

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-23-2903

RECEIVED

OCT 26 2015

S.C. Supreme Court

Marques Antonio Hudson,
#324517

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

2015-000095

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QUESTIONS PRESENTED

1. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to make a contemporaneous objection to the trial court's procedure in a Baston challenge?
2. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to move to strike the pediatric ophthalmologists hearsay testimony?
3. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to call certain witness and did the circuit court err in failing to consider the witness statements at the PCR Hearing?

STATEMENT OF THE CASE

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2004 term of the Greenville County Grand Jury for child abuse with great bodily injury (2004-GS-23-8143). He was represented by Richard H. Warder, Esquire.

After the State called the case to trial, the Applicant was found guilty of the charges as indicted. On October 10, 2007, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to fifteen years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of appeals affirmed Applicant's conviction and sentence. State v. Hudson, Op. No. 2010-UP-141 (S.C. Ct. App. Filed Feb 22, 2010). The Applicant filed a petition for writ of certiorari at the South Carolina Supreme Court, the petition was granted, and the parties submitted briefs. The Supreme Court dismissed the petition as improvidently grant. State v. Hudson, Op. No. 2012-MO-053 (S.C. Sup. Ct. filed Dec 12, 2012). The remittitur was sent December 28, 2012.

An application for post-conviction relief (PCR) was filed May 22, 2013. The Respondent

made its return on November 22, 2013. An evidentiary hearing was held on August 27, 2014 at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Carrie Woodruff and the Applicant's trial counsel, Richard H. Warder, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, Applicant's Exhibits 1-3, and Respondent's Exhibit 1. In an order filed October 21, 2015, the Court denied the Petitioner's application for post conviction relief.

The Petitioner filed a motion to alter or amend, pursuant to Rule 59(e), SCRPC, on November 3, 2014. The Court denied the Petitioner's motion in an order filed December 22, 2014. Petitioner appeals.

STANDARD OF REVIEW

In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986). As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, supra. (quoting, Pauling v. State, 503 S.E.2d 468, 331 S.C. 606 (S.C., 1998)).

ARGUMENT

1. COUNSEL INEFFECTIVE IN FAILING TO MAKE A CONTEMPORANEOUS OBJECTION TO THE TRIAL COURT'S PROCEDURE IN HIS BATSON CHALLENGE.

The PCR Judge erred in failing to find counsel ineffective for failing to make a contemporaneous objection to the trial court's procedure in a Batson challenge. The Petitioner proved deficient performance and prejudice from counsel's deficient performance.

At trial, Counsel objected to the selection of the jury because the only black lawyer called was struck from the jury panel, while two other white lawyers were seated. (App.p. 22) However, the Court noted that the jury had been sworn and that his motion was too late. (App.p. 22)

On appeal, the Court of Appeals noted that the Batson challenge was not preserved for review because Counsel "did not make a contemporaneous challenge objection to the trial court's procedure once the Court inquired into the state's reason for striking the African American lawyer." State v. Hudson, Op. No. 10-UP-141 (S.C. Ct. App. filed February 22, 2010). The Court of Appeals went on to say, "it is clear from the record that Hudson's counsel objected to the selection of the jury after the jury was sworn. As a result, Hudson's failure to state a timely objection bars appellate review." State v. Hudson, supra.

At the PCR Hearing, the Petitioner testified that James Carpenter was another lawyer seated on the jury and that he had a background working at the district attorney's office associated with the prosecution of criminal defendants. (App. p. 391-392) counsel essentially stated that he did not remember the details of his Batson objection. (App.p. 447). However, Counsel was aware of the procedure required to make a Batson objection, knew that the particular Judge moved quickly, and knew that he had to make a Batson objection before the jury is sworn. (App.p. 446). Counsel also believed that you only have to make an objection once to preserve the record for appeal. (App.p. 451). Finally, Counsel testified that he would have had the detailed juror list that lists the occupation of the jurors. (App.p. 449).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

The PCR Court erred in finding that Counsel was not deficient. Counsel admitted that he knew the procedure to make a Batson challenge. Counsel was also aware of the particular tendencies of the Trial Judge. However, Counsel still failed to act consistent with the knowledge of the rules regarding Batson challenges and did not make an objection before the jury was sworn.

