

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED
DEC 21 2015
S.C. Supreme Court

MILCIADES ALACANTARA

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2015-001317

PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT OF FACTS 3

ARGUMENT 7

CONCLUSION 10

ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to move for a severance of the two separate alleged offenses, armed robbery and kidnapping, against Petitioner where the offenses were charged in separate indictments, did not arise out of a single chain of circumstances, and were not provable by the same evidence?

STATEMENT OF FACTS

On August 20, 2009, Petitioner was indicted for armed robbery, kidnapping, first-degree criminal sexual conduct, and possession of a weapon during commission of a violent crime for an alleged incident which occurred at the Ultra Tan in Duncan, South Carolina on December 30, 2008. App. 369 – 374. Petitioner was also indicted for armed robbery, kidnapping, and possession of a weapon during commission of a violent crime for a separate incident which allegedly occurred on December 30, 2008, at the Subway in Greer, South Carolina. App. 375 – 377.

On February 8, 2010, Petitioner's case proceeded to a jury trial before the Honorable J. Derham Cole. Richard H. Whelchel and Tanya Jones represented Petitioner. App. 1. Howard W. "Trey" Gowdy, III, and Cindy Crick represented the State. App. 1.

According to Katherine Rumley, she was the only employee working at the Ultra Tan in Duncan, South Carolina, on December 30, 2008. App. 92. At around 7:00 pm, Rumley was inside the store working when she heard the "dingdong noise" from the backdoor. App. 93, ll. 1 – 14. Rumley walked down the hallway towards the backdoor and observed that the door was opened. As she proceeded to close the backdoor, she claimed to see "a man with a red hooded sweatshirt, jeans, and a blue ski mask" walk out of one of the tanning rooms into the hall way. App. 93, ll. 15 – 25.

Rumley claimed the robber had a black backpack in one hand and "a very large knife" in the other hand. App. 94, ll. 13 – 14. She asked the robber if he wanted money, and he indicated that he did. Rumley then proceeded to the front of the store to the cash register where she took all of the money out and gave it to the robber. App. 95, ll. 7 – 13. After taking the money from Rumley, the robber told her to go into the laundry room of the store, where he allegedly held a knife to her back

and forced her to have sex. App. 98 – 99. Once the robber left the store, Rumley called 9-1-1. App. 100, l. 25 – App. 101, l. 1. Officers responded to the scene.

Amanda Cooper testified that she was working at the Subway in Greer, Spartanburg County, during the evening hours of December 30, 2008. App. 165, ll. 1 – 4. Cooper had walked to the lobby of the restaurant to do some cleaning when a man walked in. App. 165, ll. 19 – 25. The man allegedly grabbed Cooper with one hand while holding a knife in the other hand. App. 165, ll. 19 – 25. He walked Cooper over to the cash register and another employee, who was standing near the register, began putting money in the robber's bag. App. 166, l. 25 – App. 167, l. 4.

After the robber left the restaurant, Cooper called 9-1-1. She did not see the robber's face. However, she claimed to observe a star-shaped tattoo on his neck. Cooper also claimed to observe the robber getting into a "burgundy Camry." App. 171, ll. 22 – 23. She stated that he wore a red hoody, and a blue ski mask. App. 166, ll. 14 – 15.

Officers put out a BOLO that a robbery had just occurred at the Ultra Tan and at the Subway, and the suspect was driving a "burgundy Toyota or burgundy Camry or Honda with a Hispanic or black male driving." App. 173, ll. 3 – 8. At around 9:00 pm the same night, Officer Terry Lane with the Duncan Police Department observed a car which fit the description and initiated a traffic stop. App. 173, ll. 13 – 17. Petitioner, who was the driver, was taken out of the vehicle and arrested. App. 175, ll. 2 – 6.

Officers searched Petitioner's apartment in Duncan, South Carolina, and recovered a red hooded sweatshirt, a blue ski mask, a cash box with cash inside, and a black book bag. App. 179 – 182. In addition to the items recovered from Petitioner's apartment, officers took a sample of semen found on the floor of the laundry room in the Ultra Tan and from Katherine Rumley's vaginal exam. App. 229, l. 23 – App. 230, l. 2. The DNA from the semen in the laundry room and

from Rumley's vaginal exam, matched Petitioner's DNA. App. 228, ll. 14 – 17. Video surveillance videos were also recovered from the Ultra Tan and the Subway.

The jury found Petitioner guilty of all charges. App. 292 – 293. Judge Cole sentenced Petitioner to fifteen years for one armed robbery, five years for one possession of a weapon during commission of a violent crime, and ten years for one kidnapping charge to run concurrently. App. 296 – 297. The judge sentenced Petitioner to twenty-five years for the first-degree criminal sexual conduct charge to run consecutively. App. 297.

Finally, the judge sentenced Petitioner to ten years for the second armed robbery charge, ten years for the second kidnapping charge, and five years for the second possession of a weapon during commission of a violent crime charge to run concurrently to each other, but consecutively to the previous sentences imposed. App. 297 – 298. Petitioner was given an aggregate sentence of fifty years' imprisonment. App. 317. Petitioner appealed his conviction and sentences.

A brief was filed on Petitioner's behalf pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967), by Assistant Appellate Defender Kathrine H. Hudgins. App. 360. The South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Anders in an unpublished opinion. State v. Alcantara, Op. No. 2012-UP-108 (filed February 22, 2012). The remittitur was sent on March 12, 2012.

