ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Horry County

Kristi Lea Harrington, Circuit Court Judge

KEION GRIFFIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000024

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective in failing to call four witnesses to establish that the shooter was the co-defendant, Demario Stukes, and not Petitioner?

STATEMENT

In June of 2008, the Horry County Grand Jury indicted Petitioner Griffin for murder and possession of a weapon during the commission of a violent crime, indictments #2008-GS-26-2552-2553. On November 2, 2009, Petitioner proceeded to jury trial before the Honorable Larry B. Hyman. James C. Galmore represented Petitioner at trial. Donna E. Elder prosecuted the case. The jury returned with verdicts of guilty. Judge Hyman sentenced Petitioner to life in prison for murder and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On August 15, 2011, the South Carolina Court of Appeals dismissed the appeal. State v. Griffin, Op. No. 2011-UP-387 (S.C. Ct.App. filed August 15, 2011).

On December 28, 2011, Petitioner filed an application for post conviction relief. The State filed a return on February 24, 2012. On August 26, 2014, an evidentiary hearing was held before the Honorable Kristi Lea Harrington. Daniel A. Selwa II, represented Petitioner at the PCR hearing. Joshua L. Thomas represented the State. In a written order filed November 19, 2014, Judge Harrington denied relief and dismissed the application. A timely notice of intent to appeal was served on January 5, 2015. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to call four witnesses to establish that the shooter was the co-defendant, Demario Stukes, and not Petitioner.

The jury found Petitioner guilty of shooting Corey Brooks following an altercation between the co-defendant, Demario Stukes, and Brooks' friend, Josh Hughes. The incident took place during bike week in Myrtle Beach. Hughes, Brooks, Zach Mathis, Jeffrey King, Dan Sweeney and Keith Griffin[1] were staying at Hughes' beach house on 3rd Ave. in Myrtle Beach. Asia Harris and her friends Emma Chandler and Kim Whitner came to Myrtle Beach for bike week on May 25, 2008. Harris mistook the Hughes front yard for a parking lot and parked her car. (App. p. 322, lines 4-17). Harris testified that two white guys, one of whom was highly intoxicated, told her that it would cost ten ($10.00) dollars to park. (App. p. 323, lines 18-25). Harris testified that at that point three black guys walked up and offered to pay for the girls to park. (App. p. 324, lines 7-15).

Demario Stukes was called as a witness by the State. According to Stukes, he, Petitioner and Darius Priest left the Landmark Hotel and were walking north when they saw a group of white guys telling some girls in a car that they could not park in the yard. (App. p. 189, lines 17- p. 190, lines 1-10). Stukes recognized one of the girls in the car and walked up to the passenger side window to talk with her. (App. p. 190, line 12 – p. 191, lines 1-5). Stukes testified that one of the white guys approached him as he was talking with the girl but Stukes ignored him. (App. p. 191, lines 3-13). According to Stukes, the white guy slapped him on his shoulder and a fight broke out between Stukes and the white guy. (App. p. 191, lines 14 – 25). Stukes testified that one of the other guys started to call the police but Petitioner slapped his phone out of his hand. (App. p. 192, lines 2-4). Stukes claimed that Petitioner then pulled out a gun and everybody started fighting. (App. p. 192, lines 5-8). According to Stukes, the deceased jumped on his back and Petitioner hit

the deceased with the gun, causing him to collapse on the ground. (App. p. 193, lines 9-16). Stukes claimed that he ran to the other side of the car and then heard a gunshot come from where Petitioner had been standing. (App. p. 193, lines 16-23). Stukes admitted that he was wearing a white tank top, a black, red and gray hat, black pants and black shoes the night of the shooting. (App. p. 199, lines 18-25). The hat was found at the scene and allowed police to identify Stukes as one of the individuals involved. (App. pp. 200-201).

During the PCR hearing trial counsel admitted that he did not interview Josh Hughes, Keith Griffin or Dan Sweeny, friends of the deceased and witnesses to the shooting. (App. p. 468, lines 1-9). None of these witnesses testified at trial. While counsel reviewed interviews of these witnesses provided in discovery, trial counsel testified, "After the trial, I learned that the reason why the other people did not testify is because they identified someone else as the shooter." (App. p. 469, lines 11-14). When asked about the description of the shooter, trial counsel testified:

> I don't remember each person's clothes. What I remember the issue being is that one of Mr. Griffin's codefendants I think – I don't remember which one it was, but one of his codefendants was a dark-skinned black male and the statements from the three white guys would have been that the dark-skinned person was the shooter.

(App. p. 470, lines 6-12).

