

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Orangeburg County

S.C. Supreme Court

Diane Schafer Goodstein, Circuit Court Judge

REGINALD MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001288

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find appellate counsel ineffective for not raising on direct appeal the trial judge's failure to declare a mistrial when the State violated the discovery rules by failing to notify the defense that the assistant solicitor showed a photo line-up to witness April Johnson and she identified Petitioner Montgomery?

STATEMENT

On November 8, 2006, the Orangeburg County Grand Jury indicted Montgomery for armed robbery, indictment #2006-GS-38-2052. On April 3, 2007, Montgomery proceeded to jury trial before the Honorable J.C. Nicholson. Thomas R. Sims represented Montgomery at trial. Brian Jeffries and Kelley Burbage prosecuted the case. The jury returned with a verdict of guilty and Judge Nicholson sentenced Montgomery to twenty two (22) years in prison. A timely notice of intent to appeal was filed and a direct appeal perfected pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). The issue raised on appeal was whether “[t]he trial judge erred in allowing show-up identification evidence into the case.” On March 9, 2009, the South Carolina Court of Appeals dismissed the appeal. State v. Montgomery, 2009-UP-134 (S.C.Ct.App. filed March 25, 2009).

On February 23, 2010, Montgomery filed an application for post conviction relief. The State filed a return on May 5, 2010. On December 1, 2011, an evidentiary hearing was held before the Honorable Diane S. Goodstein. Belinda Davis-Branch represented Montgomery at the PCR hearing. Mary S. Williams was present on behalf of the State. In a written order signed May 15, 2014, Judge Goodstein denied relief and dismissed the application. A timely notice of intent to appeal was served June 12, 2014. The petition for writ of certiorari was filed on December 8, 2014. The return was filed on February 23, 2015. On April 22, 2015, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

The PCR judge erred in refusing to find appellate counsel ineffective for not raising on direct appeal the trial judge's failure to declare a mistrial when the State violated the discovery rules by failing to notify the defense that the assistant solicitor showed a photo line-up to witness April Johnson and she identified Petitioner Montgomery.

In the early morning hours of September 17, 2006, two men robbed the Shell station in Bowman, South Carolina. The clerk recognized one of the men as a former schoolmate but could not remember his name. Later, when meeting with police, the clerk determined that the former schoolmate who robbed him was James Green. (App. p. 149, line 1 – p. 156, line 10). Green was also charged with armed robbery. (App. p. 116,

At trial Green testified as a State's witness. Green testified that on the night in question he, Petitioner Montgomery and Shawon Johnson were walking home from a club when the three discussed robbing a store. (App. p. 119, lines 9-15). Johnson was charged with accessory before the fact of a felony and pled guilty. (App. p. 91, lines 7-19). Johnson also testified as a State's witness at Petitioner's trial. According to Green, the three went back to Green's house where Johnson said he could not rob the store because he was on probation but he gave a gun to Petitioner. (App. p. 121, lines 5-17). According to Green, he and Petitioner left Green's house and robbed the Shell station. Green admitted he had the gun during the robbery. (App. pp. 122-124).

Shawon Johnson's sister, April Johnson, testified that in the early morning hours of September 17, 2006, James Green came to her house with another man and he asked her for a ride. (App. p. 174, line 1 – p. 177, line 4). April Johnson admitted that she did not recognize Petitioner as the man with Green until the solicitor brought one photo (photo of appellant) to her and asked if this was the man with Green on the morning in question. Only then did Johnson identify Petitioner as the other man with Green. (App. p. 179, line 1 – p. 187, line 12). Trial counsel objected to the one

man photo show-up identification because this information was not made known to him prior to trial so that he could have objected and moved to suppress the identification. (App. p. 190, line 16 – p. 199, line 25).

Counsel specifically argued:

My objection is, your Honor, that information that was used in regards to photographs was not provided to me pursuant to the rules of discovery in which I was to be given all of that information. I was given a photographic lineup of, of Cootney, James Green. And with the information on that he that had been signed. I had no knowledge that another lineup, or picture had been shown. The basis for my cross examination in regards to this was the fact that no lineup had been shown, no pictures had been shown, and then to be caught off guard that there are other pictures I have not seen, nor were given the opportunity in order to prepare for my trial of this matter.

(App. p. 191, line 21 – p. 192, lines 1-9). Trial counsel then moved for a mistrial based on the discovery violation. (App. p. 192, lines 12-13).

The assistant solicitor admitted that he showed the witness a photo of Petitioner. (App. p. 193, line 18 – p. 194, lines 1-8). The assistant solicitor seemed to indicate that showing the witness the photograph did not matter because the witness knew Petitioner. (App. p. 194, lines 4-25). Trial counsel then argued that if he had known about the identification procedure employed by the assistant solicitor, he would have moved pre-trial to suppress the identification. (App. p. 195, lines 6-17).