Based on the Petitioner's testimony, it also appears that there was at least one (1) other attorney who had a background in criminal work and that Counsel believed that there were two (2) other non African American lawyers struck from the jury at the time of the trial. (App.p. 22). Therefore, the challenge was legitimate despite counsel's lack of recollection of his actions at trial.

The Petitioner was prejudiced due to Counsel's failure to properly make a Batson challenge. The Court of Appeals ruled that the Batson challenge was not preserved for review. This prevented the Court of Appeals of hearing the Petitioner's complaint for a violation of his rights under the Equal Protection Clause of the United States Constitution that prohibits a prosecutor from challenging potential jurors solely on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986).

2. COUNSEL WAS INEFFECTIVE TO MOVE TO STRIKE THE PEDIATRIC OPHTHALMOLOGISTS'S HEARSAY TESTIMONY.

At trial, Dr. Anthony Johnson, a Pediatric Ophthalmologist testified that the retinal hemorrhages found on the victim required a great deal of force and that it was non-accidental. However, he also testified that "every time a head injury patient is evaluated and cared for the team would like nothing more than to find some other explanation other than a non-accidental injury." (App.p. 1180-181). Counsel objected to the testimony and the objection was sustained. (App.p. 181) Counsel did not move to strike the evidence.

Before the objection, Dr. Johnson was allowed to go into detail about the "team" of doctors in the emergency room. (App.p. 180-181)

On appeal, the Court of Appeals noted that Counsel's hearsay objection to doctor speaking on behalf of the medical was not preserved for review. State v. Hudson, Op. No. 10-UP-141 (S.C. Ct. App. filed February 22, 2010). They further stated that "where an objection is

sustained but objecting counsel does not request a curative instruction or mistrial after an objection has been sustained, counsel received what he asked for and cannot be heard to complain on appeal. State v. Hudson, Op. No. 10-UP-141 (S.C. Ct. App. filed February 22, 2010), citing (McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 350, 479 S.E.2d 67, 79 (Ct. App. 1996)).

At the PCR Hearing, the Petitioner testified that he was aware of the Court of Appeals decision. (App.p. 395). Counsel stated that the defense at trial level was “accident.” (App.p. 442).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

The PCR Court erred in finding that the Petitioner failed to provide a cognizable basis upon which counsel could have successfully moved for a curative instruction or mistrial. First, Counsel’s objection to the hearsay evidence was sustained. Therefore, the Trial Court recognized Counsel’s basis for objection. As such, counsel should have moved to strike the objectionable testimony from the Court’s record and out of the consideration of the jury. Or, in the alternative, Counsel should have moved for a mistrial to avoid prejudice due to the objectionable testimony.

As such, the Petitioner was prejudiced by Counsel’s deficient performance by not only allowing the testimony to remain in the Court’s record, but also failing to preserve the objection on appeal.

3. COUNSEL WAS INEFFECTIVE TO IN FAILING TO CALL CERTAIN WITNESSES AND THE TRIAL COURT ERRED BY FAILING TO CONSIDER POTENTIAL WITNESS TESTIMONY SHOWN THROUGH ADMISSIBLE STATEMENTS PREPARED BY THE WITNESSES.

The PCR Court erred in holding that petitioner's trial counsel was not ineffective in failing to call certain witness and the PCR Court erred in failing to consider the witness statements at the PCR Hearing.

At trial, the Petitioner testified on his own behalf and provided his own version of events that led to the victim's injuries. Only one other witness testified on his behalf.

At the PCR Hearing, he summed up his defense by stating that the victim fell on her "face in the tub" while giving her a bath, became "limp and not responding," and that they "fell down the stairs on the way to call 9-1-1." (App.p. 396-397). The Petitioner entered Applicant's Exhibits 2 and 3, which were the respective statements of Felicia Almodovar and Lisa Rayle. (App.p. 399). The statement of Carrie Smith was previously entered into evidence as Applicant's Exhibit 1. (App.p. 385).