During the PCR hearing trial counsel was asked about a police interview with Dan Sweeney. (App. p. 477, line 4 – p. 478, 479, lines 1-3). Trial counsel listened to a CD of the interview of Sweeney. PCR counsel asked, "Do you recall Mr. Sweeney identifying the guy stating he was described as the guy wearing the hat?" Trial counsel answered, "Yes, sir." (App. p. 478, lines 14-16). Testimony suggested that Petitioner was not wearing a hat. (App. p. 478, lines 23-25). Trial counsel admitted that Sweeney's testimony would have been helpful. (App. p. 479, lines 1-3).

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[1] There appears to be no relation to Petitioner Keion Griffin.

During the PCR hearing trial counsel was asked about a police interview with Keith Griffin. (App. p. 483, line5 – p. 484, 485, lines 1-7). Trial counsel listened to a CD of the interview of Griffin. PCR counsel asked, "Do you think Mr. Griffin's testimony, Mr. Keith Griffin's testimony, may have called into question the facts identifying Mr. Griffin as the shooter?" Trial counsel answered, "Yes, sir. He does appear to be identifying a different person." (App. p. 485, lines 3-7).

During the PCR hearing trial counsel was asked about a police interview with Emma Chandler, one of the girls in the car. (App. pp. 472-476). Chandler did not testify at trial. Trial counsel reviewed a transcript of the police interview with Chandler and testified, "Ms. Chandler indicates that the person who had the gun was the person that was trying to talk to her. That would be the one with the hat and glasses." (App. p. 473, line 25 – p. 474, lines 1-2). The transcript of the Chandler interview was admitted in evidence over the State's objection. (App. p. 482, lines 12-13; Supp. App.).

During the PCR hearing trial counsel was asked about a police interview with Michael Bennett. (App. p. 479, line 4 – p. 480, 481, lines 1-12). Bennett was a witness to the shooting. Bennett did not testify at trial. Trial counsel reviewed a transcript of the police interview with Bennett and then testified that Bennett indicated that the person with the gun was wearing a white T-shirt, black or blue jeans and a red bandana. (App. p. 480, lines 1-9). Trial counsel confirmed that Stukes was wearing pants a red hat and shades while Petitioner was wearing shorts. (App. p. 480, lines 17-25). The transcript of the Bennett interview was admitted in evidence over the State's objection. (App. p. 482, lines 20-21; Supp. App.).

In the order of dismissal the PCR judge found that Petitioner did not meet his burden of proving trial counsel ineffective for failing to call witnesses. In the order the PCR judge wrote:

> Regarding Sweeny and Griffin, trial counsel articulated he did not want to call any members of the victim's party for two reasons. First, those witnesses did not have a clear recollection of the events of the night of the murder. Second, trial counsel feared those witnesses would harm Applicant's case by testifying in the State's favor. Regarding Chandler, trial counsel articulated he attempted to subpoena her, but was unsuccessful.

(App. p. 508). Later in the order of dismissal the PCR judge wrote, "Likewise, Bennett's statement did not positively identify Stukes as the shooter. Chandler's statement indicates she did not actually see the gun or the shooting. Accordingly, the court agrees with trial counsel's assessment that testimony from these witnesses may not have affected the out come of Applicant's trial." The PCR judge erred.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

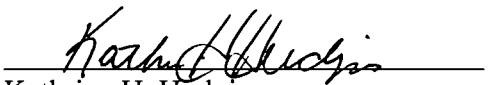
Trial counsel was ineffective in failing to call Keith Griffin, Dan Sweeney, Emma Chandler and Michael Bennett as witnesses to establish that the shooter was Demario Stukes and not the Petitioner. Petitioner was prejudiced by the deficient performance. The record does not support the PCR judge's finding that trial counsel articulated a valid strategic reason for not calling the witnesses. When asked why he failed to call the witnesses, trial counsel testified, "Well, I was not sure if they were going to be helpful or hurtful to Mr. Griffin. Two of the witnesses were in Mr. Brooks' party. This fellow Mr. Bennett, he had some North Carolina address and I didn't think we would be able to pursue him. And we were able to get – we couldn't get Ms. Chandler, but we were able to get one of the other young ladies in the car with Ms. Chandler."

Trial counsel admitted that he failed to interview Griffin and Sweeney. (App. p. 468, lines 1-9). If their testimony changed at trial, counsel could have used the police interviews to impeach their testimony. Trial counsel's purported strategic reason for not calling these two witnesses is simply not supported by the record. In regard to Bennett, the fact that he had a North Carolina address did not preclude trial counsel from attempting to subpoena Bennett to trial. It does not appear in the record that trial counsel attempted to initiate the out of state subpoena process. In regard to Chandler, the record does not reflect what efforts trial counsel used to attempt to locate this witness. The failure to call these four witnesses was not a part of a valid trial strategy. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984).

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
KRISTI LEA HARRINGTON, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keion Griffin states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 26, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for Keion Griffin.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of August, 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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Keion Griffin, #337833, at Lee Correctional Institution this 26th day of August, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of August, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.