Following a short break, the assistant solicitor advised the trial judge that in fact it was **not** a single photograph that he showed to the witness but rather a six pack photo lineup and from that lineup the witness identified Petitioner. (App. p. 200, lines 2-15). The trial judge then denied the motion for a mistrial. (App. p. 201, lines 1-2). The judge acknowledged that the information should have been turned over pursuant to rule five but instead of granting a mistrial the judge

simply gave counsel an opportunity to talk with the witness and recall if necessary. (App. p. 201, lines 4-15). The trial judge erred in refusing to grant a mistrial based on the discovery violation.

During the PCR hearing Petitioner alleged ineffective assistance of appellate counsel. (App. pp. 391-392). Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). The issue raised on appeal was whether the trial judge erred in allowing show-up identification evidence into the case. (Supp. App. p.4, Final Anders Brief). In the order of dismissal the PCR judge discussed three separate allegations of ineffective assistance of appellate counsel: 1.) "Failure to Brief on Brady v. Maryland, as to Statements of Letangela Bellamy"; 2.) "Presence During In-Chambers Conference"; and 3.) "Identification by April Johnson." (App. pp. 405-407). The identification by April Johnson is the subject of this appeal. Appellate counsel failed to raise the trial judge's error in refusing to grant the mistrial motion based on the State's discovery violation in regard to April Johnson's identification of Petitioner. Instead, appellate counsel raised an issue in regard to a show-up identification. The case did not involve a show-up identification.

In the order of dismissal the PCR judge wrote:

Applicant has set forth this issue as one of ineffective assistance of appellate counsel in failing to brief the issue of an illegal show-up identification made by April Johnson. At trial, April identified Applicant as the person in her car with Green. On cross examination, Counsel asked about her written statement in which April stated she had never seen the other individual before. (Tr. p. 178, line 3-p.179, line 25). April insisted that she had seen the man before but had never seen him with Green and did not know his name. Counsel eventually asked whether April had been shown a photographic lineup. To his surprise, she responded that she had been [shown] a lineup by the solicitor. (Tr. p. 182, lined 2-20). Following examination of the witness, Counsel moved for a mistrial based on the prosecution's failure to disclose the lineup. (Tr. p. 191, line 21-p. 192, line 17.) Counsel argued that because the lineup had not been disclosed, he had lost the opportunity to move for suppression of the identification prior to trial. (Tr. p. 195, lines 6-17; p. 198, lines 3-10.) Counsel also stated that he had prepared for trial based on April's statement which indicated she did not know who the man with Green was. (Tr. p. 197, line 14 – p. 198, line 3.)

(App. p. 407).

The PCR judge then found in the order of dismissal, “At trial, Counsel argued that he had been unable to request a pre-trial hearing on the lineup as a basis for his mistrial motion and did not pose an objection to the lineup. Appellate Counsel did brief the issue in an Anders brief. However, even if counsel had objected to the in-court identification based on the photo lineup shown to April, Applicant has failed to show that the outcome would have been different.” Trial counsel objected to the identification and moved for a mistrial based on the fact that the State violated the discovery rules by not notifying counsel of the lineup and identification. This is not the issue raised on direct appeal in the Anders brief. Appellate counsel should have raised the failure to grant the mistrial motion on direct appeal.

Instead, appellate counsel argued that the trial judge erred in “allowing a show-up identification evidence into the case.” As stated above, the present case involved a photo lineup identification, not a show-up identification, that was not disclosed to Petitioner through discovery. The assistant solicitor showed the witness, April Johnson, a photo line-up containing six photographs, one of which was a photo of the Petitioner. The witness identified Petitioner. The State failed to disclose this information. The issue that should have been raised by appellate counsel on direct appeal was the trial judge’s refusal to grant a mistrial based on the State’s violation of the Rule 5, S.C.R.Crim.P. and the rules of discovery.

Appellate counsel did not testify at the PCR hearing. Instead, appellate counsel submitted an affidavit. (Supp. App. pp. 1-2, Affidavit of Appellate Counsel). The affidavit reads as follows:

4. Allegation: Appellate counsel failed to raise the issue of prosecutorial misconduct, judicial bias, and the denial of his (Mr. Montgomery’s) opportunity to attend critical stages of his trial.

Answer: There was no indication **from the record** that prosecutorial misconduct or judicial bias occurred at trial, and there was no indication from the record that Mr. Montgomery was not present at all stages of his trial.

