STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County

Maite Murphy, Circuit Court Judge

PHILLIP SPEARS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-002096

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I. Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to contemporaneously object to James Bourgeois' tainted in-court identification of Petitioner after he had previously seen Petitioner at a bond hearing, since the issue was not preserved for appellate review, which prejudiced Petitioner?

II. Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to object to the co-defendant's attorney's closing argument that the witnesses were not untruthful, since the alleged victims identified Petitioner as one of the robbers and the co-defendant's attorney vouched for the credibility of the victims, which prejudiced Petitioner?

III. Did the PCR judge err by finding appellate counsel provided effective representation where appellate counsel failed to cite any legal authority in her appellate brief in support of the argument that the trial judge erred by refusing to declare a mistrial based on extraneous and prejudicial information published to the jury during deliberations, since the Court of Appeals deemed the argument abandoned on appeal, which prejudiced Petitioner?

STATEMENT OF THE FACTS

On August 27, 2007, a Calhoun County Grand Jury indicted Petitioner for armed robbery, kidnapping, and possession of a weapon during a violent crime. App. vol. 3, 1233 – 1238. On October 1, 2007, Petitioner's case proceeded to a jury trial before the Honorable Diane Schafer Goodstein. App. vol. 1, 1. Charlie Jay Johnson represented Petitioner. Margaret Hinds and Andrew Brown represented Petitioner's co-defendant, Titus Bantan. Karen N. Fryar and Bryan Jeffries represented the State. App. vol. 1, 1.

On October 10, 2007, Petitioner was found guilty and sentenced to thirty years' imprisonment. App. vol. 3, 1111. Petitioner appealed his convictions and sentence.

On June 15, 2011, the South Carolina Court of Appeals affirmed Petitioner's conviction in a published opinion. See State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The Remittitur was sent on July 1, 2011. M. Celia Robinson and Breen Stevens represented Petitioner on appeal. App. vol. 3, 1131.

Petitioner filed a PCR application on October 6, 2011. App. vol. 3, 1115. Respondent filed its return on January 18, 2012 requesting an evidentiary hearing. On May 28, 2014, a PCR hearing was held before the Honorable Maité Murphy. Charles T. Brooks, III represented Petitioner. Megan Harrigan Jameson represented the State. App. vol. 3, 1141.

On September 9, 2014, Judge Murphy issued an order of dismissal. App. vol. 3, 1211. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

I. The PCR judge erred by finding trial counsel provided effective representation where counsel failed to contemporaneously object to James Bourgeois' tainted in-court identification of Petitioner after he had previously seen Petitioner at a bond hearing, since the issue was not preserved for appellate review, which prejudiced Petitioner.

Relevant Facts

This case involved the armed robbery of the Bell's Wagon Wheel convenience store in Calhoun County, South Carolina. On the morning of November 6, 2006, two men entered the store and held the owner, James Bourgeois, and other employees on the floor at gunpoint. App. vol. 2, 512 – 513. Natasha Rivers, Cleveland Williams, and Iskier Prezzie were the employees present during the robbery, as well as Rivers' two minor children. App. vol. 2, 521 – 522.

The robbers stole $200 in cash, around $580 in rolled coins, and several packs of Newport cigarettes. App. vol. 2, 535, line 13 – App. vol. 2, 538, line 1. After they left the store, Bourgeois called 9-1-1 and officers responded to the scene. Rivers provided the police with a description of the robbers. App. vol. 2, 544, lines 7 – 19. Later that day, Rivers was shown a photographic line-up where she identified Petitioner as one of the men who robbed the store. App. vol. 2, 548, line 25 – App. vol. 2, 552, line 21. She also identified Titus Bantan, Petitioner's co-defendant, as the other robber in a second photographic line-up. App. vol. 2, 553, line 11 – App. vol. 2, 555, line 20.

During the investigation of the armed robbery, police learned of Tanesha Adams, Petitioner's ex-girlfriend. Adams claimed that Petitioner called her the morning of the robbery and asked her whether the convenience store had video cameras. App. vol. 2, 695, lines 12 – 25. Adams also claimed that Petitioner confessed to her that he robbed the store on the morning of November 6, 2006. App. vol. 2, 697, lines 4 – 21.

