

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

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DEC 11 2015

S.C. Supreme Court

SUPREME RAHAAM ACKBAR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001052

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in ruling that trial counsel was not ineffective in failing to move to suppress the fruits of a search of a truck which belonged to petitioner's wife because petitioner had no standing to object to the search?

STATEMENT

On November 30, 2009, a Spartanburg County grand jury indicted petitioner for murder. App. 525-26. On February 7, 2011, petitioner was tried before the Honorable J. Derham Cole and a jury. App. 1. Derrick B. Balsa represented the State. App. 1. Roger Poole represented petitioner. App. 1. The jury convicted petitioner. App. 289, ll. 1 – 5. Judge Cole sentenced petitioner to life imprisonment. App. 292, l. 23 – 293, l. 3. On September 12, 2012, the Court of Appeals dismissed petitioner's appeal. App. 514. State v. Ackbar, Op. No. 2012-UP-521 (S.C. Ct. App. Sept. 12, 2012).

On December 4, 2012, petitioner filed a PCR application. App. 295. On September 15, 2014, a hearing was held before the Honorable Roger L. Couch. App. 457. J. Brandt Rucker represented petitioner. App. 457. Suzanne White represented the State. App. 457. On March 27, 2015, Judge Couch denied petitioner's application. App. 513. This petition follows.

ARGUMENT

The PCR court erred in ruling that trial counsel was not ineffective in failing to move to suppress the fruits of a search of a truck which belonged to petitioner's wife because petitioner had no standing to object to the search.

Factual Background

On the afternoon of September 20, 2009, Ricky Kelly ("Kelly") died from stab wounds to his chest, head, and neck. App. 224, ll. 19 – 23. App. 66, l. 19 – 67, l. 7. Two witnesses at trial, both of whom suffered from impaired credibility, testified that petitioner killed Kelly. The first witness was a minor, SK. Kelly was SK's "very close friend." App. 77, ll. 16 – 18. SK was also a friend of Marcus Wright ("Wright"). App. 83, ll. 9 – 12. SK and Wright "hung out a lot." App. 83, ll. 13 – 16. SK, Wright, and several other men who were present at the stabbing "used to chill a lot." App. 83, ll. 13 – 16. In contrast, SK had only seen petitioner "a couple of times" and did not really know him. App. 91, ll. 21 – 24.

SK claimed he was in a truck smoking with petitioner when Kelly arrived. App. 81, l. 1 – 82, l. 6. The truck belonged to Octavius Burnside ("Octavius"). App. 182, ll. 8 – 13. Octavius had recently married petitioner. App. 178, l. 21 – 179, l. 1. Petitioner supposedly told SK to wait and not get out of the car to talk to Kelly. App. 82, ll. 2 – 22. A "minute and a half later" Wright arrived in another car. App. 83, ll. 4 – 8. Wright and Kelly were talking at Kelly's car. App. 84, ll. 1 – 14.

SK testified that petitioner reached in a bag, pulled on latex gloves, and then pulled out a knife. App. 85, ll. 1 – 25. Petitioner supposedly told SK that he was going to kill Kelly and asked SK to help. App. 86, l. 14 – 87, l. 19. SK, who stayed behind, did not see petitioner stab Kelly, but heard Kelly yelling. App. 87, ll. 16 – 19. SK ran home and did not tell the police

anything until after petitioner was arrested. App. 88, ll. 3 – 12. SK admitted on cross-examination that he saw Wright fleeing the scene in his car and did not see anybody in the passenger side. App. 91, ll. 11 – 13.

Wright described himself as an “occasional” friend of petitioner. App. 225, l. 23 – 226, l. 1. He grew up with the Burnside family. App. 226, ll. 2 – 9. Wright claimed he was in the yard talking to Kelly. App. 227, l. 8 – 228, l. 17. Wright began walking toward the house when he heard Kelly yell. App. 228, ll. 18 – 24. He saw petitioner “punching” Kelly and then saw blood. App. 228, ll. 18 – 24. Wright ran to his car to flee. App. 228, l. 18 – 229, l. 14. Wright claimed petitioner then jumped in the passenger seat of his car, still wearing gloves and holding a knife, and told him to drop him off at Dollar General. App. 230, l. 19 – 231, l. 10.

Wright was originally charged with Kelly’s murder. App. 244, ll. 17 – 18. His murder charge was still pending when he testified. App. 244, l. 17 – 245, l. 12. He admitted on cross-examination that the State offered him a plea to accessory after the fact which would make a “sizeable difference” in the amount of prison time he would serve. App. 244, l. 17 – 245, l. 12. Wright originally told the police he did not know anything about Kelly’s death. App. 233, ll. 9 – 16. Wright explained why he turned himself in and changed his story:

Because they put me as, labeled me as, a murderer. And my family talked to me like I need to turn myself in. I was already out on probation, I mean, on my bond for armed robbery, So, you know what I’m saying, they like if you don’t turn yourself in, the house going to get took and all of this.

App. 234, ll. 5 – 11.

