

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

RANDY L. MITCHELL

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002374

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did The undersigned P.C.R. Judge err in not finding trial counsel ineffective for not suppressing a pistol or not objecting to false testimony by government witness or for not finding prosecutorial misconduct for the inadmissible pistol.

STATEMENT

On October 3, 2010, brothers Everett and Kenny Williams were at home watching Sunday Night Football with friends. Around ten o'clock a man burst through the door with a pistol in his hand saying "Give it up". A short while later, another man came through the door holding a sawed off shotgun. APP. 62, 11. 7-25. Another brother, James, was in the back of the House. The man with the shotgun found him and took his money from the dresser. This man returned to the living room where the other man was collecting money and other items from the people there. (Note: None of the items were at trial physically or photographically.) APP. 242, 11. 11-APP. 243, 11. 1-25; APP. 265, 11. 6-8; APP. 406, 11. 25-APP. 407, 11. 1-8. The man with the pistol shot into the ceiling, then came out the house putting on a dew-rag/stocking. APP. 119, 11. 6-16. (Note: The dew-rag/stocking cap was D.N.A. tested and none of Petitioner's D.N.A. was found in the dew-rag. APP. 119, 11. 17-APP. 121, 11. 1-5.) Unknown to the two robbers, the house was under surveillance by the police at the time. When the robbers came out the four policemen gave chase and testified to losing sight of the person they were pursuing. APP. 78, 11. 3-8; APP. 112, 11. 13-21; APP. 239, 11. 22-25. Petitioner was arrested in a path and accused of being the robber coming out the house putting the stocking cap on his head. APP. 273, 11. 13-15. No pistol was found on petitioner, officers testified to not seeing petitioner with a pistol. None of petitioner's finger prints were on the pistol. APP. 113, 11. 19-21; APP. 114, 11. 4-11; APP. 403, 11. 8-17; APP. 112, 11. 22-25. On February 17, 2011, York County Grand Jury indicted petitioner on the charges of burglary first degree and armed robbery, APP. 421; APP. 429-APP. 433. On February 27-29 petitioner Mitchell proceeded to trial before the Honorable Robin Stilwell and a Jury. Petitioner was represented by Philip Jamieson, and the state was represented by Betty Miller, APP. 1. The jury returned a verdict of guilty on both charges, APP. 324, 11. 16-24. Petitioner filed a notice of appeal. The South Carolina Court of Appeals affirmed Mitchell's conviction and sentence. State v. Mitchell 2014-up-104 (ct. APP. filed March 12, 2014. APP. 422; APP. 451-APP. 452. On April 3, 2014, Petitioner filed an application for Post-conviction Relief (P.C.R.). The state filed a return on App. 421; APP. 333-APP. 344. An evidentiary hearing was held on April 14, 2015 before the late Honorable J. Ernest Kinard. Petitioner was represented by

At the P.C.R. Hearing, Petitioner Mitchell testified that his trial counsel was ineffective for not having a pistol suppressed. Petitioner testified that the pistol introduced at trial was not admissible, because the serial numbers didn't match. Petitioner testified that his last counsel had the pistol charge dismissed at a preliminary hearing. (Note: petitioner was charged with "possession of pistol with serial number obliterated" the warrant states "the pistol's serial number from the manufacturer had been removed. APP. 353, 11.15-21; APP. 402, 11.14-24. Petitioner testified "He asked new counsel Jamieson to investigate the pistol to see if it had the same serial number that Detective Weeks wrote on the forensic report, and if it did not match, he should move to have it suppressed." Petitioner testified that counsel "advised him he investigated the pistol and it was the same serial number. APP. 352, 11.21-APP. 353, 11.1. Petitioner testified "the day of trial, counsel showed him two photo, one of the serial number from the sawed off shotgun, which I could see, I told him, okay I see it and then he showed me the one suppose to have been the serial number on the pistol, I told him I don't see nothing. He told me he took the picture with his cell phone. I him I don't see no number in the picture, Petitioner said he kept telling me the number were there Petitioner also testified that "counsel checked the serial number and allowed the pistol in without objecting to the pistol under the grounds that the number did not match. APP. 353, 11.1-APP. 354, 11.1-5 Petitioner testified that Detective weeks (forensic unit) offered false testimony regarding the serial number on the pistol and trial counsel should have objected to his testimony. Mitchell testified "Detective weeks testified that the numbers from the report matched the serial numbers on the pistol, when there was no serial number on the pistol, from the photo counsel showed me. (APP. 354, 11.12-21; APP. 131, 11.15-23; see forensic report) (Note: Trial transcript reflect that the pistol was not introduced by numbers, only by word of mouth, not numbers, "Detective weeks testified, Yes ma'am. That is the same serial number, same weapon. APP. 131, 11.25-23; APP. 355, 11.11-23. (Note: this is the reason P.C.R. court denied my claim, P.C.R. Transcript shows the serial number did not match) Petitioner also filed a prosecutorial misconduct on the pistol issue.