While the police were at Adams' residence, Adams' brother told police that Petitioner would be at a home on Charlotte Circle in Orangeburg County, South Carolina. App. vol. 2, 734, line 4 – App. vol. 2, 736, line 4. After entering the home on Charlotte Circle, police handcuffed Titus Bantan and located items they thought were taken during the robbery. Petitioner was not present. App. vol. 2, 738, line 7 – App. vol. 2, 741, line 1; App. vol. 2, 743, line 17 – App. vol. 2, 744, line 12. Officers obtained a search warrant for the Orangeburg County residence and located Timberland boots and army fatigue pants which matched the description of the clothing worn by one of the robbers. Officers also recovered $260, a Coinstar receipt showing that $300 in coins had been exchanged for cash, and packs of Newport cigarettes. App. vol. 2, 745, line 16 – App. vol. 2, 747, line 15.

Petitioner was arrested on November 9, 2006 in North Carolina. App. vol. 1, 307, lines 7 – 18.

Motion to Suppress Petitioner's In-court Identification

Prior to trial and pursuant to State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), defense counsel for Petitioner moved to suppress the in-court identification of Petitioner by James Bourgeois. Bourgeois testified during the suppression hearing. App. vol. 1, 425.

According to Bourgeois, as he was walking out the back door of the store to see whether all of the trash had been loaded onto his truck, a man had a gun pointed at his face. The man, who was standing behind Bourgeois, ordered him to go back inside the store and lie down. App. vol. 1, 425, line 14 – App. vol. 1, 426, line 1. Bourgeois stated that the individual had his cap pulled down to "eyebrow level." App. vol. 1, 429, line 24 – App. vol. 1, 430, line 1.

According to Bourgeois, the man "was about five-ten, five-eleven, slender build." App. vol. 1, 430, lines 12 – 13. Bourgeois stated that the individual "had acne bumps or something all over

his face" and "[k]ind of had a scruffy looking mustache." App. vol. 1, 430, line 22. Bourgeois admitted that he had his head down as he was being poked with a gun. He also stated that the two robbers "were constantly moving." App. vol. 1, 435, lines 19 – 24; App. vol. 1, 436, line 2.

Bourgeois claimed that he gave the police a description of what the suspects looked like, but he was never shown a photographic line-up. App. vol. 1, 442, lines 1 – 9.

In April 2007, Bourgeois was notified of a bond hearing for Petitioner at the magistrate's office. App. vol. 1, 438, line 24 – App. vol. 1, 439, line 1. He claimed that when he saw Petitioner walk through the front door of the magistrate's office, he recognized him. App. vol. 1, 440, lines 1 – 8. He also acknowledged the fact that Petitioner was being escorted by officers when he walked in and was the only inmate there that day.

Officer Stanley Graham also testified during the suppression hearing. Graham notified Bourgeois of the bond hearing for Petitioner. App. vol. 1, 445. Graham could not recall getting a description of the two robbers from Bourgeois when he responded to the convenience store after the robbery. App. vol. 1, 450, line 23 – App. vol. 1, 451, line 3. Graham also could not explain "why Mr. Bourgeois, if he could identify someone, was not shown a photo lineup." App. vol. 1, 452, lines 4 – 6.

After the pre-trial testimony, defense counsel for Petitioner argued that the police showed a photographic line-up to the only person who indicated she could identify the robbers – Natasha Rivers. App. vol. 1, 452, lines 20 – 25. Further, any identification made of Petitioner in-court was unduly suggestive. App. vol. 1, 454, line 11 – App. vol. 1, 455, line 3.

The trial judge agreed that "[i]t certainly is suggestive when an individual is going to the courthouse to a bond hearing and they know that, and they know that the person is going to be there." App. vol. 1, 455, lines 17 – 22. However, the judge considered the fact that Bourgeois had

seen nothing about Petitioner between the time of the robbery and the bond hearing where he "recognized" Petitioner as the man who robbed his store. App. vol. 1, 458, lines 8 – 12.