On January 7, 2013, Petitioner filed a PCR application. App. 300. Respondent filed its return on June 6, 2014 requesting an evidentiary hearing. App. 309. On September 16, 2014, an evidentiary hearing was held before the Honorable Roger L. Couch. App. 314. J. Brandt Rucker represented Petitioner. Suzanne White represented the State. App. 314.

Petitioner testified at the hearing. Petitioner stated that defense counsel should have requested a severance at trial. App. 322. Petitioner was on trial for two different crimes which

occurred in two different cities with different victims. App. 322 – 323. Petitioner stated that trying two separate offenses together “affected the jury’s decision.” App. 323.

Defense counsel also testified at the evidentiary hearing. Counsel indicated that he discussed the possibility of a severance of Petitioner’s charges. App. 342, ll. 19 – 20. However, counsel did not make a motion for a severance of the charges. App. 347, ll. 12 – 15. Counsel did not think he could successfully get a severance granted. App. 346, ll. 19 – 23. Counsel opined that if Petitioner was convicted of one offense, the State could have served him notice that it would seek life without parole on the other offense. App. 343, ll. 2 – 6. Counsel acknowledged that the solicitor never told him that if he moved for and was granted a severance of the charges, the State would seek life without parole at the next trial. App. 347, ll. 20 – 25.

The PCR judge issued an order of dismissal on May 8, 2015. App. 359. The judge wrote that Petitioner’s allegation that counsel should have made a motion for severance was without merit. App. 362 – 363. The judge also found that Petitioner failed to demonstrate any prejudice as a result of trying to two cases jointly. App. 363. The PCR judge found that Petitioner failed to prove that counsel was deficient and that Petitioner was prejudiced as a result. App. 367.

Petitioner appealed the judge’s order of dismissal. This petition for a writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to move for a severance of the two separate alleged offenses, armed robbery and kidnapping, against Petitioner where the offenses were charged in separate indictments, did not arise out of a single chain of circumstances, and were not provable by the same evidence.

Defense counsel was ineffective for failing to move for a severance of the cases against Petitioner. The offenses occurred at two different businesses and were charged in separate indictments. The offenses did not arise out of a single chain of events and were provable by different pieces of evidence. Because of counsel's deficiency, the severance issue was not a part of the record to be considered on appeal.

"[O]ffenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006) (citing State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002)). The joinder of offenses in one trial is proper if they (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof. State v. Carter, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996). Such offenses are "considered to be of the same general nature where they are interconnected." Rice, 368 S.C. at 614, 629 S.E.2d at 395.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," Butler v. State, 286 S.C.

441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, counsel should have moved to sever the cases against Petitioner. Although Petitioner was indicted for the same offenses, each offense occurred in a different establishment in two different cities. The police discovered evidence which matched Petitioner's DNA profile at the Ultra Tan and from Katherine Rumley's vaginal exam. However, Petitioner's DNA was not found at the Subway. Further, Amanda Cooper observed a star tattoo on the robber's neck at the Subway. Rumley did not describe any tattoos on the assailant at the Ultra Tan.

While there was surveillance video from the Ultra Tan and the Subway, Petitioner was never identified at either business during the robbery since the employees did not see the robber's face. The only evidence that was similar in both cases was the clothing the assailant wore – the red hoody and blue ski mask. Because counsel failed to at least move for a severance of the offenses,

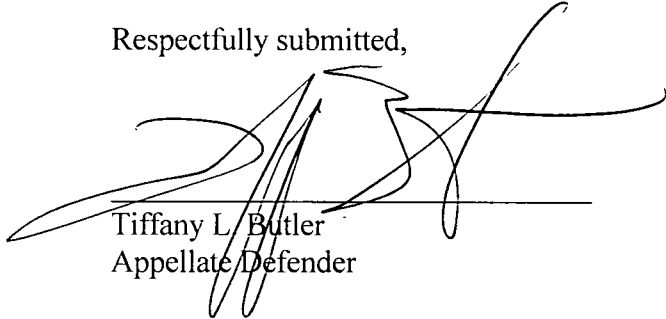
the motion was not a part of the record. Even if counsel did not think the trial judge would grant his motion to sever the cases, the severance issue would have been preserved for appellate review.

Since the jury heard testimony and was presented with evidence from both armed robberies, the jury convicted Petitioner on the improper basis that if his DNA was found at the Ultra Tan and he committed that robbery, he must have robbed the Subway as well. Because of the inevitable spill-over effect of evidence of one armed robbery and kidnapping, it was impossible for Petitioner to get a fair trial. If the cases were severed and tried separately, there is a reasonable probability that the result of Petitioner's trial would have been different.

CONCLUSION

For the reasons argued above, Petitioner Milciades Alacantara respectfully requests this Court to grant his petition for writ of certiorari and order a full briefing of the issue.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Tiffany L. Butler', is written over a horizontal line.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

MILCIADES ALACANTARA

PETITIONER,

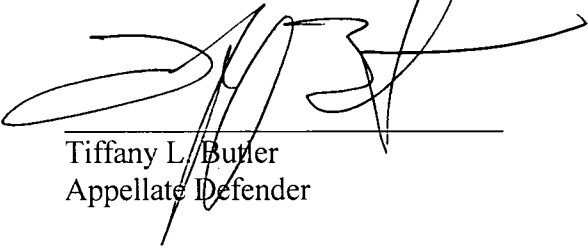
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Milciades Alacantara #339223, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 21st day of December, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of December, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.