

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

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SC SUPREME COURT

ROBERT MAX WATKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002191

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR Court erred in finding that appellate counsel was not ineffective in failing to file a Return to the State's Motion to Recall the Remittitur where the issuance of the remittitur was not made by some mistake or inadvertence on the part of the Court of Appeals or its officer such that its' recall was improper?

STATEMENT OF THE CASE

First Trial and Appellate Reversal

Petitioner Robert Watkins was convicted of armed robbery and possession of a weapon after a jury trial held before the Honorable C. Victor Pyle, Jr. on October 23-25, 2002 in Greenville County. He was sentenced to thirty years for the armed robbery and five years for possession of a weapon. Watkins' direct appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). State v. Watkins, Op. No. 2004-UP-406 (filed June 22, 2004).

Watkins filed an application for post-conviction relief on October 22, 2004. An evidentiary hearing was held on April 8, 2005, before the Honorable Larry R. Patterson. On January 17, 2006, Judge Patterson issued an order denying and dismissing Watkins' application.

On appeal from the PCR dismissal, the South Carolina Supreme Court reversed Judge Patterson's order and granted Watkins a new trial. Watkins v. State, Memorandum Opinion No. 2008-MO-001 (filed January 14, 2008). The Court found that trial counsel was ineffective in failing to properly argue that Watkins was entitled to a jury charge on alibi.

Second Trial and Direct Appeal

After several pre-trial hearings, Watkins' case was retried before Judge Patterson on September 22-24, 2008. Watkins was represented by Stephen J. Henry during jury selection and pre-trial motions but represented himself, with Henry serving as standby counsel, for the remainder of the trial. The State was represented by assistant solicitor Lucas Marchant. Watkins was again convicted. He was sentenced to consecutive sentences of twenty-five years for armed robbery and five years for the weapons offense, for a total of thirty years.

Watkins was represented by appellate defenders Elizabeth Franklin-Best and David Alexander on direct appeal. App. 629; App. 689; App. 731. The State was represented by Assistant Attorney General William Blich, Jr.¹ App. 646; App. 668; App. 705. In an unpublished opinion, the Court of Appeals reversed Watkins' convictions, finding that Judge Patterson erred in denying Watkins' motion for recusal because Judge Patterson presided at Watkins' PCR hearing from his first trial. App. 666.

The State filed a Petition for Rehearing on March 21, 2011. Supp. App. 3. The Court of Appeals denied the Petition for Rehearing on April 21, 2011. Supp. App. 9. The letter to the Attorney General's Office enclosing the denial was addressed to Assistant Deputy Attorney General Salley Elliott. Supp. App. 8. On June 2, 2011, the Court of Appeals issued the Remittitur to the lower court. Supp. App. 10. On June 15, 2011, the State filed an Expedited Motion to Recall Remittitur, alleging that the Order denying the petition for rehearing was never served on anyone at the Attorney General's Office. Supp. App. 11. **Watkins' appellate counsel did not file a Return to the State's Motion.** On June 30, 2011, the Court of Appeals entered an Order recalling the Remittitur. Supp. App. 15.

On July 14, 2011, the State filed a Petition for Writ of Certiorari. App. 668. Watkins' Return was filed on October 14, 2011. App. 689. This Court granted certiorari on November 6, 2012. App. 704. Following oral argument held October 16, 2013, this Court issued an opinion reversing the Court of Appeals' decision and affirming Watkins' convictions. App. 756.

¹ It is apparent from the context that references in the PCR hearing transcript to "Mr. Beach" and "Mr. Glitch" were intended to refer to AAG Blich.

PCR Application and Hearing

Watkins filed his application for post-conviction relief (“PCR”) on January 31, 2014, and an amendment thereto on May 2, 2014. App. 760; App. 779. The State filed its Return on July 11, 2014. App. 785. An evidentiary hearing was held before the Honorable Edward W. Miller on April 22, 2015. Watkins was represented by R. Mills Ariail, and the State was represented by assistant attorney general Karen Ratigan. The witnesses at the hearing included Watkins and defense attorney Henry, who represented Watkins at his re-trial until just before opening statements. App. 236- 238.

The hostility towards Watkins from the PCR judge, assistant attorney general, and even his own PCR attorney, is palpable even through the pages of the transcript. Watkins was repeatedly cut off and interrupted as he attempted to present the testimony and documents necessary to support his claims. At one point Watkins said from the witness box:

I thought in court I’m supposed to be able to litigate my issues and get my issues on the record. It seems like I can’t get my issues – all I wanted to do was come here, present my exhibits, and prove what I have on the record. It seems like it’s like every time I get to something, I’m getting cut off, I’m not getting to be able to put my claims properly on the record, and all I’m trying to do is make my claim, put my stuff on the record the best way I know how. You [PCR counsel] told me that I’d be able to do this. Now you’re shaking your head, and I don’t understand it.