The trial judge found "the burden which [had] been articulated in the (sic) State v. Ora Simmons [had] been met" and allowed the in-court identification. App. vol. 1, 458, lines 18 – 21.

Defense counsel for Petitioner made no contemporaneous objection during the witness' testimony identifying Petitioner as one of the men who robbed his convenience store. App. vol. 2, 596, lines 3 – 8. The Court of Appeals found that the issue of the in-court identification was "not properly before [the] court." State v. Spears, 393 S.C. 466, 480, 713 S.E.2d 324, 331 (Ct. App. 2011).

PCR Hearing

Petitioner testified during the PCR hearing. Petitioner explained to the PCR judge that defense counsel failed to contemporaneously object to the in-court identification of Bourgeois. App. vol. 3, 1154, lines 10 – 12. Because counsel did not object during the witness's testimony identifying Petitioner as one of the men who robbed the Wagon Wheel, "it wasn't preserved for direct appeal or review." App. vol. 3, 1154, lines 18 – 20.

Defense counsel could not recall whether he failed to interject objections during the trial when he should have objected. However, he stated he renewed all of his objections at the end of trial. App. vol. 3, 1179, lines 1 – 9.

Order of Dismissal

The PCR judge denied Petitioner's application. The judge found that Petitioner was "unable to establish any requisite prejudice from this allegation." App. vol. 3, 1221. The judge wrote that "[h]ad counsel contemporaneously objected and the issues were preserved for appellate review, the

result would still have been the same – the convictions and sentence would have been affirmed." App. vol. 3, 1221.

Discussion

The PCR judge erred by finding trial counsel provided effective representation. Counsel failed to contemporaneously object to James Bourgeois' tainted in-court identification of Petitioner after Bourgeois saw him at a bond hearing. Because counsel did not object when the identification was made, the issue was not preserved for appellate review, which prejudiced Petitioner.

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).

The decision to admit an eyewitness' identification of a defendant is in the trial judge's discretion. State v. Govan, 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007). The South Carolina Supreme Court has held that when there has been no out of court identification of a defendant, an *in camera* hearing must be held during which the burden is on the State to establish that the in-court identification was "of independent origin" and not a tainted product of circumstances surrounding a bond hearing. State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992). The in-court identification may be so tainted by the circumstances surrounding a witness seeing the accused as to require that the in-court identification be suppressed. State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971).

Here, Bourgeois' in-court identification of Petitioner was severely tainted by the fact that he had seen Petitioner at a bond hearing prior to trial. Bourgeois did not give police a detailed description of Petitioner when they responded to the convenience store minutes after the robbery. Bourgeois never identified Petitioner out of court as the police had never shown Bourgeois a photographic line-up.

Bourgeois did not see Petitioner until the bond hearing at the magistrate's office. Although he testified that he recognized Petitioner when he walked through the door, he was informed of only one bond hearing being held that day. He arrived at the office expecting to see the person who allegedly robbed his store. Bourgeios' in-court identification of Petitioner was not "independent of" seeing Petitioner at the bond hearing and should have been suppressed.

Although counsel made a motion *in limine* to suppress the in-court identification, he did not contemporaneous object to it. Therefore, the issue of whether the trial judge erred by failing to grant counsel's motion to suppress was not preserved for appellate review. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine ins not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced."). Trial counsel's failure to preserve the issue for appellate review prejudiced Petitioner on appeal. Had the issue been preserved, there is a reasonable probability that the Court of Appeals would have ruled that the trial judge erred by refusing to exclude the in-court identification, reversed Petitioner's conviction and sentence, and remanded for a new trial.

II. The PCR judge erred by finding trial counsel provided effective representation where counsel failed to object to the co-defendant's attorney's closing argument that the witnesses were not untruthful, since the alleged victims identified Petitioner as one of the robbers and the co-defendant's attorney vouched for the credibility of the witnesses, which prejudiced Petitioner.

