

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

STEVEN COLLINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to investigate the physical evidence consisting of a print card indicating that the lifted print from the box cutter, alleged to have been used in the armed robbery, could not be matched to Collins because the print was deemed not comparable by the State's finger print examiner?

STATEMENT

In February of 2006, the Greenville County Grand Jury indicted Collins in a two count indictment for armed robbery and possession of a weapon during the commission of a violent crime, indictment #2006-GS-23-1381. On September 11, 2006, Mr. Collins proceeded to jury trial before the Honorable Edward W. Miller. Kenneth C. Gibson represented Collins at trial. The jury returned verdicts of guilty as charged. Judge Miller sentenced Mr. Collins to life without parole pursuant to S.C. Code §17-25-45(A).

A timely notice of intent to appeal was filed on September 15, 2006. The appeal was perfected and a brief filed pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The issue raised on direct appeal involved the trial judge's refusal to grant a mistrial when a witness testified that the Collins was on house arrest, implying that the defendant was already in trouble with the law at the time of the armed robbery for which he faced trial. The South Carolina Court of Appeals dismissed the appeal. State v. Collins, Op.No. 2009-UP-479 (S.C. Ct.App. filed October 14, 2009).

On December 10, 2009, Collins filed an application for post conviction relief. The State filed a return on April 21, 2010. On May 12, 2011, an evidentiary hearing was held before the Honorable G. Edward Welmaker. Carolina Horlbeck represented Collins at the PCR hearing. In a written order signed July 8, 2011, Judge Welmaker denied relief and dismissed the application. A timely notice of intent to appeal was filed on August 5, 2011. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to investigate the physical evidence consisting of a print card indicating that the lifted print from the box cutter, alleged to have been used in the armed robbery, could not be matched to Collins because the print was deemed not comparable by the State's finger print examiner

At trial, William Cromer, a fingerprint examiner with the Greenville County Department of Public Safety, testified, as an expert in fingerprint identification, that a latent print (latent lift #1) lifted from a box cutter found near petitioner's abandoned truck could not be matched to petitioner because the print was deemed not comparable. (App. p. 265, lines 23 – p. 266, lines 1-9). The State alleged that Collins used the box cutter in the robbery of a BP station. After the examiner testified, trial counsel moved for a mistrial based on the fact that the State's failure to turn over the examiner's results from latent lift #1 constituted a Brady violation. (App. p. 269, lines 20 – p. 270, lines 1-3).

The Assistant Solicitor conceded that the results were exculpatory but argued that evidence such as print cards was not typically given to opposing counsel but counsel was free to view the evidence at the law enforcement center. The Assistant Solicitor stated that trial counsel declined their invitation to view the evidence. (App. p. 270, lines 1-23). The Assistant Solicitor further argued that trial counsel had both constructive and actual notice of the print card based on the reports of the crime scene investigator, Diane Orlando, and the fingerprint examiner. (App. p. 270, lines 25, - p. 271, lines 1-13).

The judge asked trial counsel how he was prejudiced if the State's handling of the print card evidence constituted a Brady violation. (App. p. 271, lines 14-16). Trial counsel argued that if he had known that the examiner deemed the prints not comparable, he would have hired his own

fingerprint expert to determine if the prints were in fact not comparable. (App. p. 271, lines 17 – p. 272, lines 1-18). The judge denied the mistrial motion but cautioned the State to disclose exculpatory information in a clear manner. (App. p. 273, lines 1-5).

During the PCR hearing, Collins testified that trial counsel only learned at trial that the print lifted from the box cutter as well as another print lifted from the truck was deemed not comparable. (App. p. 475, lines 2-25). Collins testified that the outcome of his trial would have been different if trial counsel had known the prints were not comparable and had hired his own expert to analyze the prints. (App. p. 476, lines 1-10). Trial counsel admitted at the PCR hearing that he wished he had caught the discrepancy with the fingerprints but testified that the real problem with the case was the other evidence presented by the State against Collins. (App. p. 488, lines 7- p. 489, lines 1-6).

In the order of dismissal the PCR judge wrote:

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly challenge the introduction of fingerprint evidence from his truck (instead of the crime scene). The Applicant argues trial counsel failed to articulate the proper grounds when he moved for a mistrial. While trial counsel did testify that he could have done more with the fingerprint issue, a review of the record shows that there was overwhelming evidence of the Applicant's guilt. Therefore, this Court finds the Applicant cannot prove there was a reasonable probability that the outcome of the proceedings would have been different if trial counsel had successfully excluded the fingerprint evidence from his truck.

(App. p. 498). The PCR judge erred. Trial counsel was ineffective for failing to realize that fingerprints found on a box cutter alleged to have been used in the armed robbery could not be matched to petitioner because the prints were deemed non-comparable by the State's finger print examiner.

In Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011), the South Carolina

Supreme Court wrote:

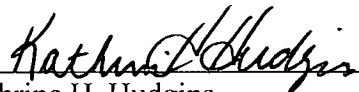
This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *see also* McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (“A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.”).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Id.* at 693, 104 S.Ct. at 2052. Trial counsel was deficient in not reviewing the print card indicating that the lifted print from the box cutter could not be matched to Collins because the print was deemed not comparable by the State's finger print examiner. Collins was prejudiced by the deficient performance.

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 17th day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

STEVEN COLLINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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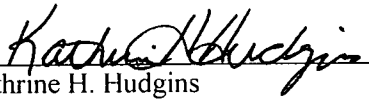
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven Collins 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 May 12, 2011. 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 Steven Collins.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of May, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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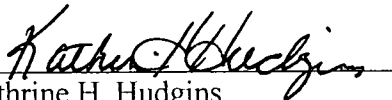
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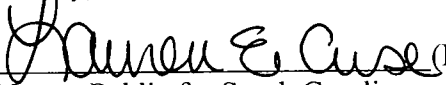
CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire and Steven Collins, # 141257, at McCormick Correctional Institution this 17th day of May, 2012.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of May, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.