

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015 – 001079
Lower Court Case No. 2012-CP-42-1824

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MAR -2 2016

SC SUPREME COURT

Kenneth Wayne Chiles, #167250,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel failed to move for a severance prior to Petitioner's joint armed robbery trial with his codefendant, Carnie Norris, III, where Petitioner and Norris had inconsistent defenses, and the jury could not make a reliable judgment about Petitioner's guilt, which prejudiced Petitioner?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the September 2008 term of the Spartanburg County Grand Jury for armed robbery (2008-GS-42-5630). Petitioner was represented by J. Roger Poole, Esquire (Counsel). On July 6, 2009, Petitioner proceeded to trial after which a jury convicted him as indicted. He was sentenced by the Honorable J. Derham Cole to confinement for eighteen (18) years.

A timely Notice of Appeal and Anders brief were filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Chiles, Op. No. 2011-UP-336 (S.C. Ct. App. filed June 28, 2011). The remittitur was issued on July 14, 2011.

Petitioner then filed an application for post-conviction relief on April 20, 2012. Respondent filed a Return on March 1, 2013. An evidentiary hearing was held on September 17, 2014, at the Spartanburg County Courthouse. Petitioner was represented by Leah B. Moody, Esquire. The State was represented by J. Clayton Mitchell of the South Carolina Attorney General's Office. The Honorable Roger L. Couch issued an Order of Dismissal on May 8, 2015, denying relief.

Petitioner filed a notice of appeal on May 14, 2015. A Petition for Writ of Certiorari was submitted by Tiffany L. Butler, Esquire on November 16, 2015. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **Certiorari is not warranted where Counsel made the strategic decision not to move to sever Petitioner's case from his codefendant's case. Further, it is unlikely that such motion would have been successful because there was no legal basis for the trial court to sever the cases.**

Petitioner argues the PCR court erred in failing to find Counsel ineffective for not moving to sever Petitioner's case from his codefendant, Carnie Norris, III's case. Specifically, Petitioner argues the two had inconsistent defenses which supported a motion to sever. Petitioner also argues the PCR court erred in failing to find Petitioner was prejudiced by this deficiency and that if such a motion was made, it would have likely been granted by the trial judge. Respondent submits these arguments are without merit and requests this Court to deny the petition for writ of certiorari.

How the issue was raised below

Trial

Petitioner was tried jointly for armed robbery with his codefendant Norris. (App. p. 7, lines 2-5). Andrew Bond, a victim, testified that he and friends were playing Frisbee golf near the First Baptist Church. (App. p. 113, lines 11-22). Bond's friend, Hub Blankenship, threw the Frisbee on top of a building behind the parking lot and Hub's brother, Zach, went to retrieve it. (App. p. 114, lines 6-20). Bond testified that he was then pushed down from behind by a man he identified as Norris. (App. p. 1-23). Norris then pulled a knife and put it to Bond's throat. (App. p. 116, lines 4-9). Petitioner then approached Norris who then handed him Bond's wallet. (App. p. 117, line 18 – p. 118, line 10). Petitioner and Norris then went through Bond's wallet and removed the contents and eventually gave the wallet back to Bond. (App. p. 119, lines 17-21; p. 120, lines 18-21). Bond testified Petitioner and Norris left and walked across the street to the

front porch of a house as police arrived on the scene. (App. p. 121, line 23 – p. 122, line 4). Both were then arrested on the porch of a house across the street for armed robbery.

Petitioner testified in his defense that Norris knocked on his door and told him that someone was attempting to break into a building across the street from his residence. (App. p. 240, line 3 – p. 241, line 18). He testified there were two, maybe three, people on top of the building. (App. p. 241, lines 19-21). He testified that when he approached the scene, Bond was sitting on the ground. Petitioner believed Norris was making a citizen's arrest. (App. p. 241, line 22 – p. 242, line 24). He testified that he did not know Norris was robbing Bond and that only Norris had a weapon. (App. p. 243, lines 3-8). Petitioner testified Norris handed him a stack of cards from Bond's wallet. The contents of the wallet were found in Petitioner's pocket by police. (App. p. 243, lines 9-17).