Relevant Facts

During closing argument, defense counsel for Titus Bantan, Petitioner's co-defendant, argued that Bantan was not a participant in the robbery of Bell's Wagon Wheel. App. vol. 2, 970, lines 4 – 6. Counsel for Bantan argued that the evidence the State presented during trial did not link Bantan to the robbery. Instead, the evidence showed "that Mr. Bantan and Mr. Spears were acquaintances." App. vol. 2, 974, lines 10 – 12.

Counsel for Bantan, Margaret Hinds, summarized each victim's account of the robbery. Specifically, counsel contended:

> "I don't think Mr. Bourgeois would tell an untruth to y'all."

App. vol. 2, 982, lines 6 – 7.

Counsel also asserted:

> "All I'm saying is I don't think anybody's been untruthful in this proceeding, but there was so much happening."

App. vol. 2, 982, lines 18 – 20.

Counsel for Petitioner, Charlie Johnson, made no objections during closing argument.

PCR Hearing

Petitioner explained that trial counsel "failed to object to [his] codefendant's attorney's closing arguments statement – stating that she doesn't believe that the victim Mr. Bourgeious would tell an untruth to the Court." App. vol. 3, 1152, lines 2 – 5. Petitioner contended that counsel for

his codefendant, Bantan, "vouched for the credibility of the witness," and Petitioner's counsel should have objected. App. vol. 3, 1152, lines 6 – 11.

Counsel for Petitioner could not recall the co-defendant's closing argument. App. vol. 3, 1181, lines 4 – 6. Counsel stated that he did not think there was anything to object to. By objecting, explained counsel, he "would have called more attention to it, made the jury think about it more." App. vol. 3, 1181, lines 4 – 13. Counsel did not believe that the co-defendant's attorney said anything about Petitioner in closing, therefore, he "really didn't care too much about what she said." App. vol. 3, 1181, lines 11 – 13.

Order of Dismissal

The PCR judge dismissed Petitioner's application. The judge found that counsel's "performance was reasonable according to professional standards." App. vol. 3, 1219. The judge also found that Petitioner "failed to establish the requisite prejudice required for relief, as there is no reasonable likelihood that the result of the proceeding would have been different." App. vol. 3, 1219.

Discussion

The PCR judge erred by finding trial counsel provided effective representation. Counsel failed to object to the co-defendant's attorney's closing argument that the witnesses were not being "untruthful" in their testimony. Because the alleged victims identified Petitioner as one of the robbers, the co-defendant's attorney vouching for the credibility of the victims prejudiced Petitioner.

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).

Closing arguments "must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999). It is the province of the jury to assess "the credibility of witnesses based on evidence in the record." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002); Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). See State v. Schuler, 344 S.C. 604, 545 S.E.2d 805 (2001) (holding that a solicitor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness.).

Here, trial counsel for Petitioner's co-defendant, Titus Bantan, improperly vouched for the credibility of the victims. Bantan's counsel offered her personal opinion that none of the witnesses were "untruthful" or telling an "untruth," which was highly improper. Natasha Rivers and James Bourgeois both identified Petitioner as one of the robbers during trial. Bourgeois claimed that he was certain Petitioner was involved, even though he never identified Petitioner in a photographic line-up and had seen Petitioner at a bond hearing prior to trial. See Issue I supra.

Further, Bantan's counsel belabored the fact that the evidence presented against Petitioner was greater than the evidence presented against Bantan. Batan asserted that he did not rob the Wagon Wheel, but was merely an acquaintance of Petitioner. Counsel contended that no evidence linked Bantan to the armed robbery.

Petitioner's counsel should have objected when Bantan's attorney improperly asserted that the alleged victims were telling the truth. Although Bantan's attorney was not advocating on behalf of the State, Petitioner and his co-defendant had inconsistent defenses. Counsel's contention that the victims were telling the truth in their identification of Petitioner as one of the robbers, in addition to the State's argument that Petitioner was guilty, carried considerable weight with the jury. The jury hearing Titus Bantan's attorney opine that the victims were truthful unduly prejudiced Petitioner. Had counsel objected to the improper argument, there is a reasonable probability that the jury would have found Petitioner innocent.

