

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Richland County

SEP - 8 2015

Robert E. Hood, Circuit Court Judge

S.C. Supreme Court

DARRELL WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000071

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in holding Petitioner could not prove prejudice from appellate counsel's deficiency merely because the Court of Appeals dismissed his appeal pursuant to *Anders v. California*?

STATEMENT

On September 19, 2008, the Richland County Grand Jury indicted Petitioner Darrell Williams for first-degree burglary and petit larceny. App. 627-630. On September 23, 2008, Petitioner proceeded to trial before The Honorable J. Michelle Childs and a jury. Petitioner represented himself with Hans Pauling as standby counsel. Heather Weiss and Dolly J. Garfield represented the State. App. 67.

The State alleged that on July 12, 2007, Petitioner entered a couple's home and took valuables while they were out to see a movie. App. 174, line 15—App. 175, line 11. The State called one of the homeowners to testify that they left the house during daylight hours around 8:30 p.m. App. 192, lines 2-10. They returned around 11:30 p.m. and saw signs that someone had entered the house and searched through their belongings. App. 194, line 6—App. 195, line 19. The State later called a police officer who testified that the sunset time for the date was 8:37 p.m. App. 297, lines 10-12.

After the close of the State's case, Petitioner moved for a directed verdict arguing the State did not adduce sufficient evidence to prove beyond a reasonable doubt that he entered the house during the nighttime as required for first-degree burglary. Ap. 350, line 14—App. 351, line 16. The trial judge denied the motion on grounds that absent an indication that the crime took place between 8:30 p.m. and 8:37 p.m., the evidence supported an inference that it occurred during the nighttime. App. 363, line 9—App. 364, line 9; App. 365, line 25—App. 366, line 9.

At the close of trial the jury found Petitioner guilty as charged. App. 488, line 20—App. 489, line 4. Judge Childs sentenced Petitioner to life without parole for the burglary charge¹ and time served for the larceny charge. App. 499, lines 17-35.

Petitioner filed a motion for a new trial, and on May 19, 2009, Petitioner again appeared before Judge Childs to be heard. App. 67; App. 69, lines 13-19. On March 26, 2010, Judge Childs issued an order denying the motion. App. 533-App. 551. In the order, she ruled against, inter alia, Petitioner's argument that the State did not adduce sufficient evidence to prove beyond a reasonable doubt that he entered the home during the nighttime. App. 540-541.

Petitioner appealed his conviction, and on October 24, 2012, his appellate counsel, Dayne Phillips, filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing an issue from trial unrelated to the directed verdict motion and seeking to be relieved as counsel. App. 552—App. 565. Petitioner filed a pro se brief dated November 27, 2012. App. 566—App. 579. On November 13, 2013, the South Carolina Court of Appeals issued an unpublished opinion dismissing Petitioner's appeal and relieving appellate counsel. App. 580—App. 581; 2013-UP-416 (S.C. Ct. App. Nov. 13, 2013).

On November 22, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of appellate counsel. App. 582—App. 589. The State filed a return on February 25, 2014. App. 590—App. 595. On September 2, 2014, Petitioner appeared at an evidentiary hearing before The Honorable Robert E. Hood. Anna Good represented Petitioner and Suzanne White represented the State. App. 596.

Petitioner testified that he spoke with appellate counsel multiple times to discuss the appealable issues from his trial, including the denial of the directed verdict motion. App. 599, line

¹ The State asked the court to sentence Petitioner to life without parole under S.C. Code Ann. §

19—App. 600, line 7. He testified that appellate counsel explained to him that the filing of an *Anders* brief meant that the Court of Appeals would review the entire record to look for appealable issues. App. 610, lines 9-13. Appellate counsel then testified that he believed the trial judge’s denial of the directed verdict motion was correct because substantial circumstantial evidence supported a finding that the entry to the home occurred during nighttime. App. 616, lines 1-19.