Norris also testified in his defense. (App. p. 264). Norris testified he saw individuals on the roof of a building and that he went to wake up Petitioner to alert him to a possible burglary. (App. p. 266, lines 12-19). Norris testified that he wanted to know what Bond and his friends were doing on top of the building. (App. p. 270, line 6-9). Norris claimed he did not rob Bond and did not intent to commit a crime.

PCR

The PCR court ruled that Petitioner failed to meet his burden in proving Counsel was ineffective for failing to move to sever Petitioner and Norris's trial. The court found Counsel made the strategic decision not to move to sever the cases. The court also found that a motion to sever would not likely have been granted by the trial court.

Relevant Law

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). In order to prove prejudice, an applicant must show "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. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Discussion

The PCR court did not err in failing to find Counsel ineffective for not moving to sever Petitioner and Norris's case. "Criminal defendants who are jointly tried [...] are not entitled to separate trials as a matter of right." State v. Dennis 337 S.C. 275, 281, 523 SE2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). "Charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced." State v. Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). A court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." Id. at 282, 523 S.E.2d at 176.

First, Counsel articulated a reasonable strategy in not moving for a severance of the cases. Counsel testified that Petitioner and Norris presented consistent defenses and that he argued Petitioner was not as responsible as Norris. (App. p. 404, lines 10-11). Counsel testified

he was able to get a mere presence charge which was consistent with Petitioner's defense that he did not have the requisite intent to be convicted. (App. p. 402, lines 15-23). He also viewed the motion to sever as meritless and took that into consideration in deciding not to make the motion. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choices of tactics will not be deemed ineffective assistance.). It was reasonable for Counsel to argue that Petitioner was not as culpable as Norris and that he should be acquitted on those ground. Counsel's strategy is apparent from his closing argument where he emphasized that Petitioner did not have the necessary intent to be convicted. (App. p. 287, lines 8-20; p. 292, lines 6-10; p. 293, line 22 – p. 294, line 1). He also noted that only Norris handled Bond's wallet and only Norris wielded a weapon. (App. p. 290, lines 6-12). This defense is consistent with Norris's defense in that both argued they lacked the requisite *mens rea*. Respondent submits Counsel's decision not to move for a severance was reasonable because there did not exist meritorious grounds to move to sever the cases. Therefore, certiorari is not warranted.

Second, Petitioner was unable to show any resulting prejudice because there is not a reasonably likelihood that a severance would have been granted. Counsel also testified and the PCR court agreed that there was no basis to move to sever the cases. Petitioner was unable to point to any specific trial right that was violated by trying him and Norris together. Furthermore, the incident clearly arose out of the same circumstances, the charges were proved by the same evidence, and the charges are of the exact same nature.

In any event, a cautionary instruction as to multiple defendants is sufficient to protect each co-defendant from prejudice that might result from a joint trial. See State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973). The trial court gave specific instructions that the jury

was to consider the evidence “separately and apply the law to each indictment separately.” (App. p. 311, lines 16-22). The trial court went on to reiterate that the verdicts will “depend upon your determination of facts as it relates to the particular defendant and then your application of the law to those facts as you determine them to be.” (App. p. 327, lines 4-7). Respondent submits there is ample evidence to support the PCR court’s findings that Counsel was not ineffective in failing to move for a severance.


CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court’s ruling as there is ample evidence of probative value to support the PCR Court’s denial of Petitioner’s application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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BY: 

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ATTORNEYS FOR RESPONDENT

March 2, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2015-001079

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KENNETH W. CHILES, #167250,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Tiffany L. Butler, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 2nd day of March, 2016


ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

March 2, 2016

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

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SC SUPREME COURT

RE: Kenneth W. Chiles v. State of South Carolina
Appellate Case No.: 2015-001079

Dear Ms. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

AAO/ah
Enclosures

cc: Tiffany L. Butler, Esquire