Petitioner testified the prosecutor erred by entering a pistol she knew was not part of evidence or not correcting false testimony by witness. APP. 382, 11.12-23. At trial the prosecutor hands Detective weeks the pistol asked if he recognize it. Detective weeks testified, "Yes, ma'am. That is my writing, and if you want to show it to defense, and then I'll look at the serial number, see if they match." "Yes ma'am. That is the same serial number, same weapon. APP. 131, 11.15-23. This was false testimony that was not corrected by the prosecutor. The serial numbers from the pistol did not match the serial number from the forensic evidence sheet. Also prosecutor is in charge of the evidence, she viewed it, she knew it did not match the numbers from the evidence sheet. The pistol had no legal right to be presented or enter into evidence at trial. Petitioner Mitchell motion and had the pistol subpoena to the P.C.R. Hearing and it was reviewed by the late Honourable Judge Kinard to see if the Serial number from it, matched the numbers on the forensic report. Judge Kinard called out several different numbers from the pistol that was presented at the P.C.R. hearing and testified "He did not know what the numbers were," None of the numbers he called out matched the numbers on the forensic report. APP. 390, 11.9-14. Petitioner testified, "wrong number, wrong pistol." "That's not the pistol, Your Honor, not the pistol. It's not the pistol in the photo in this evidence. That's not the right pistol. That's not even that pistol. It's not the pistol. And the Serial number states 5--." "Here you go right here. It states 541498, not no 55, nothing. it 541498, and that's not the same pistol in that picture." Petitioner testified to the Judge that the serial number just read off the pistol did not match the numbers on the forensic report. APP. 390, 11.9- APP. 391, 11.1-25. Petitioner testified "It's 541498, and that's not the same pistol in that picture". The Judge Kinard viewed the pistol and the picture of the pistol in the Rule 5 discovery and testified "All Right."

ARGUMENT

The P.C.A. court erred in not finding trial counsel ineffective for not suppressing a pistol or not objecting to false testimony by government witness, or not finding prosecutorial misconduct for the inadmissible pistol.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice; "unfair prejudice" means an undue tendency to suggest a decision on an improper basis, such as an emotional one. State v. Owens, (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745; see, State v. Pipkin, (S.C. App. 2004) 358 S.C. 322, 597 S.E.2d 831, (Even relevant evidence may be excluded on the ground of its competency.) see, Miller v. Paste, 87 S.Ct. 785 (The Supreme Court made it clear that a defendant can not be convicted on false evidence.) see, State v. Grace, (S.C. App. 2002) 350 S.C. 19, 564 S.E.2d 331 (A trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances.) see, Washington, 228 F.3d at 700; (A prosecutor's misrepresentation of material evidence can have significant impact on Jury's deliberations "because a Jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty.") see also, United States v. Sullivan, 937 F.2d 1146, 1150 (6th Cir. 1991) (Because jurors are likely to "place great confidence in the faithful execution of the obligation of a prosecuting attorney, improper insinuations or suggestions [by the prosecutor] are apt to carry [great] weight against a defendant and therefore more likely to mislead a Jury.) see, State v. Adams, (S.C. App. 2003) 354 S.C. 361, 580 S.E.2d 785 (Court of Appeals reviews a trial court's decision regarding the probative value and prejudicial effect of relevant, pursuant to the abuse of discretion standard and is obligated to give great deference to the trial court's judgment.)

