STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Clifton Newman, Circuit Court Judge

RICHARD A. GREEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002622

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel rendered ineffective assistance of counsel in derogation of Petitioner's Sixth Amendment rights where counsel was admittedly unprepared and surprised when the trial court, at the State's request, submitted to the jury the lesser included offense of attempted burglary after granting a directed verdict on the indicted offense of first degree burglary since an effective attorney would have been prepared to defend against the lesser included offense?

STATEMENT

Factual Background

At around one thirty in the morning on May 4, 2010, Rita Davis was awoke in her Sumter County residence to the ringing of her front doorbell. App. 50, ll. 12-21. Davis proceeded to the front door and, looking through the peephole, observed a man walking away from the front door. App. 51, ll. 2 – p. 53, ll. 11.

Shortly after the man disappeared from view, Davis heard what she believed to be someone attempting to force open her garage door. *Id.* Watching from her dining room window, she believed she recognized him as Petitioner. *Id.* Davis and Petitioner lived in the same neighborhood. App. 46, ll. 4-24. Davis attempted to call the police, but her home telephone was not working and her cell phone was in her car parked inside the garage. *Id.*; App. 60, ll. 5-17.

Unable to call for assistance, Davis grabbed her pistol and returned to the front window. App. 55, ll. 10 – p. 59, ll. 24. The man she identified as Petitioner was unable to enter the garage and returned to the front door. *Id.* Davis would recall at trial that the man "jerked my front door trying to get it open." App. 57, ll. 22-25. Davis decided against shooting through her front door and instead stepped out of her back door and fired four gunshots into the air over her neighbor's house. App. 59, ll. 22 – p. 60, ll. 18.

The man fled at the sound of the gunshots. *Id.* Davis did not seek help until around four in the morning when she signaled her next door neighbor by flashing her outdoor lights as he left for work. App. 60, ll. 1 – p. 61, ll. 24. Escorted by her neighbor, Davis retrieved her cell phone and called the police.

An inspection of the garage door did not show any damage. The door was still locked and the only possible evidence of an attempted entry was that the garage door was hovering about two

inches off the ground. App. 63, ll. 5 – p. 22. Law enforcement did not attempt to collect fingerprints from either the front door or the garage door. App. 138, ll. 15 – p. 139, ll. 21. Law enforcement located Davis' telephone lines and concluded that they had been deliberately cut

Indictment and Trial

On September, 2 2010, the Sumter County Grand Jury indicted Petitioner Richard A. Green for first degree burglary. App. 337 – p. 338. On September 12, 2011, Appellant proceeded to trial before the Honorable Howard P. King and a jury. Calvin Hastie represented Appellant, and Assistant Solicitor John Meadows represented the State.

Directed Verdict Motion

At the close of the State's evidence, defense counsel moved for a directed verdict of acquittal arguing that the State had failed to present any direct or substantial circumstantial evidence that Petitioner actually entered Davis' dwelling. App. 148, ll. 22 – p. 149. The State conceded that there was no direct evidence of entry, but that the circumstantial evidence – Davis believed she heard someone trying to enter the garage door and the door resting two inches off the ground – was sufficient to submit the issue of entry to the jury. App. 150, ll. 15 – p. 151.

The court granted the direct verdict and acquitted Petitioner of the first degree burglary charge. App. 152, ll. 23 – p. 158, ll. 8. However, the State then posited that they had presented sufficient evidence of the lesser included charge of attempted first degree burglary. *Id.* Defense counsel vociferously objected to any deviation from the indictment arguing that the defense had no notice that Petitioner would stand trial for an attempt crime. *Id.* The trial court ruled that the lesser included charge of attempted first degree burglary should be submitted to the jury as there was sufficient evidence of an attempt to open the front door and the garage door. App. 162, ll. 1 – p. 163, ll. 23.

After two hours of deliberation, the jury was deadlocked. App. 208, ll. 6 – p. 213, ll. 15. The trial court then gave *Allen* charge. *Id.* After an additional hour of deliberation, the jury found Appellant guilty of attempted first degree burglary. App. 214, ll. 18 – p. 217, ll. 6.

At sentencing Petitioner strenuously maintained his innocence, stating that Davis' identification was in error and that he had been asleep at home when the incident occurred. App. 231, ll. 25 – p. 232, ll. 17. The trial court sentenced Appellant to twenty years imprisonment. App. 235, ll. 4-8.

