STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Steven H. John, Circuit Court Judge

KELVIN BOWEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002248

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

!. Did the PCR judge err in refusing to find that appellate counsel was ineffective for failing to raise the issue of whether the trial judge abused his discretion in admitting State's Exhibit #82, a composition notebook, attributed to co-defendant Ronald Mack, containing irrelevant and prejudicial gang language?

2. Did the PCR judge err in stating that he would not speculate as to the contents of the notebook, State's Exhibit # 82, because Petitioner did not introduce the notebook at the PCR hearing when the notebook was admitted in evidence at trial and discussed at length prior to admission?

STATEMENT

In July of 2009, the Williamsburg County Grand Jury indicted Petitioner Bowen and co-defendants Ronald Hakeem Mack, Antonio Lavelle McClary and Tawanda Mack Allen for murder, burglary first degree and conspiracy, indictment #2009-GS-45-180. Petitioner and Ronald Mack were additionally indicted for possession of a weapon during the commission of a violent crime in the same four count indictment. Two pre-trial hearings were held on August 26, 2010, and August 30, 2010, in regard to a missing Samsung cell phone. On January 31, 2011, Petitioner proceeded to jury trial before the Honorable Clifton Newman. William Jenkinson and Amanda Shuler represented Petitioner at trial. Kimberly Barr and Tyler Brown prosecuted the case. The jury returned with verdicts of guilty on all four counts. Judge Newman sentenced Petitioner to consecutive sentences of ninety nine (99) years for murder, thirty (30) years for burglary first degree, five (5) years for conspiracy and five (5) years for the weapons charge. A timely notice of intent to appeal was filed and the direct appeal perfected. Susan Hackett represented Petitioner for the appeal. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Bowen, 2013-UP-453 (Filed December 11, 2013).

On March 4, 2014, Petitioner filed an application for post conviction relief [PCR], 2014-CP 45-117. Petitioner filed amendments to the PCR application on September 9, 2014, September 26, 2014, February 9, 2015, and February 10, 2015. The State filed a return and motion for a more definite statement on December 2, 2014. On July 13, 2015, an evidentiary PCR hearing was held in Sumter before the Honorable Steven H. John. Charles T. Brooks, III, represented Petitioner at the PCR hearing. Daniel Gourley represented the State. In a written order signed August 4, 2015, Judge John denied relief and dismissed the application. A timely notice of intent to appeal was served on October 27, 2015. This appeal follows.

ARGUMENT

1. The PCR judge erred in refusing to find that appellate counsel was ineffective for failing to raise the issue of whether the trial judge abused his discretion in admitting State's Exhibit #82, a composition notebook, attributed to co-defendant Ronald Mack, containing irrelevant and prejudicial gang language.

At trial the State moved to introduce in evidence State's Exhibits #81 and #82, notebooks found in co-defendant Ronald Mack's bedroom. (App. p. 528, lines 2-3). Petitioner objected and argued the notebooks were irrelevant. (App. p. 528, line 4). The State argued, "Judge, I'm offering the exhibits to establish that the defendant, Ronald Mack, was in the second bedroom as opposed to what we consider the master bedroom, which was where the murder weapon was found." (App. p. 528, lines 10-13). Petitioner argued that the gang related material in the notebook was irrelevant. (App. p. 528, lines 15-22). The State argued, "And Judge, we would certainly submit that the whole motive regarding why this child was shot was because Ronald Mack was a member of a gang and that's just how they dealt with people they had disagreements with and so certainly that would corroborate the motive as we see it and corroborate his testimony regarding being in a gang." (App. p. 528, line 23 – p. 529, lines 1-3). The judge initially admitted both notebooks but then took a break to allow defense counsel to further review the notebooks. (App. p. 529, lines 16-25). The judge noted, "It's all gang stuff, seems to me, but if you can, we'll take a break and let him look at it and see if you have anything else to say about it." (App. p. 529, lines 20-22).

After the break counsel for Petitioner again argued that the notebooks were irrelevant and also objected to the admission of the notebooks because they contained inflammatory prejudicial gang references. (app. p. 530, lines 1-21). Counsel stated, "Then when you, it also has some inflammatory language and I particularly refer to and we don't know when it was written says that 'Leave da crab ass nigger in da funeral home' and I don't want that kind of connotation is, but

again, it's one kind of writing here and then when you compare it to the eighty- one, eighty- one has no name in it whatsoever." (App. p. 530, lines 4-10). The State argued, "I think it's clearly relevant to establish that one, that he was in a gang, which corroborates his earlier testimony and two, to establish that that was his bedroom as opposed to the master bedroom." (App. p. 531, lines 5-8). Also admitted in evidence as State's Exhibit #83 was a class schedule issued to Ronald Mack and found in the second bedroom where the notebooks were found.