III. The PCR judge erred by finding appellant counsel provided effective representation where appellate counsel failed to cite any legal authority in her appellate brief in support of the argument that the trial judge erred by refusing to declare a mistrial based on extraneous and prejudicial information published to the jury during deliberations, since the Court of Appeals deemed the argument abandoned on appeal, which prejudiced Petitioner.

Relevant Facts

During jury deliberations, the forewoman, Rosella Jones, sent the judge a note:

> "It has been brought to the jury's attention that one of the jurors has heard, quote unquote, something about these two guys being targeted by the police for an alleged bank robbery in Cameron, South Carolina. It is my concern that by hearing this comment, this juror may not be capable of providing an unbiased opinion based solely on the evidence."

App. vol. 3, 1054, lines 1 – 11.

The trial judge questioned the juror about what he heard. App. vol. 3, 1065, lines 7 – 25. The juror overheard two men at the gas pump discussing the trial and the fact that Petitioner and his co-defendants were suspects in a bank robbery in Cameron. The juror commented on what he heard during deliberations. App. vol. 3, 1060, lines 3 – 14.

The judge brought each juror out of the jury room and asked whether they could continue to deliberate and make a decision "based solely on the evidence in this courtroom, the witnesses' testimony from the witness stand, the exhibits admitted into evidence." App. vol. 3, 1068 – 1090.

Motion for Mistrial

Immediately following the trial judge's examination of the jury, defense counsel for Petitioner and Bantan moved for a mistrial. App. vol. 3, 1090, line 19 – App. vol. 3, 1092, line 17. Counsel for both defendants argued that the entire jury panel had been tainted by the juror's comment as to what he overheard. App. vol. 3, 1090, lines 23 – 24. The prejudice to both

defendants was "so severe that it cannot be cured." App. vol. 3, 1091, lines 7 – 8. In addition to other evidence that was "mentioned in court when it should not have been," the information overheard by the juror and shared with the jury had a cumulative effect. App. vol. 3, 1091, lines 9 – 12.[1]

Counsel also explained that the purpose of arguing pre-trial motions was to prevent this very issue – prejudicial information being heard by the jury. App. vol. 3, 1092, lines 9 – 13. Counsel asserted that "it's too big of an issue . . . to be cured by a curative instruction." App. vol. 3, 1092, lines 13 – 17.

The trial judge denied counsel's motion and gave a curative instruction to the jury. The judge noted defense counsel's exception to the curative instruction. App. vol. 3, 1096, lines 4 – 8.

The South Carolina Court of Appeals found that the issue of whether the trial judge erred by refusing to grant the motion for a mistrial, based on the juror's comment which tainted the jury, was not preserved for appellate review. State v. Spears, 393 S.C. 466, 486, 713 S.E.2d 324, 334 (Ct. App. 2011). The Court wrote:

> "[T]he appellate brief fails to cite any legal authority in support of this argument. Therefore, this argument has been abandoned on appeal."

Id.

PCR Hearing

Petitioner contended that appellate counsel abandoned the mistrial issue because "she didn't file any, any case law to support her argument." App. vol. 3, 1164, lines 9 – 16. Appellate counsel recalled that she was initially planning to make one argument regarding both mistrial motions that

[1] Defense counsel made a motion for a mistrial after testimony concerning .40 caliber bullets, drugs, and a shotgun that were recovered during the search of home on Charlotte Circle. App. 748. The trial judge ruled, pre-trial, that the evidence was improper and inadmissible. However, the judge denied defense counsel's motion for a mistrial. App. 750.

the trial judge refused to grant. However, counsel considered both mistrial issues important issues to argue in the appellate brief. App. vol. 3, 1199, lines 15 – 21.

Appellate counsel explained:

> "So at the last minute, I split off that last argument into a fifth argument. And what I was supposed to do was pull the cites, "see supra." You know, make my little argument, which I was doing, and then say, "see Parker supra." I just didn't. And the Court of Appeals found, Well this argument had no – no authority cited for it; so we're not even going to consider it."