Direct Appeal

Dayne Phillips and Carmen Ganjehsani represented Petitioner on appeal. App. 237 – p. 258. Assistant Deputy Attorney General David Spencer represented the State. App. 259. On appeal, Petitioner argued that:

> the trial court erred in allowing the jury to consider an act that was not alleged in the one-count indictment for first degree burglary, when the trial court granted a directed verdict on the first degree burglary charge, and at the State's request, erroneously sent the common-law offense of attempted burglary to the jury as a lesser-included offense, thereby creating a structural due process defect that deprived Appellant of a fair trial.

App. 248- p. 257. Petitioner contended the indictment specifically alleged that he entered "the dwelling of Rita Davis", not that he *attempted to enter the dwelling. Id.* Therefore the trial court erred in submitting attempted burglary to the jury as it constituted a material variance from the indictment and impermissibly enlarged the indictment. *Id.*

The Court of Appeals disagreed and affirmed Petitioner's conviction. App. 269 – p. 274; *State v. Green*, 406 S.C. 589, 753 S.E.2d 259 (Ct. App. 2014). The Court of Appeals held that the trial court was correct in submitting the lesser included charge of attempted burglary to the jury and that there was no material variance between the indictment and the crime charged. *Id.* Moreover the indictment was not impermissibly enlarged as "the same theory was used by the State under

attempted burglary and first degree burglary charge." *Id.* Therefore, Petitioner "was on notice of the charge and its lesser included offenses." *Id.*

Post-Conviction Relief Application Evidentiary Hearing

On March 3, 2014, Petitioner filed a post-conviction relief application (PCR) alleging ineffective assistance of counsel, a due process violation, and a lack of subject matter jurisdiction. App. 275 – p. 283. All allegations related to the submission of the attempted burglary charge to the jury. *Id.* On August 11, 2014, the State filed a Return. App. 285- p. 289.

An evidentiary hearing was held on October 2, 2014 before the Honorable Clifton Newman. App. 290 – p. 328. Lance Boozer represented Petitioner and Assistant Attorney General Daniel Gourley represented the State.

Petitioner testified that counsel should have objected to the charge of attempted burglary because the State had not indicted him on that charge and Petitioner "was never put on notice for a attempted burglary." App. 296, ll. 7-11. Petitioner stated that counsel never discussed the possibility of Petitioner facing the lesser included offense of attempted burglary. *Id.* Petitioner further alleged that counsel was ineffective for failing to present a "no presence defense" as Petitioner explained that he was asleep at home when the attempted burglary occurred. *Id.*

On direct examination, trial counsel stated that his trial strategy was that to show the State could not prove Petitioner entered the dwelling. App. 311, ll. 3-15. Counsel considered the trial court's acquittal of Petitioner a "success" and a vindication of his trial strategy. App. 315, ll. 13 – p. 319, ll. 16. Counsel conceded he was completely surprised by the charge on the lesser included attempted burglary stating, "I didn't think there would be a charge with attempt. That was our discussion . . . . [T]here was no discussion from the Solicitor's Office about charging him with the attempt so when they came with that, it was kind of a surprise." App. 317, ll. 15-21.

Counsel confirmed that he never discussed attempted burglary with Petitioner. *Id.* More troubling, trial counsel confessed, "there was no talk of going any further until the directed verdict was won." App. 317, ll. 13-25. With respect to a possible "no presence" defense, trial counsel agreed that the defense's theory was "not only did [Petitioner] not enter, but he wasn't there." App. 317, ll. 2-6. Interestingly, counsel admitted he presented no evidence or testimony to support the "no presence" defense when the trial proceeded on the attempt charge. App. 316, ll. 2-24.

Order of Dismissal

The PCR court made an oral ruling from the bench denying Petitioner's application finding that trial counsel preserved his objections to the attempted burglary charge. App. 322, ll. 9-23. The court also concluded that Petitioner was on notice that attempted burglary was a possible charge and that the due process allegations were not proper issues for PCR relief. App 324, ll. 2 – p. 14. The court specifically noted that trial counsel "did a great job. He did all he could do." App. 326, ll. 1-10. A written Order of Dismissal was drafted by the Attorney General's Office and signed by the PCR court on November 12, 2014. App. 329 – p. 336.