The P.C.A. undersigned Judge erred in not finding trial counsel or prosecutor in violation for allowing false testimony and an inadmissible pistol into evidence. The serial numbers did not match. The Judge clearly read different numbers from the pistol, and could not come up with a match from the numbers on the forensic report, The Judge stating "I don't know". The pistol was not the pistol in the picture, the Judge agreeing testifying "All right" after viewing the pistol in the picture and the pistol he was holding. The pistol was never introduced by the numbers at trial.

Conclusion

Based on the above, certiorari should be granted, and petitioner's convictions and sentences vacated, and the case remanded for a new trial.

Respectfully submitted
Randy L. Mitchell

ISSUE PRESENTED

Did the undersigned P.C.R. Judge err in not finding trial counsel ineffective for not objecting to the reference and presentment of inadmissible evidence, or false testimony by Government witness or for not finding prosecutorial misconduct for the inadmissible black gloves.

STATEMENT

At the P.C.R. Hearing, Petitioner testified that Trial counsel was ineffective for not objecting to the reference to a second pair of black gloves and for not objecting to the false testimony by Government witness about the gloves. Petitioner Mitchell Explained that the Solicitor handed officer Rowe a pair of black gloves and asked if they refresh his memory. Officer reviewed the gloves and stated, "this is a pair of black gloves that I recovered at 21:51 hours from Gregory Crawford. Gregory Crawford Plead Guilty in this case. (Trial trans. 236, 11.14-19; P. 8, 11.10-16) APP. 365, 11.19- APP. 366, 11.1-15. Petitioner explained that he was prejudiced by this act because the black gloves were not part of evidence recovered by officers the rule 5, none of the evidence sheet in the rule 5 verifies a second pair of black gloves. (Reference- rule 5). The gloves were reference to and presented in front of the Jury and not enter into evidence. (Trial trans. 236, 11.14-19.) APP. 366, 11.9- APP. 368, 11.1-5. Petitioner testified, "that the second pair of black gloves was false evidence, used to give the Jury a false conception, that he was with the codefendant." (Note: officer Rowe testified he recovered a pair of black gloves out of my pocket (Trial trans. P. 232, 11.16-21) Now he's testifying he recovered a pair of black gloves out of the codefendants possession. Counsel should have objected to this false testimony, there IS no second pair of black gloves and the officer Rowe just had testified that he never had contact with Gregory Crawford (Trial trans. 236, 11.12-13). Petitioner Mitchell also filed prosecutorial misconduct on the glove issue. Petitioner stated "She presented the gloves to jury when there was no second pair of black gloves, and she used the gloves to create a false connection with him and codefendant. APP. 382, 11.24- APP. 383, 11.1-8.

ARGUMENT

The P.C.R. court erred in not finding trial counsel ineffective for not objecting to the reference and presentment of the black gloves or the false testimony by witness or for not finding prosecutorial misconduct for using the gloves.

A prosecutors misrepresentation of material evidence can have significant impact on jurys deliberations "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty. washington, 228 F.3d at 700; see also united state v. Sullivan, 937 F.2d 1146, 1150 (6th cir. 1991) Because jurors are likely to "place great confidence in the faithful execution of the obligation of a prosecuting attorney, improper insinuations or suggestions [by the prosecutor] are apt to carry [great] weight against a defendant" and therefore more likely to mislead a jury.)see, Miller v. Pate 87 sct. 785 (The supreme court made it clear that a defendant can not be convicted on false evidence)see, (An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounds) in factual conclusion, is without evidentiary support.) State v. Hawes, 411 S.C. 188, 191 767 S.E.2d 707, 708 (2015) (Citing, State v. Black, 400 S.C. 10, 16 732 S.E.2d 880, 884 2012 (A failure to exercise discretion amounts to an abuse of that discretion. Id. (Citing Samples v. Mitchell, 327 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)

The undersigned P.C.R. Judge erred in not finding trial counsel or prosecutor in violation for allowing the false testimony about the gloves and the presentment of the black gloves. The black gloves were not part of evidence, the rule 5 discovery does not show a second pair of black gloves taken from the co-defendant, The gloves was never enter into evidence but presented and used to gain some type of advantage, they are not part of evidence they had no legal right in or presented in trial.

conclusion

Based on the above, certiorari should be granted, and petitioner's convictions and sentences vacated, and the case remanded for new trial.