(Supp. App. p. 2, Affidavit of Appellate Counsel)(emphasis in original). Contrary to appellate counsel's assertion, trial counsel's motion for a mistrial based on the State's failure to follow the discovery rules appears clearly in the record. (App. p. 191, line 21 – p. 192, lines 1-13). In the affidavit appellate counsel offered no strategic reason for failing to raise the preserved meritorious issue in regard to the judge's refusal to grant the mistrial based on the discovery violation and instead raising an issue in regard to a show-up identification that did not take place in the present in the case. There is no strategic reason for such a decision. Instead, as reflected in the affidavit, appellate counsel simply failed to recognize and raise the preserved meritorious issue in regard to the mistrial and the discovery violation.

In Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) the South Carolina Supreme Court wrote:

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

Appellate counsel was ineffective in failing to raise the meritorious claim that the judge erred in refusing to declare a mistrial based on the State's failure to disclose the fact that April

Johnson identified Petitioner from a photo line-up shown to her by the assistant solicitor. Petitioner was prejudiced by appellate counsel's deficient performance. There is a reasonable probability that if appellate counsel had raised the issue in regard to the trial judge's refusal to grant a mistrial based on the State's violation of Rule 5, Petitioner would have prevailed on direct appeal and a new trial would have been granted.

As noted by trial counsel in the mistrial motion, his trial preparation and cross examination of witness April Johnson was based on the fact that she had never identified Petitioner as the man with Green on the morning in question. Trial counsel made the mistrial motion at the close of cross examination. Trial counsel's cross examination would have been different had trial counsel been aware of the identification.

Additionally, Rule 5, S.C.R.Crim.P. provides that, "Upon request of the defendant, the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant." The identification of the Petitioner was material to the preparation of the defense and the State should have disclosed the identification pursuant to Rule 5. The trial judge noted that trial counsel made a request pursuant to Rule 5. (App. p. 201, lines 4-8). Allowing trial counsel to re-cross the witness would not have cured the prejudice to petitioner because it would have further emphasized the identification. A mistrial was warranted based on the State's violation of the rules of discovery.

The identification of Petitioner distinguishes the present case from State v. Scipio, 283 S.C. 124, 126, 322 S.E.2d 15, 17 (1984) where the South Carolina Supreme Court found the trial

judge did not abuse his discretion in failing to grant a mistrial when the State failed to disclose a composite sketch because counsel was given the opportunity to cross examine the witness in regard to the sketch. As noted, cross examination would not have cured the prejudice caused by the State's violation of the discovery rules in the present case. The Court in Scipio wrote, "Sanctions for non-compliance with Circuit Court Rule 103 are within the discretion of the trial court and will not be disturbed on appeal absent abuse or prejudice. State v. Bridges, 278 S.C. 447, 298 S.E.2d 212 (1982). This does not relieve a solicitor of the duty under his oath to fully comply with the disclosure rule. We take this opportunity to advise the solicitors to promptly comply with this rule." Id. 283 S.C. at 126, 322 S.E.2d at 17 (1984). The trial judge in the present case abused his discretion in refusing to grant the mistrial. Appellant counsel was ineffective in failing to raise the issue on direct appeal.

The fact that appellate counsel filed an Anders brief does not prevent this Court from finding ineffective assistance of appellate counsel. In footnote #6 in Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009), this Court wrote:

Appellate counsel filed an Anders brief, as opposed to a brief on the merits. Even in this context, when analyzing a claim of ineffective assistance of appellate counsel, we apply the Strickland test. See Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (finding that even where appellate counsel believes his client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under Strickland.)

The South Carolina Court of Appeals reviewing the case on direct appeal overlooked the issue in regard to the mistrial and the discovery violation just as appellate counsel overlooked the issue. Under the Strickland analysis, appellate counsel's performance was deficient and Petitioner was prejudiced by the deficient performance. The admission of the identification was not harmless. The evidence against Petitioner was not overwhelming and the main evidence came from the two

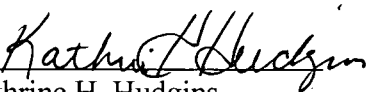
co-defendant's, Green and Johnson. The non-disclosed identification was made by April Johnson, co-defendant Johnson's sister.

Petitioner is entitled to a new trial based on ineffective assistance of appellate counsel. Appellate counsel failed to raise an issue on direct appeal that constituted reversible error. See Ezell v. State, 345 S.C. 312, 314, 548 S.E.2d 852, 853 (2001); Southerland v. State, 337 S.C. 610, 617, 524 S.E.2d 833, 836 (1999); Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of August, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

REGINALD MONTGOMERY,

PETITIONER,

V.

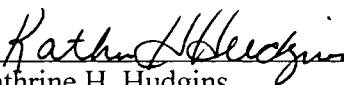
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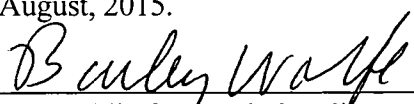
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on J. Clayton Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Reginald Montgomery #257290, at Lee Correctional Institution, this 19th day of August, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of August, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021