App. 825, l. 20 – 826, l. 5.

Despite the contentious atmosphere of the hearing, Watkins testified that appellate counsel was ineffective in failing to oppose the Attorney General Office’s motion to recall the remittitur in the South Carolina Court of Appeals. Watkins testified that when the Court of Appeals’ opinion was issued on March 8, 2011, it was sent to ADAG Salley Elliott, who forwarded it on AAG William Blich. AAG Blich then filed his petition for rehearing on March 21, 2011. On April 21, 2011, when rehearing was denied, the Order was again sent to ADAG

Elliott, but she did not forward it on to AAG Blich. The Court of Appeals issued the remittitur and Watkins was sent back to the county jail, expecting a retrial. When AAG Blich later filed a motion to recall the remittitur so that he could file a petition for writ of certiorari, appellate counsel Elizabeth Franklin-Best did not file any Return to the motion. Watkins explained that the failure to file a Return could have been deemed consent and that the recall of the remittitur was improper because the Court was not at fault. App. 817, l. 20 – 822, l. 2.

Judge Miller interrupted Watkins' testimony and ruled:

Well, I'm going to make the finding that even if the conduct of the appellate counsel fell below an objective standard of reasonableness, the fact that the Supreme Court took the case up in any way, regardless, there's no prejudice from any deficiency, if there was any. So next ground.

App. 822, ll. 3-8. Later on in the hearing, Watkins attempted to introduce a copy of the Attorney General Offices' mail logs, which he received in response to a Freedom of Information Act request, to support his claim that the motion to recall the remittitur included false statements.

App. 831, l. 4 – 832, l. 10. AAG Ratigan objected to admission of the documents:

I would object. This hasn't been authenticated, Your Honor. I mean, there is a cover letter. I can identify Ms. Myers' signature, so I would have no objection to the actual cover letter, but the rest of this, I'd argue, hasn't been authenticated. This looks like it could be typed by anybody for any purpose.

App. 832, ll. 11-16. The objection was sustained and only the cover letter was admitted into evidence. App. 832, ll. 17-22; App. 844 (Applicant's Ex. 1).

Order of Dismissal

On October 2, 2015, Judge Miller entered an Order of Dismissal, denying Watkins' application for post-conviction relief. App. 845 (Order of Dismissal). With respect to the allegation of ineffective assistance of appellate counsel for failure to file a return to the motion to recall the remittitur, the PCR court noted that appellate counsel was not called to testify at the

PCR hearing. The PCR court thus found that it could not “speculate as to whether appellate counsel considered filing such a motion or believed it would have any merit.” The court further found that “the timeline of when the State received the Court of Appeals’ denial of its petition for rehearing was presented to the Supreme Court and that Court chose to grant the State’s motion.” Thus, the PCR court ruled that Watkins failed to show that appellate counsel was deficient or that he was prejudiced. App. 851 – 852 (Order of Dismissal, pp. 7-8).

Watkins’ filed a timely Notice of Appeal from the Order of Dismissal. This petition for writ of certiorari follows.

ARGUMENT

The PCR Court erred in finding that appellate counsel was not ineffective in failing to file a Return to the State's Motion to Recall the Remittitur where the issuance of the remittitur was not made by some mistake or inadvertence on the part of the Court of Appeals or its officer such that its' recall was improper.

Appellate counsel Franklin-Best was deficient in failing to challenge the State's motion to recall the remittitur, which did not support a finding that the remittitur was issued by some mistake or inadvertence on the part of the Court of Appeals. See State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893). Additionally, appellate counsel's failure to file a Return to the motion may have been deemed consent to the State's motion. See Rule 204(e), SCACR ("Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition."). Had the Court of Appeals' Remittitur not been recalled, the State would not have been able file its' subsequent Petition for Writ of Certiorari, asking the South Carolina Supreme Court to review the Court of Appeals' unpublished opinion reversing Watkins' conviction.² Watkins' was prejudiced in that the Supreme Court's review resulted in reversal of the Court of Appeals' opinion and affirmance of his conviction.

All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See

² Though not explicitly stated at the PCR hearing, appellate counsel was further ineffective in failing to file a motion to dismiss the State's petition for writ of certiorari as untimely filed. Rule 242(c), SCACR, provides in pertinent part: "A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals." In the present case, the Order denying rehearing was entered April 21, 2011. Thus, because May 21, 2011 was a Saturday, the petition for writ of certiorari should have been filed on or before May 23, 2011. The recalling of the remittitur on June 30, 2011 did not make the filing of the State's petition timely when it was filed on July 14, 2011.

Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether appellate counsel's performance was deficient and whether the defendant was prejudiced by the deficient performance. Id. The prejudice test is whether the defendant was "prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

For over a century this Court has held fast to the principle that recalling a remittitur is an extraordinary action that will not be granted absent an error on the part of the Court. Keels, 39 S.C. at 553, 17 S.E. at 802 ("In order to justify this court in exercising the unusual power of recalling the remittitur after it has been sent down, a very strong showing would be required that the remittitur was sent down through some mistake or inadvertence on the part of [the] court or its officer...."); Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817 (1910). In Thomas, this Court explained that the "manifest purpose" of the Rule on remittiturs is "to give parties and their attorneys ample time and opportunity to examine the orders and opinions of the court, and the grounds upon which they are based, and bring to the attention of the court any errors or omissions therein, before the court has lost jurisdiction of the cause by sending the remittitur to the court below." 87 S.C. at 44, 68 S.E. at 817. The Court went on to explain:

It is to be regretted in any case when a party loses the opportunity afforded by the law and the rules prescribed for the administration thereof to present his cause on the merits. **But it must always be remembered that the other party to the cause has the right to the orderly disposition thereof, and that his rights must be respected**, and that it is essential to the due and orderly administration of the law that the methods of procedure prescribed by the statutes and rules of court be complied with. Otherwise, there would be no end to litigation. It has frequently been decided that, when the remittitur has been properly sent to the court below, the Supreme Court loses jurisdiction, and thereafter neither the court nor any justice thereof can make any order in the case.

Id. (emphasis added); see also Earle v. City of Greenville, 84 S.C. 293, 65 S.E. 1050 (1909) (“[W]hen the remittitur has been sent down this court loses jurisdiction, and cannot thereafter, in the further progress of the case, render a different decision upon the points decided . . .”).

In the present case, the State’s motion to recall the remittitur was not supported by any affidavits or documentation. Though the Attorney General’s Office claimed that it never received a copy of the Order denying Rehearing, it was admitted in the Motion that the “docketing office” of the Court of Appeals was contacted and indicated that the Order was sent on or around April 21, 2011 to ADAG Salley Elliott. Notably, the letter enclosing a copy of the Court’s opinion was also sent to ADAG Elliott rather than to AAG Blich. There was nothing in the State’s motion to indicate they made any request to the Court that further documents be sent to AAG’s Blich’s direct attention rather than to ADAG Elliott. See Supp. App. 11 (Expedited Motion to Recall Remittitur). Based on the body of case law weighing against the recalling of remittiturs and the facts of this case, appellate counsel should have filed a Return in opposition to the motion to recall the remittitur.

Contrary to the PCR court’s finding otherwise, appellate counsel’s testimony was not necessary in order for Watkins to meet his burden of proof. In Bannister v. State, cited in the Order of Dismissal, the applicant failed to call the favorable witness who he alleged his trial attorney was ineffective in failing to call at the trial. 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). The Bannister Court reiterated that the courts will not speculate that the witness, who was not called at trial or at the PCR hearing, would have provided favorable testimony. Id. Cases like Bannister, involving an uncalled trial witness, are distinguishable from the claim of ineffective assistance of appellate counsel. While there are some circumstances where appellate counsel’s testimony may be helpful, such was not the case here because there was no valid strategic reason

that appellate counsel could have possibly provided for failing to oppose the motion to recall the remittitur. Cf. Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (noting “that labeling counsel’s actions as ‘trial strategy’ does not ‘automatically immunize an attorney’s performance from Sixth Amendment challenges’” (quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)). Thus, the PCR Court needed only to review the appellate documents and the relevant case law. Watkins attempted to further substantiate his claim that the State included false information in its’ Motion, but was precluded from doing so after AAG Ratigan objected to the very documents that her own office provided to Watkins.

Were it not for appellate counsel’s deficient conduct in failing to oppose the recall of the remittitur, the State would not have been able to seek review of the Court of Appeals’ decision reversing Watkins’ conviction by the South Carolina Supreme Court. Watkins would have remained in the county jail and proceeded to another retrial. The PCR court erred in finding that Watkins failed to meet his burden of proof. Watkins is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner Robert Max Watkins respectfully requests that this Court grant the petition for writ of certiorari and order additional briefing on the issue raised herein.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2016.

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IN THE SUPREME COURT

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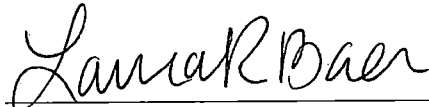
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Max Watkins states:

1. She is 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 held on April 22, 2015. 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 one arguable legal issue which arose during the post-conviction relief process.

THEREFORE, counsel requests that the Court relieve her as counsel for Robert Max Watkins.

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of April, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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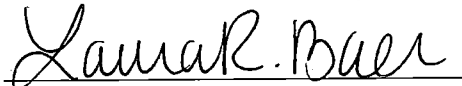
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CERTIFICATE OF SERVICE

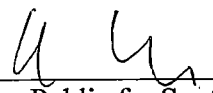
The undersigned attorney hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and Appendix in the above referenced case has been served upon Karen C. Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Robert Max Watkins, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of April, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of April, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.