

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County
Frank R. Addy, Circuit Court Judge

TYRONE SHUMPERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000579

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in failing to find that Derek Mosley's admission, for the first time at the PCR hearing, that his trial testimony indicating that Petitioner was present at the time of the armed robbery was based on what he was told by others constituted newly discovered evidence requiring a new trial?

STATEMENT

In November of 2002, the Lauren County Grand Jury indicted, in a four count indictment, Petitioner Shumpert and four others for conspiracy, two counts of armed robbery and possession of a weapon during the commission of a violent crime, indictment #02-GS-30-1018. On April 28, 2003, Petitioner proceeded to jury trial before the Honorable James W. Johnson, Jr. William G. Mayer represented Petitioner at trial. Jerry Peace prosecuted the case. The jury found Petitioner guilty of conspiracy and two counts of armed robbery. The jury found Petitioner not guilty of possession of a weapon during the commission of a violent crime. A timely notice of intent to appeal was filed. Appellate Defender Tara S. Taggart perfected the direct appeal filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Anders brief raised the issue of whether the judge erred in failing to grant a verdict of acquittal where there was insufficient evidence of guilt. Petitioner filed a *pro se* brief raising a Batson violation, prosecutorial misconduct based upon a comment, bolstering a witnesses, improper seating of a juror and ineffective assistance of counsel. The South Carolina Court of Appeals dismissed the appeal. State v. Shumpert, Op. No. 2005-UP-095 (S.C.Ct.App. filed Feb. 8, 2005).

On May 24, 2005, Petitioner filed an application for post conviction relief. 2005-GS-30-422. On January 18, 2006, an evidentiary hearing was held before the Honorable Wyatt T. Saunders. Rodney W. Richey represented Petitioner at the PCR hearing. Julie M. Thames represented the State. Petitioner alleged that trial counsel was ineffective in failing to object to an all white jury, failing to call alibi witness Candi Robertson, the mother of Petitioner child, failing to object to the prosecutor's argument alluding to Petitioner's failure to put up a defense, failing to call three co-defendants, Willie Lamar Todd (App. p. 190, lines 23-25), Marcus A. Brown and Maurice Marquis Suber, two of whom who would have testified that Petitioner was not involved with the robbery and

failure to admit a juror affidavit indicating that jurors improperly considered Petitioner's failure to testify as evidence of guilt. Candi Robertson testified at the PCR hearing that on the night in question Petitioner worked and then came home. (App. p. 196, lines 10-13). Robertson testified that Petitioner was at her house at the time the robbery was committed. (App. p. 196, lines 15-18). Robertson testified that she went to bed about 1:30 AM and Petitioner came to bed about 2:00 AM. (App. p. 196, lines 13-14). The robbery took place around midnight. (App. p. 43, lines 3-25). Trial counsel interviewed co-defendants Brown and Suber and admitted that both co-defendants would have testified that Petitioner had nothing to do with the robbery. (App. p. 200, line 6 – p. 201, lines 1-8). Trial counsel admitted that the sole evidence against Petitioner was the testimony of another co-defendant, Derek Mosley. (App. p. 201, lines 22-23). Judge Saunders denied relief and dismissed the application finding that trial counsel articulated a valid trial strategy for failing to call witnesses. (App. pp. 235-237). Judge Saunders also found that the juror affidavit was inadmissible. (App. p. 232).

A timely notice of intent to appeal was filed and a petition for writ of certiorari filed with this Court. Appellate Defender Robert Pachek represented Petitioner and raised the issue of whether Petitioner's case should be remanded for consideration of the juror affidavit that was wrongly excluded. On December 13, 2007, this Court granted the petition for writ of certiorari and ordered further briefing. The brief of petitioner was filed on January 9, 2008. The brief of respondent was filed on February 8, 2008. On May 12, 2008, this Court affirmed the judgment denying post conviction relief. Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008). (App. pp. 239-243)

On September 9, 2008, Petitioner filed a petition for habeas corpus in the Federal District Court of South Carolina. (App. pp. 244-258). Petitioner alleged that trial counsel failed to make

Batson motion, failed to present an alibi defense, failed to object to the prosecutor alluding to Petitioner's failure to testify and the denial of the admission of the juror affidavit. The State filed a return and motion for summary judgment on December 17, 2008. (App. pp. 259-289). On January 26, 2009, Petitioner filed a motion in opposition to the grant of summary judgment and included a claim of actual innocence. (App. pp. 290 – 309). On April 22, 2009, the Magistrate issued a report and recommendation that the motion for summary judgment be granted. (App. pp. 310-324). The report found that Petitioner's first three claims were procedurally barred for failure to exhaust state court remedies. (App. pp. 319-321). The report found the claim in regard to the juror affidavit was not a ground for federal habeas relief. (App. p. 322). Petitioner filed objections to the Magistrate's report. (App. pp. 325-329). On May 29, 2009, the Honorable Henry F. Floyd adopted the findings of the Magistrate, granted summary judgment and dismissed the petition for habeas corpus. (App. pp. 330-332).

On March 11, 2010, Petitioner filed a second application for post conviction relief. 2010-CP-30-339. (App. pp. 333-339). Petitioner sought relief pursuant to S.C. Code §17-27-45(c) alleging after/newly discovered evidence in the form of the co-defendant and State's sole witness against Petitioner at trial, Derek Mosley's recanted statement in an affidavit dated December 2, 2009. The State filed a return and motion to dismiss on October 13, 2010. (App. pp. 340-351). The Honorable Eugene C. Griffith Jr. signed a conditional order of dismissal on October 25, 2010. (App. pp. 352-362). Petitioner filed a response on November 5, 2010. (App. pp. 363-370). On December 9, 2011, Judge Griffin signed an order vacating the previous conditional order of dismissal and setting the case for an evidentiary hearing. (App. pp. 371-372). On August 17, 2012, Judge Griffith signed an amended conditional order of dismissal. (App. pp. 373-381). On June 3, 2013, a hearing was held before Judge Griffith who appointed counsel, Josh Nasrollahi, to represent

the co-defendant, Derek Mosley. The case was continued once on February 18, 2014, and then again on October 17, 2014, because Mosley was incarcerated in federal prison in Pennsylvania and unavailable to testify.

