

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

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JUL 06 2015

SC SUPREME COURT

Brian Sturgeon -- Petitioner,

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S.C. SUPREME COURT

-Vs-

State of South Carolina -- Respondent,

Appellate Case No.2014-001836

PETITIONER'S PRO-SE JOHNSON
PETITION FOR WRIT OF CERTIORARI

Brian Sturgeon
SCDC# 316514
PCI
430 Oaklawn Rd.
Pelzer, SC. 29669

Petitioner,

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ISSUES PRESENTED

(A)

The PCR Court erred in failing to find that trial counsel rendered ineffective assistance when counsel failed to object to the "consecutive" sentences handed down by the trial court.

(B)

The PCR Court erred in failing to find that trial counsel rendered ineffective assistance of counsel when counsel failed to properly impeach the State's key witness, William Hembree with, prior instances in which he lied to the police.

STATEMENT OF THE CASE

To save the Court's time, Petitioner adopts Counsel (Wanda H. Carter's) statement of the case at Counsel's Johnson petition p.3

ISSUE (A)

The PCR Court erred in failing to find that trial counsel rendered ineffective assistance when counsel failed to object to the "consecutive" sentences handed down by the trial court.

FACTS

Petitioner proceeded to trial by jury for one count of murder (2008-5590), one count of assault and battery with the intent to kill (ABWIK)(2008-5589) and one count of kidnaping (2009-GS-23-1673), ROA.p.8-9.

Ultimately the jury convicted Petitioner of the ABWIK, kidnaping and the lesser included offense of voluntary manslaughter, ROA.p.213-214. During sentencing the Honorable Edward W. Miller, sentenced Petitioner to 30-years for the manslaughter, 30-years for the kidnaping, concurrent, and an additional consecutive 15-years for the ABWIK, ROA.p.218, L.21-23.

Petitioner raised this ground via "ineffective assistance of counsel", Ground W., ROA.p.255. Petitioner testified during the PCR hearing that counsel was ineffective for failing to object to the trial court handing down "consecutive" sentences, at ROA.p.267, L.3-9.

During the PCR hearing trial counsel testified and the following colloquy was recorded:

Q. Okay. Do you believe it would have been proper to object to the Judge running his sentences consecutive instead of concurrent?

A. I don't know what the objection would be. In South Carolina that's a legitimate sentence. I'm going to object to what? Judge, I'm sorry, you can't do that because my client ain't that kind of bad guy. I mean I don't know what the objection would be.

ROA.p.279, L.14-21

In denying relief on this issue the PCR Court ruled: "This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the consecutive sentence in this case. This Court finds the Applicant has failed to present any cognizable basis upon which trial counsel could have made such an objection to a lawful sentence." ROA.p.293.

DISCUSSION

Petitioner would submit the PCR Court erred in failing to find counsel rendered ineffective assistance of counsel when counsel failed to object to the "consecutive" sentence handed down by the trial court. The PCR Court noted that counsel had no basis to object to a lawful sentence.

However, Petitioner would submit that pursuant to S.C. Code Ann. §17-25-50 (Code 1976), counsel could have objected and requested "concurrent" sentences based on a continuous course of conduct.

§17-25-50 states:

In determining the number of offenses for the purposes of imposition of sentence, the Court shall treat as one offense any number of offense which have been committed at times so closely connected in point of time that they may be considered one offense, notwithstanding under the law they constitute separate and distinct offenses.

As is seen in the above 17-25-50 clearly states that the sentencing court shall treat "any number of offenses" which have been committed at times so closely connected in point of time that they may be considered [one offense] for sentencing purposes. Id.

Here 17-25-50 clearly implements that "the Court shall treat any number of offenses so closely committed in time that they may be considered as [one offense] for sentencing purposes.

The word shall is considered mandatory. See e.g. South Carolina Police Officers Retirement Sys. v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990)("shall" is considered mandatory under the principles of statutory interpretation"). Also see South Carolina Dept. of Highway & Pub. Trans. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 135 ("ordinarily the use of the word shall in a statute means that the action referred to is mandatory").