Respectfully submitted
Randy L. Mitchell

ISSUE PRESENTED

Did the undersigned P.C.R. Judge err in not finding trial counsel ineffective for failure to motion for suppression of in-court identification.

STATEMENT

At the P.C.R. Hearing petitioner testified his trial counsel was ineffective for failure to suppress in-court identification. APP. 378, 11.3-4. Petitioner explained there was no physical evidence presented at trial, connected him to the crime, (APP. 377, 11.17-20), and that his counsel's cross examination was on the witness accuracy of their description, and on did they pick anybody out of a physical or photo line up. APP. 378, 11.9-16; APP. 174, 11.1- APP. 178, 11.1-6; APP. 189, 11.20- APP. 190, 11.1-22. This is evidence to prove counsel was aware of his ineffectiveness, he should have failed a in-court identification suppression motion. Petitioner testified the witness testified they were never asked to identify anyone photographically or physically. APP. 378, 11.18-APP. 379, 11.1; APP. 174, 11.1-15; APP. 189, 11.20-APP. 190, 11.1-22. Officer's testified they never took the suspects back to be viewed by the witness in the house or they never did a physical or photo line up on the suspects. APP. 123, 11.23-124, 11.1-14... Petitioner explained that the witness never gave a out-of-court identification, but was allowed to come to court two years later and make a in-court identification. Petitioner testified at the P.C.R. hearing, he explained this to his trial counsel before trial, and counsel's failure to file a in-court identification suppression motion, prejudice his defense. APP. 379, 11.1-17. Petitioner contends, the two years absent of the witness not identifying anyone and being allowed to I.d. him as the second robber in court two years later when it was only him and his counsel was prejudice.

ARGUMENT

The P.C.R. court erred in not finding trial counsel ineffective for failing to file a motion for suppression of in-court identification.

The undersigned P.C.R. Judge erred in not finding trial counsel in violation, for not filing a suppression of in-court identification. Clearly the petitioner was prejudiced by the fact that there was never a out-of-court identification made on him by any of witness, but the witness were allowed to do a in-court identification two years later. No physical evidence connected him to the crime. The only direct evidence was witness testimony and they never identified petitioner in a photo or physical line up.

Conclusion

Based on the above, certiorari should be granted, and petitioner's convictions and sentences vacated, and the case remanded for a new trial.

ISSUE PRESENTED

Did the undersigned P.C.R. Judge err in not reviewing Petitioner's issue's in the light of The Honorable Ernest J. Kinard order's or making sure Judge Kinard's orders were carried out.

STATEMENT

Requesting a new P.C.R. Hearing or that Petitioner's hearing be ruled upon, under The Honorable Ernest J. Kinard orders. The Honorable Judge Kinard died before making a ruling on Petitioner's P.C.R. Hearing. At the P.C.R. Hearing petitioner testified "I just wanted to ask the court, because I will have to bag up, I will if I have to, because I wanted to enter these in as exhibits." "would I be allowed to enter these as exhibits" "I testified, but I didn't get all the references in the judge need to go to find page numbers and information". The judge testified, "He can put them in." "You can mark them". The court order counsel to type out the Exhibits. APP. 379, 11.18 - APP. 380, 11.1-9; APP. 388, 11.13-25. (Note: Exhibits explain the issue and told the page references were the judge needed to go to find my facts and evidence, the exhibits are in the back of this Petition and are marked Ex. 1-8 for viewing). None of these orders were honored. Counsel never typed the exhibits out and she never sent them to the judge. None of the exhibits were marked. Judge Kinard said he would review my issue in the light of the Exhibits I requested to be marked and allowed in.

ARGUMENT

The undersigned P.C.R. Judge erred in not reviewing Petitioner's issue's under the order's of the court.

The undersigned P.C.R. Judge erred in not reviewing Petitioner's issue's under the orders of the court. Petitioner was prejudice by the fact that his P.C.R. Hearing was not heard under the court's orders.

Conclusion

Base on the above, request should be granted and petitioner P.C.R. Hearing should be heard under p.c.r. courts orders or the hearing redone.

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