

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

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JUL 14 2015

S.C. Supreme Court

CARIUS LOMAX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000040

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel's performance was constitutionally deficient for failing to adequately prepare Petitioner's case and call a witness to support his defense where the witness's guilt as a third-party was Petitioner's only plausible defense and where counsel did not investigate or subpoena the witness but then on the day of trial asked Petitioner to find him so he could testify.

STATEMENT

On July 2, 2008, the Anderson County Grand Jury indicted Petitioner Carius Lomax for trafficking in crack more than ten grams but less than twenty-eight grams and possession of hydrocodone with intent to distribute. App. 208-211. On February 2, 2009, the case proceeded to a trial-in-absence before The Honorable J.C. Buddy Nicholson and a jury. Kurt Tavernier represented Petitioner and Rame Campbell represented the State. App. 1; App. 33, lines 10-13.

The State alleged that on April 28, 2008, a police officer pulled Petitioner over in the vehicle he was driving with a passenger. Petitioner got out of the car and attempted to walk away, and the officer drew his gun and ordered Petitioner to the ground. After speaking with Petitioner and checking his driver's license records, the officer searched his car and found small amounts of hydrocodone pills and crack cocaine. App. 39, line 4—App. 40, line 6. After the State presented its case, trial counsel did not call any witnesses. App. 85, lines 3-7. The jury found Petitioner guilty on both counts, and the trial judge entered a sealed sentence. App. 106, lines 18-25; App. 111, lines 16-17. On April 7, 2009, Petitioner appeared before the trial judge, who unsealed the sentences of twenty years' incarceration for the cocaine charge and five years concurrent for the hydrocodone charge. App. 111, line 18—App. 112, line 18.

On March 5, 2012, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 125—App. 130. The State filed a return on August 2, 2012. App. 131—App. 135. On February 27, 2013, Petitioner appeared at an evidentiary hearing before The Honorable J. Cordell Maddox. Sarah G. Drawdy represented Petitioner and John W. Whitmire represented the State. App. 136.

Petitioner testified that he discussed calling his passenger and codefendant, Bobby Geer, as a witness with counsel prior to trial. However, on the day of the trial, counsel told him that he

simply “forgot” to subpoena him. App. 143, line 21—App. 148, line 12. Petitioner told him again that Geer was necessary for his defense, and counsel responded, “Do you think you can find him?” App. 147, line 20—App. 148, line 2. Counsel testified that he was aware through an investigating officer that Geer “took responsibility for the alcohol in the vehicle, but neither party took responsibility for the drugs that were found.” App. 171, lines 10-14. He was also aware that no fingerprints were found on the drugs. App. 176, line 13.

On January 30, 2014, the PCR judge issued an order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 196—App. 207. The order stated the evidence showed counsel made a reasonable decision to elicit testimony from witnesses at trial that the absence of fingerprints in the vehicle and on the drugs precluded the State from proving Geer planted the drugs. App. 8. The order also stated counsel’s decision not to call Geer was reasonable because Geer would not likely have claimed the drugs. App. 9.

ARGUMENT

Counsel's performance was deficient due to his failure to investigate and call Geer to testify, which was without question unreasonable.

Counsel's performance was deficient due to his failure to investigate and call Geer to testify, which was without question unreasonable. "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "[W]hile 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 facts and circumstances of the case.'" *Lounds* at 460, 670 S.E.2d at 649 (quoting *Ard v. Catoe* at 331-32, 642 S.E.2d at 597); see also *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'" (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968))). Counsel must be found deficient when "the trial transcript and . . . PCR testimony inescapably point to the conclusion that [counsel] simply had not adequately prepared the defense case." *Lounds* at 462, 670 S.E.2d at 650.

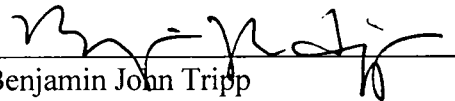
In this case, Counsel's failure to investigate and call Geer was unreasonable. The record shows Petitioner and counsel discussed Geer as a witness. Counsel specifically testified that he was aware that Geer took responsibility for the alcohol in the vehicle and that no fingerprints were found on the drugs. Counsel therefore should have understood that the evidentiary value in investigating and calling Geer was substantial. Showing the contraband in the car belonged to Geer was Petitioner's only possible defense.

In the order of dismissal, the PCR court concluded that counsel made a reasonable decision to elicit testimony from witnesses at trial that the absence of fingerprints in the vehicle and on the drugs precluded the State from proving Geer planted the drugs. The order also concluded counsel's decision not to call Geer was reasonable because Geer would not likely have claimed the drugs. These conclusions are unsupported by the record for multiple reasons. First, the record shows counsel never made an affirmative, reasoned decision not to call Geer. Trial counsel never fully considered Geer as a witness, and indeed it appeared to Petitioner that he simply forgot about him. Thus, when Petitioner mentioned Geer again on the day of trial, counsel, having not affirmatively decided whether Geer would be helpful, asked Petitioner to try and find him. Second, the PCR judge made the naked and unjustified assumption that Geer, testifying under oath and in the crucible of cross-examination, would not connect himself to the drugs. Third, even if Geer resisted claiming the drugs, counsel could have discredited him during cross-examination. The record shows counsel's avoidance of this strategy resulted from his altogether failure to investigate Geer, not from a studied decision on whether he would be helpful as a witness.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his petitioner for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2015.

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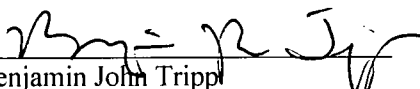
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carius Kenton Lomax 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 February 26, 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 Carius Kenton Lomax.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of July, 2015

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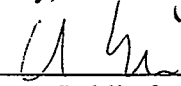
CERTIFICATE OF SERVICE

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 John Walt Whitmire, Esquire and Carius Kenton Lomax, #262660, at Perry Correctional Institution this 14th day of July, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of July, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.