The cardinal rule of statutory interpretation is to determine the intent of the legislature, Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct.App.2003).

What the legislature says in a statute [is] considered the best evidence of the legislative intent or will, Bayle v. South Carolina Dept. of Transp., 334 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).

Petitioner would submit the above clearly states that if counsel would have requested the trial court to impose "concurrent" sentences on the grounds that although the offenses are separate and distinct under law, they were committed in the "continuous course of conduct" because they were committed so closely at a connect in time that they could have been considered as one offense for sentencing purposes, Gordon v. State, 356 S.C. 143, 588 S.E.2d 105 (SC. 2003)(internal citations omitted).

Petitioner would submit that counsel rendered ineffective

assistance in this regard. Counsel testimony during the PCR hearing that "I don't know what the objection would be", ROA.p. 279, L.14-21 is not an answer of strategic decision. Petitioner would submit counsel's testimony supports the deficient performance prong that counsel's performance fell below an objective standard of reasonableness, and the prejudice incurred is easily seen as Petitioner now has to serve 45-years instead of 30-years had counsel of requested concurrent sentences be imposed. Counsel was no doubt ineffective and those actions violated Petitioner's Sixth Amendment right to received effective representation, Strickland v. Washington, 466 U.S. 668 (1984). Here had counsel of asked for concurrent sentences, rather than the consecutive sentence handed down by the Court there is a reasonable probability the results of the proceeding could have been different. A reasonable probability sufficient to undermine the outcome. Id.

ISSUE (B)

The PCR Court erred in failing to find that trial counsel rendered ineffective assistance of counsel when counsel failed to properly impeach the State's key witness, William Hembree, prior instances in which he lied to the Police.

FACTS

During trial the State presented the testimony of William Hembree. Hembree testified that he, Petitioner and the decedent were inside a parked car in front of a friend's apartment in Greenville in the morning of December 2, 2007. Hembree testified that Petitioner kept insisting that he (Petitioner) needed a car.

Hembree testified that Petitioner was sitting behind the driver's wheel and the decedent was beside him in the passenger seat. Hembree explained that at some point he [came to] and realized that he apparently had been shot and that Petitioner had a gun.

Hembree then testified that he saw Petitioner drive away in the vehicle while the decedent was still inside the vehicle, ROA. p.42, L.5-p.52, L.12; ROA.p.61, L.23-p.621. The decedent's body was later found off Blue Ridge Drive in Greenville and an autopsy later revealed the decedent dies from a gun shot wound to her head, ROA.p.124, L.4-p.125, L.13; ROA.p.80, L.21-p.81, L.20.

Petitioner testified in his own defense. Petitioner testified that he was sitting in the passenger seat and the decedent was in the back seat and it was Hembree who was driving. Petitioner testified that he and Hembree were argu[ing], Hembree tried to shoot

him. Petitioner testified that he heard a "pow" and he responded by grabbing Hembree's hand and he guessed it went to the backseat because he was not sure [how] the decedent got shot.(emphasis).

Petitioner testified that he began hitting Hembree and that's when the gun went off again, so he (petitioner) grabbed the gun and spun it around. Petitioner further testified that he did drive off without Hembree and later pulled the decedent body out of the car, ROA.p.147, L.6-p.150, L.7.

During the PCR hearing Petitioner testified that trial Counsel should have investigated and properly impeached Hembree with the fact he has lied to the Police in the past by giving false names not only to the Police but also to the Hospital as well.

The following colloquy was recorded between Petitioner and PCR Counsel:

Q. Okay. Do you believe that he failed to investigate to try to impeach Hembree about his lying to the Police about his name?