The PCR Court’s Ruling

Pursuant to a warrant, Officer David Hogsed conducted a search of Octavius’s truck that was at the scene of the incident. App. 160, ll. 9 – 20. Inside the truck, the police found a

camouflage bag that contained a pistol. App. 165, ll. 9 – 17. The police also found latex gloves and a knife sheath. App. 163, l. 20 – 167, l. 15. While the knife was never found, the pathologist testified that the sheath would be consistent with the kind of knife that inflicted Kelly’s wounds. App. 224, ll. 2 – 5.

Trial counsel did not move to suppress the search of the truck under the Fourth Amendment. App. 473, ll. 10 – 21. Petitioner contended at the PCR hearing that the police did not have probable cause to search the truck. App. 473, ll. 22 – 23. Trial counsel testified that he did not move to suppress the search because he “was under the impression [petitioner] didn’t have any proprietary or ownership interest in any of those items.” App. 496, l. 20 497, l. 1. The PCR court agreed with trial counsel and ruled that petitioner failed to meet his burden of proof on this claim. App. 521.

Discussion

The PCR court erred in holding trial counsel had no basis to object to the search of the truck. First, the truck belonged to petitioner’s wife, therefore he had a reasonable expectation of privacy in the truck. Katz v. United States, 389 U.S. 347 (1967). He arrived at the scene in his wife’s truck and was in the truck with her permission. App. 182, l. 6 – 183, l. 18. Simply because the truck was registered to his wife did not mean that petitioner could not assert any Fourth Amendment rights. United States v. Jones, ___ U.S. ___, 132 S.Ct. 945, 949 (2012).

Jones concerned the government’s warrantless placement of a GPS tracking device on the undercarriage of Jones’ car. Id. at 948 and n.1. The car in Jones was registered to the driver’s wife. Jones at 949 n.2. The government conceded this had no effect on “his ability to make a Fourth Amendment objection.” Id.

An Illinois case also emphasized that even a person who borrows a car can assert Fourth Amendment rights. People v. LeFlore, 996 N.E.2d 678, 686-87 (Ill. Ct. App. 2013). In LeFlore, a warrantless GPS case, the court addressed whether “a person who borrows a vehicle with the owner’s consent comes into lawful possession of that vehicle and has standing to challenge a search under the fourth amendment.” LeFlore at 686. The court held that “the State’s trespass on [the owner’s] vehicle would not have ended when the defendant came into lawful possession by borrowing the vehicle with consent.” Id. at 687. The court concluded that, “if defendant came into lawful possession of the vehicle by borrowing it with [the owner’s] consent, and while the State’s trespass remained ongoing, his standing to challenge the use of the GPS device would come within the ambit of Jones.” Id. It is clear from Jones and LeFlore that the PCR court compounded trial counsel’s failure to understand the law relating to Fourth Amendment standing.

“The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures.” State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). The police did not have probable cause to search the truck. SK did not give a statement until after petitioner was arrested, so the police had no way to link the truck to the crime. Therefore, trial counsel performed deficiently in failing to ask that the search of the truck be suppressed. Strickland v. Washington, 466 U.S. 668 (1984).

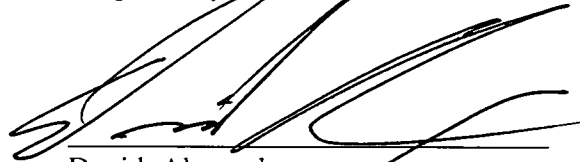
Trial counsel’s deficient performance severely prejudiced petitioner. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson

v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). Both SK and Wright's credibility was extremely suspect. SK was close friends with Kelly and Wright. Wright was charged with murder and had great incentive to shift the blame from petitioner to himself. The discovery of the knife sheath, which the pathologist said was consistent with the crime, was the key piece of evidence against petitioner. Had this evidence been suppressed, the outcome of petitioner's trial would have been different.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's conviction and granting him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROGER L. COUCH, CIRCUIT COURT JUDGE

SUPREME RAHAAM ACKBAR, PETITIONER,

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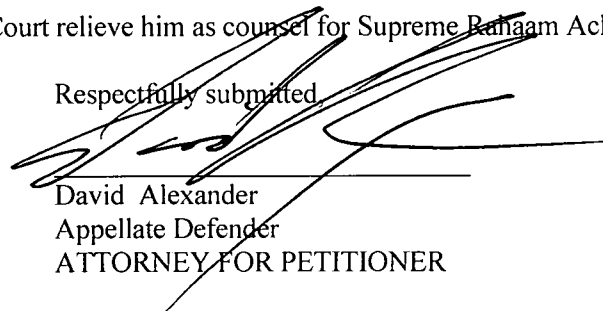
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Supreme Rahaam Ackbar 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 15, 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 Supreme Rahaam Ackbar.

Respectfully submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of December, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
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SUPREME RAHAAM ACKBAR, PETITIONER,

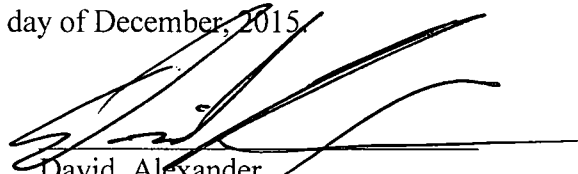
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APPELLATE CASE NO. 2015-001052

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 Alicia Olive, Esquire and Supreme Rahaam Ackbar, # 275886, at Lieber Correctional Institution this 11th day of December, 2015.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of December, 2015.

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