A co-defendant, Antonio McClary, testified at trial that Ronald Mack and the deceased were drug dealers and gang members. (App. p. 428, lines 1-12). McClary also testified that Ronald Mack told him that the deceased owed him some money. (App. p. 384, lines 8-18). At trial Mack admitted that he was in a gang. (App. p. 311, lines 21-23). Petitioner was the boyfriend of Ronald Mack's mother, Tawanda Mack Allen, and lived in Maryland.

The judge sustained the objection to State's Exhibit #81 but overruled the objection to State's Exhibit #82 stating:

> The State has the burden of proving conspiracy, putting the co defendants together, putting the defendants together with the murder weapon. Ronald Mack nor Mr. Bowen, neither one and they were not they were arrested outside, of course at this point the reference to gang type symbols and all as it relates to Ronald Mack must be weigh to, Bowen, weighed toward the probative value of the evidence and the Court certainly has to consider that and also the book that Mr. Jenkinson says is in the different handwriting and that one where the word composition is struck through leaving the word Compton, and the Court would take judicial notice that is a city in Southern California. At this point I'm going to admit number eighty-two containing Ronald Mack's name, and leave for identification at this time number eighty-one for identification purposes.

(App. p. 531, lines 9-25). Kelly Harding, a police officer from Maryland then testified, over objection, that the notebook contained gang writing. (App. pp. 533 – 537). The officer was qualified as an expert in gang detection, activity and writing. (App. p. 537, line 25 – p. 538, lines 1-

4). The officer testified that specific writing in the notebook referred to the Blood gang. The officer also testified about the Blood code of honor. (App. pp. 536-538).

On direct appeal Petitioner argued that his federal and state constitutional rights to due process of law were violated by the admission of a witness's identification of Appellant where the out-of-court identification process was unnecessarily suggestive and conducive to irreparable mistaken identification. The South Carolina Court of Appeals affirmed the convictions and sentences.

In the initial application for post conviction relief Petitioner alleged that, "Hackett, [appellate counsel] failed to raise and brief the issue that the trial court abused it discretion when it allowed the State to improperly admit evidence of a general criminal intent by the inference of gang activity, when neither gang activity was not an allegation against Applicant nor any evidence that Applicant was a gang member and only worked to prejudice Applicant, creating an inference of guilt from bad character, in violation of Applicant's Sixth and Fourteenth Amendment to a fair trial and due process of law." (App. p. 866). Petitioner raised the issue during the PCR hearing. (App. p. 932, line 20 – p. 933, 934, 935, lines 1-9). Petitioner argued that appellate counsel was ineffective in failing to challenge the admission of State's Exhibit #82. The PCR hearing was held in Sumter County while the trial was held in Williamsburg County. The trial exhibit, State's Exhibit #82, remained in Williamsburg County. Petitioner introduced a photograph of the notebook at the PCR hearing in Sumter County. (App. p. 933, line 22 – p. 934, lines 1-4; Plaintiff/Applicant's Exhibit #14[1]).

In the order of dismissal the PCR judge wrote:

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[1] Counsel for Petitioner was not able to locate exhibits introduced during the PCR hearing. State's Exhibit #82 is on file with the Williamsburg County Clerk of Court. A transportation order will be prepared for this exhibit to be delivered to the Court.

> Applicant alleges appellate counsel was ineffective for failing to brief the issue of whether the court abused its discretion in allowing exhibit #82 – Co-Defendant Mack's composition notebook into evidence. This Court finds this allegation without merit. This issue is not clearly stronger than the single photograph array issue raised by appellate counsel. This Court notes Applicant failed to provide State's Trial Exhibit 82 for this Court's review. This Court will not speculate as to the contents contained in this exhibit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. This allegation is readily denied and dismissed with prejudice.

(App. p. 1005). The PCR judge erred. First, as addressed in issue two below, while State's Exhibit #82 was not re-introduced at the PCR hearing, it was introduced at trial and part of the record below. Second, the discussion of the exhibit during the trial supports the fact that appellate counsel was ineffective for failing to raise the issue of whether the trial judge abused his discretion in admitting State's Exhibit #82, the composition notebook containing irrelevant and prejudicial gang language.

