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STANLEY GOLSON,

PETITIONER,

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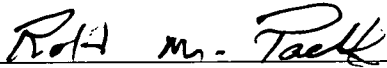
APPELLATE CASE NO. 2014-000446

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CERTIFICATE OF SERVICE

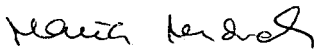
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I certify that a true copy of the brief of petitioner, in this case has been served on John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19<sup>th</sup> day of May, 2015.

  
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Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19<sup>th</sup> day  
of May, 2015.

  
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(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.