On December 5, 2014, an evidentiary hearing was held before the Honorable Frank R. Addy Jr. Elizabeth Wiygul represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. Brian J. Ellsworth represented Derek Mosley on behalf of Josh Nasrollahi. In a written order signed January 16, 2015, Judge Addy denied relief and dismissed the application. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in failing to find that Derek Mosley's admission, for the first time at the PCR hearing, that his trial testimony indicating that Petitioner was present at the time of the armed robbery was based on what he was told by others constituted newly discovered evidence requiring a new trial.

The State presented three witnesses at trial, the two victims and one of four co-defendants, Derek Mosley. During the first PCR hearing, trial counsel admitted that he interviewed co-defendants Marcus A. Brown and Maurice Marquis Suber and admitted that both of these two co-defendants would have testified that Petitioner had nothing to do with the robbery. (App. p. 200, line 6 – p. 201, lines 1-8). Trial counsel admitted that the sole evidence against Petitioner was the testimony of co-defendant Derek Mosley. (App. p. 201, lines 22-23). The victims did not identify Petitioner. One victim, Payul Cagle was able to identify one of the robbers as Maurice Suber by recognizing his shoes. (App. p. 48, line 1 – p. 49, lines 1-5). Cagle recognized Brown as driving through the parking lot "the first time." (App. p. 49, lines 5-11).

During the second PCR hearing addressing after discovered evidence Derek Mosley testified by the phone from the federal prison in Pennsylvania. Mosley told the court, "Well, I'd like for y'all to get in contact with Mr. Suber." (App. p. 406, lines 4-5). When asked why he wanted Mr. Suber contacted, Mosley answered, "If I recall, he was the one that had – he was the main suspect in that case that had to do with Mr. Shumpert and I. He was the one – see, at that time I went to the county – the county jail, well Mr. Brown, he was in that case but he's deceased. I never knew Mr. Shumpert's name. That's the name I got. I only knew his name from that case. I never knew his name. That's how his name came about." (App. p. 406, lines 17-24). When asked if the information Mosley testified to at trial actually come from Suber, Mosley answered, "Only thing I asked them was who was that other guy that was with us, man. And they told me his name

was Tyrone Shumpert. That's the only way I knew his name. He didn't arrive at the scene with us." (app. p. 407, lines 8-11). PCR counsel for Petitioner then asked Mosley, "So the information you gave the jury was simply information provided to you by Mr. Suber and Mr. Brown?" (App. p. 407, lines 12-13). Mosley responded, "Yes, ma'am." (App. p. 407, line 14).

In the order of dismissal the PCR judge found that Petitioner did not meet his burden of proving that an affidavit from Mosley recanting his trial testimony constituted newly discovered evidence. (App. pp. 417-423). The PCR judge erred in refusing to find that that Derek Mosley's admission at the PCR hearing that his trial testimony that Petitioner was present at the time of the armed robbery was based on what he was told by others constituted newly discovered evidence requiring a new trial.

In Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387, 192 L. Ed. 2d 173 (U.S.S.C. 2015) this Court wrote:

Traditionally, in South Carolina, " '[t]o obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.' " McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013) (quoting Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993)).

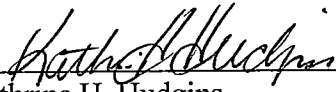
Derek Mosley's admission at the PCR hearing that his trial testimony that Petitioner was present at the time of the armed robbery was based on what he was told by others constituted newly discovered evidence requiring a new trial. The information would probably change the result if a new trial is had because the only evidence against Petitioner came from Mosley. The information was only revealed by Mosley at the second PCR so it was discovered since trial. It could not have been discovered prior to trial. Mosley testimony placed Petitioner at the scene of the crime. The fact that Mosley did not know Petitioner and Petitioner's name was merely provided to Mosley after

the robbery calls Mosley's credibility into question, especially in light of the fact that Mosley was the sole witness against Petitioner at trial. The information is not merely cumulative or impeaching. The PCR judge erred in failing to find that that Derek Mosley's admission at the PCR hearing that his trial testimony that Petitioner was present at the time of the armed robbery was based on what he was told by others constituted newly discovered evidence requiring a new trial. This newly discovered evidence renders trial counsel's purported strategic decision not to call co-defendant Suber as a witness at trial unreasonable.

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 14th day of January, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LAURENS COUNTY
FRANK R. ADDY, CIRCUIT COURT JUDGE

TYRONE SHUMPERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-000579

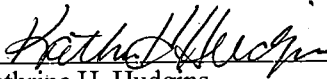
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrone Shumpert 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 December 5, 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 Tyrone Shumpert.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of January, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Frank R. Addy, Circuit Court Judge

TYRONE SHUMPERT,

PETITIONER,

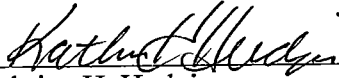
V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

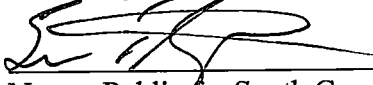
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Tyrone Shumpert, #292828, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512 this 14th day of January, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of January, 2016.



(L.S.)

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