A. Yes, I do. And I have paper work on where Hembree has lied numerous times on using his name. Because right before this crime in Pickens County he had used a guy named Rick Motes' name. And I have all the paper work. And he's also talking about where he had been shot before in the past. And I also wanted Godfrey to investigate that, his prior shooting. I mean, why does this man keep saying he keeps getting shot. So there's got to be a problem. And I got the paper work from the Pickens County Hospital where he mentioned that he had a gunshot in his shoulder.

ROA.p.268, L.8-21.

During the PCR hearing Petitioner presented exhibits to support his contentions regarding Hembree's willingness to lie and fabricate the truth to his benefit, See ROA.p.24-252.

In ruling on this issue the PCR unreasonably found "The Applicant stated trial counsel should have impeached Hembree because he initially did not give his correct name to the police, ROA.p. 289. However, the PCR Court correctly found that Petitioner argued counsel was ineffective for failing to impeach Hembree about having given police a false name and having been involved in a shooting, ROA.p.291. The PCR rather alternatively found counsel impeached Hembree with the inconsistencies between his statement and trial testimony and further questioned Hembree as to why he lied to the police by calling Petitioner Brian Sorgee when Hembree in fact knew Petitioner's real name, ROA.p.291.

The PCR Court further found that trial counsel was very experienced criminal defense attorney and did a fine job of cross-examining the State's key witness, ROA.p.291-292. These findings were in error.

The failure to impeach a witness is deficient performance that prejudices a defendant, *Driscoll v. Delo*, 71 F.3d 701, 710-11 (8th Cir.1995); *Berryman v. Morton*, 100 F.3d 1089, 1097 (trial counsel failed to impeach with inconsistent identification). In *Driscoll*, defense counsel's failure to impeach an eyewitness with prior inconsistent statements was held prejudicial. Trial counsel failed to impeach a prosecution witness who claimed at trial the defendant had confessed to the murder with a prior statement omitting the alleged confession. Id at 709-712. The centrality of the witness's testimony was an important factor in the court's consideration. Id Here, Hembree was the central and only eye witness in the trial. The failure of counsel to impeach Hembree with

the fact that he (Hembree) had previously lied to police and had deliberately given false information was prejudicial. See also Pebble v. State, 958 S.W.2d 533, 536037 (Ark.1998)(holding that defendant was prejudiced by trial counsel's failure to impeach a witness with a prior denial that a crime had occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla.Ct.App.2009)(remanding case for prejudice inquiry because trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three mexicans when same officer testified at trial he was only attacked by the defendant).

The PCR Court erred in making these findings based on the PCR Court's personal finding that trial counsel was an experienced criminal attorney. Trial counsel's alleged cross-examination reveals that the PCR Court's post-hoc rationale is not accurate.

Furthermore, the importance of the impeachment would not be to show what Hembree did, but to expose the fact to the jury that he was willing to lie to the police when convenient for himself.

Hembree's testimony regarding the incident was essential to the State's case. Any attack on his credibility could have provided reasonable doubt as the entire case hinged on a swearing match between Hembree and Petitioner.

This Court should grant certiorari and reverse because of the prejudicial effect of trial counsel's ineffective assistance, See Strickladd v. Washington, 466 U.S. 668 (1984).

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner respectfully prays certiorari will be granted and full briefing be ordered in the hope of granting a new trial.

Respectfully Submitted,

/s/ Brian Sturgeon
Brian Sturgeon

Petitioner,

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appellate Case No. 2014-001836

Brian Sturgeon -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned does hereby certify he has served a true and correct copy of the enclosed on the persons whose addresses appear below,

by placing the aforesaid in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this 30 day of June, 2015.

Those Served:

Karen Ratigan
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Mr. Daniel Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330

Columbia, SC. 29211

Respectfully Submitted,

/s/ *Brian Sturgeon*

Brian Sturgeon
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430 Oaklawn Rd.
Pelzer, SC. 29669

Sworn to and Subscribed Before
Me this 30 day of June, 2015

Tamara Conwell
Notary Public

My Comm. Expires My Commission Expires
September 25, 2023

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JUN 20 2015

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