ARGUMENT

Tprial counsel rendered ineffective assistance of counsel in derogation of Petitioner's Sixth Amendment rights where counsel was admittedly unprepared and surprised when the trial court, at the State's request, submitted to the jury the lesser included offense of attempted burglary after granting a directed verdict on the indicted offense of first degree burglary since an effective attorney would have been prepared to defend against the lesser included offense.

Discussion

Counsel admitted that his trial strategy was to stress that the State could not present any evidence that Petitioner entered Davis' dwelling. Even if successful this strategy, permitted a lesser included offense to be submitted to the jury, which carried the same sentencing range as the completed offense. App. 317, ll. 2 – p. 319, ll. 16. Trial counsel conceded that he never considered the possibility of the lesser included attempted burglary charge and was totally unprepared to defend Petitioner against it. *Id.* Accordingly, counsel's trial strategy was incomplete and fatally flawed; the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 669; *See Strickland v. Washington*, 466 U.S. 668 (1984).

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. 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).

Deficient Performance

Trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. At the evidentiary hearing, counsel stated, "our position was [Petitioner] wasn't there." App. 316, ll. 7-16. However, when expounding on his trial strategy, defense counsel testified, "our strategy was with the -- of all the evidence that I saw in the record, [the State] never could prove that there was entering into this house. . ." App. 315, ll. 19-23.

In Petitioner's case, trial counsel's professed strategy was not objectively reasonable as it failed to address the lesser included offense of attempted burglary or the remaining elements of first degree burglary. App. 317, ll. 2 – p. 319, ll. 16. Counsel frankly admitted that he never even considered the possibility of a lesser included charge, never prepared to refute it at trial, and never discussed it with Petitioner. *Id.*; *see Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) ("counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness").

Given the facts of the case, trial counsel should have been aware that, even if the State presented no evidence of an entry by Petitioner, there was evidence of an attempted entry that could warrant a lesser included charge if the State was able to satisfy the other elements of burglary. App. 317, ll. 2 – p. 319, ll. 16; *see State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (attempt crimes are specific intent crimes requiring the State to prove the defendant's specific intent coupled with an overt act, beyond mere preparation and in furtherance of that intent, and the

actual or present ability to complete the crime); *see also* William Shepard McAninch, W. Gaston Fairy, and Lesley M. Coggiola, The Criminal Law of South Carolina at 45 (5th Ed. 2007).

Accordingly, the PCR court's ruling that, "[c]ounsel's actions were reasonable in the circumstances, and did not fall below professional norms," was in error and contradicts trial counsel's own credible, on-the-record admissions at the evidentiary hearing. App. 335; *see Strickland*, 466 U.S. at 687-88.

Prejudice

Petitioner was prejudiced as 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). At the PCR hearing, counsel reflected his strategy had been a "success". App. 317, ll. 2 – p. 319, ll. 16.

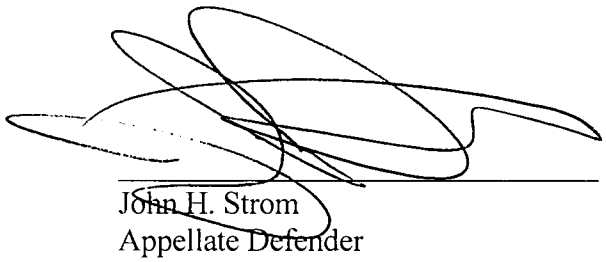
If it was a "success", it was a pyrrhic victory. The "success" of counsel's trial strategy left Petitioner, by counsel's own admission, bereft of any defenses to the attempt charge or to the remaining elements of burglary. *Id.* Trial counsel's strategy only subjected part of the prosecution's case to meaningful adversarial testing and his contemporaneous objection, no matter how vigorous, was not an adequate substitute for a objectively reasonable trial strategy. *United States v. Cronic,* 466 U.S. 648, 659 (1984); *see Nance v. Ozmint,* 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (counsel's failure to investigate, plan, and present a defense constituted a breakdown in the adversarial process.).

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." App. 336; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

CONCLUSION

Based on the foregoing reason, Petitioner Richard Green's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

RICHARD A. GREEN,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard A. Green 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 October 2, 2014. 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 Richard A. Green.

Respectfully submitted,

John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th 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 Daniel Gourley, Esquire and Richard A. Green, #291708, at Wateree River Correctional Institution this 27th day of July, 2015.7

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.