At the PCR Hearing, Carrie Smith testified that Applicant's Exhibit 1 was her statement and recalled giving the statement to police. (App.p. 385). Felicia Almodovar and Lisa Rayle did not testify at the PCR Hearing but they were subpoenaed to appear at the Hearing. (App.p. 353 and 355).

Carrie Smith's statement stated that the victim was "somewhat scared" of water and has to be "encouraged" to sit down. (App.p. 469). Carrie Smith testified at trial, Counsel did not cross examine Ms. Smith on her statement or otherwise enter her statement into evidence.

The Petitioner was questioned as to Felicia Almodovar's statement. Ms. Almodavar stated that the Petitioner told her that "the little girl awoke, panicked, and hit her head on the tub" and that she heard a "loud commotion" that "sounded like somebody going down the stairs hard." (App.p. 401-401 and 358). Ms. Almodovar's address was listed on the statement.

The Petitioner was also questioned as to Lisa Rayle's statement. Ms. Rayle stated that she saw the Petitioner screaming "come on baby, come on baby breath. Breath baby." (App.p. 406-407 and 357). She also stated that he told her "that the baby woke up while he was giving her a bath and she freaked out when she found out she was in the bath tub," "that the baby fell and bumped her head and swallowed some water in the bathtub," and "that he and the baby fell down the stairs." (App. p. 357).

It was established that Counsel was in possession of all of these statements in 2003 and that he did not interview the witnesses. (App.p. 459). Counsel knew that these were the only witnesses as to what happened when he was trying to dial 9-1-1(App.p. 458). The witnesses' addresses were on their respective statements. (App.p. 406 and 409). Counsel state that he

would've tried to contact the witnesses but don't get witnesses until he gets a feeling its coming to trial. (App.p. 461).

The PCR Court erred by failing to consider Felicia Almodovar and Lisa Rayle's statements. The content of their statements were admitted in to Court without objection from the Respondent and should have been considered by the Court.

I believe that Order of Dismissal of the Petitioner's Application for Post Conviction Relief concedes deficiency but states that statements cannot be considered because the witnesses did not testify. However, the nature of their testimony was shown through their statements admitted at the PCR Hearing and should have been considered by the PCR Court. Pauling v. State, 331 S.C. 606, 503 S.E.2d 486 (1998).

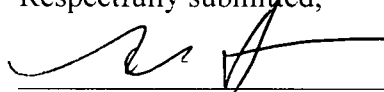
The Petitioner was prejudiced by the failure of counsel to contact these witnesses in a timely manner considering their statements tend to support the Petitioner's version of events. If Counsel had done so, he could have maintained current contact information to secure their presence at trial.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

October 21, 2015

Respectfully submitted,



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Attorney for Petitioner

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM GREENVILLE COUNTY
COURT of COMMON PLEAS
THE HONORABLE JAMES R. BARBER, III
CIRCUIT COURT JUDGE**

Case No.: 2013-DR-23-2903

Marques Antonio Hudson,
#324517

Petitioner,

v.

State of South Carolina,

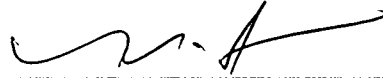
Respondent.

PROOF OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari, Appendix, and supporting documents in the above-captioned matter on the following by depositing same in the United States Postal Service first class mail, postage prepaid, on October 23, 2015 to the addresses as follows:

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October 23, 2015

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October 23, 2015

VIA U.S. POSTAL

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OCT 26 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Marques Antonio Hudson vs. State of South Carolina
Appellate Case No.: 2015-000095

Dear Mr. Shearouse:

I am writing regarding the above referenced case. The Petition for Writ of Certiorari, Appendix, and supporting documents are enclosed.

If you wish to discuss the foregoing or need additional information please contact me at 864-331-1630.

Thank you.

Sincerely,



Brian P. Johnson, Esquire

BPJ/lf
cc: Karen Ratigan