The gang references in the notebook are irrelevant and highly prejudicial. While there was testimony that both the deceased and Ronald Mack were in a gang, the State did not argue that the shooting was gang related. McClary testified that the deceased owed Ronald Mack money. (App. p. 384, lines 8-18). Additionally, Ronald Mack admitted that he was in a gang so the State did not need the gang material for impeachment. The State did not need the notebooks to establish which bedroom belonged to Ronald Mack. The State could easily have used the class schedule to establish that Ronald Mack's bedroom was the second bedroom and not the master bedroom where the weapon was found. The details and explanations by the Maryland police officer about the gang references contained in the notebook and the Blood code of honor is highly prejudicial. The reference to 'Leave da crab ass nigger in da funeral home' is inflammatory and highly prejudicial. Trial counsel objected to the admission of the notebook containing the gang references and prior to the State's closing argument asked the trial judge, "Your Honor, I would just ask the Court to make

sure the Solicitor proceeds with caution as to any gang related activities in her argument. We ask to make sure that's not included in the arguments." (App. p. 793, lines 3-6). Appellate counsel should have challenged the admission of the gang references on appeal.

In Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) the South Carolina Supreme Court wrote:

> A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

Appellate counsel was ineffective in failing to raise the meritorious claim that the judge abused his discretion in admitting State's Exhibit #82, the composition notebook, that included irrelevant and prejudicial gang language. See State v. Sobers, 404 S.C. 263, 266, 744 S.E.2d 588, 590 (Ct. App. 2013). The issue is stronger than the identification issue raised by appellate counsel. Petitioner was prejudiced by appellate counsel's deficient performance. There is a reasonable probability that if appellate counsel had raised the issue in regard to the notebook containing gang language and references, Petitioner would have prevailed on direct appeal and a new trial would have been granted.

2. The PCR judge erred in stating that he would not speculate as to the contents of the notebook, State's Exhibit # 82, because Petitioner did not introduce the notebook at the PCR hearing when the notebook was clearly entered in evidence at trial and discussed at length prior to admission.

In the order of dismissal the PCR judge wrote, "This Court notes Applicant failed to provide State's Trial Exhibit 82 for this Court's review. This Court will not speculate as to the contents contained in this exhibit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809." The PCR judge did not have to speculate as to the contents of the exhibit. The exhibit was entered into evidence at trial and was part of the record below. The PCR judge's reliance on Bannister v. State, 333 S.C. 302, 509 S.E.2d 807(1998) is misplaced. In Bannister the PCR applicant alleged that trial counsel was ineffective in failing to subpoena a witness but failed to call the witness or introduce her testimony at the PCR hearing. The Court wrote:

> This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, 318 S.C. at 498–99, 458 S.E.2d at 540. The State's failure to object to respondent's testimony as to Ms. James' alleged testimony does not relieve respondent of the burden of producing and/or offering Ms. James' testimony in accordance with the rules of evidence.

Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). In contrast, in the present case State's Exhibit #82 was part of the record below and should have been considered by the PCR judge.

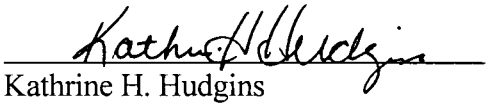
Although the PCR judge did not have the benefit of the actual notebook entered in evidence as State's Exhibit #82,[2] as discussed above in issue one, there was adequate information in the trial transcript to allow the PCR judge to make findings of fact and conclusions of law in regard to the issue of whether appellate counsel was ineffective for failing to raise the issue of whether the trial judge abused his discretion in admitting State's Exhibit #82, the composition notebook containing irrelevant and prejudicial gang language. The PCR judge erroneously found that appellate counsel was not ineffective and Petitioner asks this Court to reverse that decision by the PCR judge and remand for a new trial. Alternatively, Petitioner asks this Court to remand the case to the PCR judge to allow him to rule on the issue after considering State's Exhibit #82.

[2] The trial exhibit remained in Williamsburg County while the PCR hearing was held in Sumter County.

CONCLUSION

Based on the argument presented in issue one, this Court should reverse the finding of the PCR judge and remand for a new trial. Based on the argument presented in issue two, this Court should remand the case to the PCR judge for further findings after reviewing State's Exhibit #82.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Julie Coleman, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of June, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of June, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.