App. vol. 3, 1199, line 25 – App. vol. 3, 1200, line 6.

Appellate counsel further explained:

> "[The Court] wouldn't consider it because I didn't put in the supra cite. That's all I had to do was put, "see Parker supra," but I somehow, at the last minute, just forgot."

App. vol. 3, 1200, lines 13 – 15.

Order of Dismissal

The PCR judge found that Petitioner could not "establish that he would have been successful on appeal absent counsel's allegedly unprofessional errors." App. vol. 3, 1231. The judge wrote that there was "overwhelming evidence of Applicant's guilt . . . and there [was] no reasonable likelihood that Applicant would have been successful on appeal. App. vol. 3, 1231. The PCR judge dismissed Petitioner's application.

Discussion

The PCR judge erred by finding appellant counsel provided effective representation. Appellate counsel failed to cite any legal authority in her appellate brief in support of the argument that the trial judge erred by refusing to declare a mistrial based on extraneous and prejudicial information published to the jury during deliberations. Because appellate counsel failed provide any authority, the Court of Appeals deemed the argument abandoned, which prejudiced Petitioner.

A criminal defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999) (citing Evitts v. Lucey, 469 U.S. 387 (1985) (holding that, to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair)). In analyzing a claim of ineffective assistance of appellate counsel, a court will apply the Strickland test as it does in claims of ineffective assistance of trial counsel. Southerland, 337 S.C. at 616, 524 S.E.2d at 836; see Strickland v. Washington, 466 U.S. 668 (1984).

First, Petitioner must show that appellate counsel's performance was deficient, as measured by the standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 685. Second, Petitioner must prove that prejudice resulted from appellate counsel's deficiency. Id. Specifically, a petitioner must show there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding would have been different. Id.

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). A defendant moving for a mistrial must show both 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, the trial judge should have declared a mistrial after the jury was exposed to the extraneous and unduly prejudicial information that both defendants were suspects in the Cameron, South Carolina, bank robbery. Not only did the jury hear this information from a fellow juror, the jury heard it during deliberations – while deciding Petitioner's guilt. The curative instruction given by the trial judge was futile. By refusing to declare a mistrial, the trial judge enabled the jury to reach a verdict on the improper basis that if Petitioner and his co-defendant were suspects in another robbery, then they committed the robbery of the Wagon Wheel convenience store.

Because appellate counsel failed to cite legal authority which supported the argument that the judge committed error by refusing to declare a mistrial, the Court of Appeals did not even consider the issue. In fact, the Court declared "[the] argument [had] been abandoned on appeal." State v. Spears, 393 S.C. 466, 486, 713 S.E.2d 324, 334 (Ct. App. 2011). See State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (recognizing that an argument is deemed abandoned on appeal when it is merely conclusory and made without supporting authority).

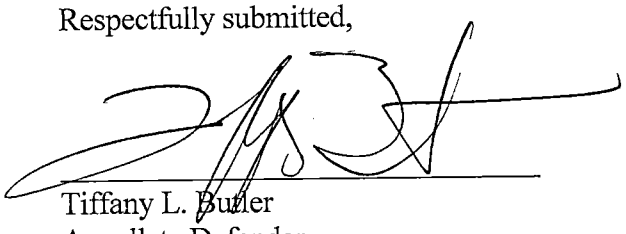
Had appellate counsel cited the proper legal authority to support her argument that the trial judge committed prejudicial error by refusing to declare a mistrial, the Court of Appeals would have examined the issue. Improper evidence that Petitioner was a serial armed robber not being brought to justice was explosively prejudicial and justified a mistrial. The improper evidence invited a verdict on the impermissible ground that Petitioner may have been involved in the other armed robbery in Cameron.

There is a strong possibility that the Court would have agreed with appellate counsel's contention, reversed Petitioner's conviction and sentence, and remanded the case for a new trial.

CONCLUSION

For the grounds argued above, Petitioner Phillip Spears respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Calhoun County
Maite Murphy, Circuit Court Judge

PHILLIP SPEARS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Phillip Spears #297965, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of June, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of June, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.