On December 1, 2014, the PCR judge filed an order dismissing Petitioner’s application. App. 620—App. 626. Specifically, the order stated Petitioner failed to prove prejudice resulting from any defect in appellate counsel’s representation because the Court of Appeals dismissed his appeal after appellate counsel filed an *Anders* brief and Petitioner filed a pro se brief. App. 624.

ARGUMENT

The PCR court erred in holding Petitioner could not prove prejudice from appellate counsel's deficiency merely because the Court of Appeals dismissed his appeal pursuant to *Anders v. California*.

The PCR court erred in holding Petitioner could not prove prejudice from appellate counsel's deficiency merely because the Court of Appeals dismissed his appeal pursuant to *Anders v. California*. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

In determining whether a criminal defense counsel adequately argued an issue to the jury or trial judge, a court must identify an affirmative decision by counsel concerning what points to argue and assess the reasonableness of the decision under the facts and circumstances within counsel's knowledge: "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)). *Cf. Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984))).

An accused is entitled to a directed verdict when the State fails to present evidence to

support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *In re Jeremiah W.*, 353 S.C. 90, 93-94, 576 S.E.2d 185, 187 (Ct. App. 2003) (*rev'd on other grounds*, 361 S.C. 620, 606 S.E.2d 766 (2004)); *see also In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). Where an element must be proven by circumstantial evidence, to justify denial of a directed verdict the circumstantial evidence must be substantial; in other words, the evidence must do more than “merely raise a suspicion that the accused is guilty.” *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). “Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001)).

In this case, Petitioner adduced proof that appellate counsel was deficient in failing to argue that the trial court’s denial of his directed verdict motion was in error. The trial judge denied the motion on grounds that absent an indication that the crime took place between 8:30 p.m. and 8:37 p.m., the evidence supported an inference that it occurred during the nighttime. This ruling was erroneous for two reasons. First, it placed the burden on Petitioner to prove his innocence rather than on the State to prove guilt of all of the elements of the charge beyond a reasonable doubt. Second, the ruling was based on a factual misapprehension insofar as civil twilight extends to thirty minutes past sunset. Thus, the State was required to prove beyond a reasonable doubt that Petitioner entered the house after 9:07 p.m., nearly forty minutes after the homeowners left. The record gives no indication that appellate counsel took these matters into consideration or was even

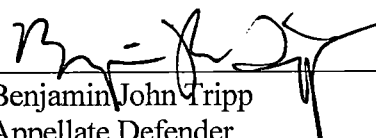
aware of them. Accordingly, the record does not support a reasonable, professional decision on his part not to argue the issue on appeal.

In order to show prejudice from appellate counsel's performance when an *Anders* brief is filed, the test enunciated in *Strickland* should be applied. *Smith v. Robbins*, 528 U.S. 259 (2000) (even if appellate counsel believes an appeal is without merit and files an *Anders* brief, the appellant may have been entitled to a merits brief, and the challenge to appellate counsel's performance should be reviewed under *Strickland*); *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 273 (2009) (even where an *Anders* brief is filed, when analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test). Thus, to prove appellate counsel was ineffective, Petitioner was required to show that but for appellate counsel's errors, the result of the appeal would have been different. *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001). Put differently, no presumption existed that the Court of Appeals reviewed every potential appellate issue and correctly determined each to be without merit. However, the PCR court ruled that Petitioner could not prove prejudice because the Court of Appeals dismissed his appeal pursuant to *Anders v. California*. This ruling constituted plain legal error, and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Darrel Williams's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
ROBERT E. HOOD, CIRCUIT COURT JUDGE

DARRELL WILLIAMS,

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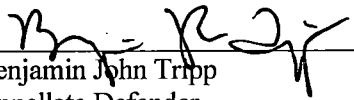
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Darrell Williams 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 September 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 Darrell Williams.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of September, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

DARRELL WILLIAMS,

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CERTIFICATE OF SERVICE

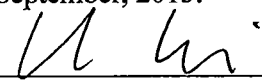
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire and Darrell Williams, #219730, at Lee Correctional Institution this 8th day of September, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of September, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.