

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Daniel D. Hall, Circuit Court Judge

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S.C. Supreme Court

ANDREW DAVION BURNSIDE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000771

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in his overall representation of petitioner to the extent that he did not subject the State's case to a meaningful adversarial testing?

STATEMENT

Petitioner was convicted of trafficking in crack cocaine, third offense (25 years), possession of a weapon (5 years), possession of a controlled substance (1 year), distribution of crack cocaine, third offense (15 years), and possession of cocaine, second offense (5 years) after a jury trial held before the Honorable C. Victor Pyle, Jr. on May 15-16, 2012, in Greenville County. Scott D. Robinson, Esq. was trial counsel. Lisa Bentley, Esq. was the assistant solicitor. (App. p. 1- p. 234)

Petitioner appealed his convictions and they were affirmed by the Court of Appeals on November 6, 2013. State v. Burnside, Op. No. 2013-UP-409. (App. p. 246)

Petitioner filed an application for post-conviction relief on December 30, 2013. (App. p. 235- 244) Respondent filed a return dated May 14, 2014. (App. p. 245- p. 250) An evidentiary hearing was held on February 17, 2015, before the Honorable Daniel Hall. Petitioner was present and was represented by R. Mills Ariail, Esq. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 251- p. 284). On March 4, 2015, Judge Hall issued an order denying and dismissing the application for post-conviction relief. (App. p. 285- p. 293)

This petition follows.

ARGUMENT

Defense counsel was ineffective in his overall representation of petition to the extent that he did not subject the State's case to a meaningful adversarial testing.

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, 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).

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).

At the evidentiary hearing, petitioner was asked if he and counsel discussed the case, elements of the crime. Petitioner said counsel told him that they did not have anything on him, the only thing they had was just his presence in the trailer. Counsel did not tell him about a confidential informant. Petitioner did not find out about the confidential informant until during the trial. (App. p. 257, l. 21- p. 258, l. 7) He was never told there was an audio recording of what went on. Counsel never gave him a copy of a statement given by the confidential informant. It was his co-defendant's mother who got a copy of the statement and sent it to him. Counsel did not tell him about the statement or the audio. (App. p. 258, l. 13- p. 259, l. 7)

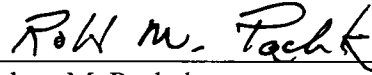
Petitioner testified that the co-defendant's attorney tried to get the statement from the confidential informant. Defense counsel never objected to the statement. (App. p. 260, l. 9- 19) If defense counsel had gotten the statement suppressed it would have proven that the informant did not buy drugs from the trailer petitioner was in but from one on the other side of the street. (App. p. 260, l. 24- p. 261, l. 9) Defense counsel never explained the difference between constructive possession and actual possession. (App. p. 264, l. 19-22)

As can be seen from petitioner's own testimony, defense counsel was ineffective in his representation of petitioner and did not subject the State's case to a meaningful adversarial testing.

CONCLUSION

Petitioner's writ should be granted and his conviction should be reversed.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
DANIEL D. HALL, CIRCUIT COURT JUDGE

ANDREW DAVION BURNSIDE,

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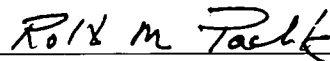
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Andrew Davion Burnside 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 17, 2015. 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 Andrew Davion Burnside.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of July, 2015

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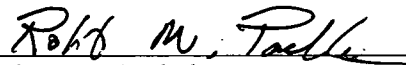
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-000771

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 Karen Ratigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Andrew Davion Burnside, #328129, at Lieber Correctional Institution this 31st day of July, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day
of July, 2015.



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