

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
D. Craig Brown, Circuit Court Judge

RECEIVED

JUN 28 2016

SC SUPREME COURT

BENNIE GOLSTON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000289

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

1.

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to introduce a color copy of Petitioner’s booking photograph at trial when the picture, which showed marks or scratches on Petitioner’s face, would have corroborated Petitioner’s testimony that he acted in self-defense after his girlfriend “jumped” on him and “clawed” his face, mouth, and nose.....4

Facts at Trial.....4

PCR Hearing.....6

Order of Dismissal.....7

Discussion.....7

CONCLUSION11

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to introduce a color copy of Petitioner's booking photograph at trial when the picture, which showed marks or scratches on Petitioner's face, would have corroborated Petitioner's testimony that he acted in self-defense after his girlfriend "jumped" on him and "clawed" his face, mouth, and nose?

STATEMENT

A Lexington County Grand Jury indicted Petitioner at the May 12, 2009 term of the Court of General Sessions for criminal domestic violence of a high and aggravated nature (CDVHAN). App. 596-597. His case was called to trial on May 13, 2009 before the Honorable R. Knox McMahon, and a jury. App. 1. Assistant Solicitors Rhonda Patterson and Kate Whetstone represented the state, and Matthew Buchanan and David Mauldin represented Petitioner. App. 1. On May 14, 2009, the jury found Petitioner guilty. App. 353, ll. 18-22. He was sentenced by Judge McMahon to ten years' imprisonment. App. 367, l. 22 – 368, l. 2.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012). This Court denied the petition for writ of certiorari to the Court of Appeals. App. 464. The state was represented by Assistant Deputy Attorney General Deborah R.J. Shupe, and Petitioner was represented by LaNelle Durant. App. 417.

On December 27, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 465-476. The state filed a return to this application dated June 13, 2014. App. 477-481. Petitioner filed an amended application for post-conviction relief on April 13, 2015 and a second amended application on October 1, 2015 raising the issue argued in this petition. App. 482-487. The matter proceeded to an evidentiary hearing on December 9, 2015 before the Honorable D. Craig Brown. App. 488. Assistant Attorney General Patrick Schmeckpeper represented the state, and Kristy Goldberg represented Petitioner. App. 488. By order dated February 1, 2016, Judge Brown denied Petitioner relief. App. 583-595.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to introduce a color copy of Petitioner's booking photograph at trial when the picture, which showed marks or scratches on Petitioner's face, would have corroborated Petitioner's testimony that he acted in self-defense after his girlfriend "jumped" on him and "clawed" his face, mouth, and nose.

Facts at Trial

On the morning of March 22, 2008, movers arrived at Myrtle Johnson's house in Lexington to deliver furniture from her deceased mother's home in New Jersey. When the movers received no response to their knock at the door, they walked to a neighbor's home. The neighbor, Gail Jones, agreed to check on Johnson. Jones entered Johnson's house and found her lying on a mattress in a bedroom with swelling and injuries to her face. App. 150, l. 12 – 151, l. 25.

Jones called 911. App. 153, ll. 7-10. When officers arrived, they asked Johnson what happened. She told them her boyfriend beat her during an argument around midnight the night before. App. 172, l. 6 – 173, l. 1; App. 187, l. 23 – 189, l. 2.

Johnson testified she and Petitioner had been in a relationship for about five years, and that he stayed with her "off and on." Sometimes he stayed with her for an entire week at a time and other times he would only stay a couple of nights. Petitioner also allegedly kept various personal belongings at her house. App. 121, l. 3 – 122, l. 11.

The day before, Johnson's friend, Alfred Hunter, and his wife came over to paint and do repair work to her house since Johnson was moving her mother's furniture into the home the next day. App. 122, l. 15 – 123, l. 21. Johnson claimed Petitioner became jealous of Hunter. App. 124, ll. 7-25. That night, she said Petitioner, who had been drinking, told her "he should beat me for

bringing that man [Hunter] in our home.” App. 124, ll. 7-23. Johnson claimed Petitioner beat her face and head with his fists. She also claimed that, while Petitioner did not hit her with a hatchet, he rubbed the steel over her skin. App. 125, l. 3 – 128, l. 9. Most of the confrontation occurred outside the front of the home after Johnson tried to flee in her car. After the attack, Johnson said she managed to crawl back into the house. She went to sleep and did not wake up until she heard Jones’ voice the next morning. App. 128, l. 11 – 129, l. 9.

During her testimony, Johnson admitted she talked to law enforcement the next morning, but she claimed she did not remember telling officers that no weapons were used in the assault. App. 275, l. 20 – 276, l. 12; App. 276, l. 21 – 277, l. 14. However, neighbor Jones testified that she was in Johnson’s bedroom when the police questioned Johnson and Johnson told the police approximately *three times* that no weapons were used against her during the altercation. App. 278, l. 16 – 279, l. 7.

Deputy Kevin Blake, who responded to Johnson’s house that morning, maintained that Johnson was hit with a piece of firewood and that he found a piece of firewood with hair on it outside the residence. App. 174, l. 7 – 175, l. 19. However, no DNA analysis was conducted on the hair. App. 184, l. 21 – 185, l. 2.

After law enforcement responded, Johnson was taken to the trauma center at Palmetto Richland Hospital. App. 131, l. 23 – 132, l. 20. A C.A.T. scan showed no fractures or broken bones. However, Johnson had a large amount of swelling to her face, and her eyes were swollen shut. She spent a few hours in the emergency room during the day, but was discharged from the hospital later that same evening. App. 228, l. 3 – 231, l. 5.

Petitioner testified that he did not live with Johnson, but that they had an intimate relationship and he occasionally slept at her home. App. 289, ll. 1-4. He said on the night of the

altercation, Johnson became furious with him, and began to leave the home. When he told her to stay, she turned, “jumped” on him, and began “clawing” him in the face. “She clawed him on both sides of his nose” and “cut [his] lip all the way through.” Petitioner admitted he slapped Johnson in self-defense, and that she fell. After she fell, Petitioner went into the house and got a hatchet, but when he got outside, Johnson had calmed down and asked him to help her get up. He put the hatchet on top of the car, helped Johnson up, and left. App. 292, l. 1 – 293, l. 20.

During Petitioner’s testimony, the state presented a black and white copy of Petitioner’s booking photograph from the day of his arrest for this offense along with his booking report. The state asked Petitioner on cross-examination whether “anything on [his] booking report” indicated he “had any injury to [his] face.” Petitioner answered, “No, but ask the police.” App. 299, l. 15 – 301, l. 6. The booking report and photograph were marked for identification as State’s Exhibit No. 26, but the exhibit was never admitted into evidence because it was never properly authenticated. App. 301, l. 7 – 302, l. 7.

The jury ultimately convicted Petitioner of CVDHAN and Judge McMahon sentenced him to the maximum ten years’ imprisonment. App. 353, ll. 18-22; App. 367, l. 22 – 368, l. 2.

PCR Hearing

Petitioner testified at the PCR hearing that his trial counsel should have introduced a color copy of his booking photograph from his arrest because it showed scratches on his face that would have corroborated his testimony that Johnson “jumped on [him]” and struck him in the mouth, nose, and face. App. 502, l. 18 – 505, l. 12.

Matthew Buchanan, Petitioner’s trial counsel, testified that he received a black and white copy of Petitioner’s booking photograph through discovery. App. 518, l. 23 – 519, l. 3. He tried to obtain a color copy from the detention center, but was never “able to find one.” App. 523, l. 22 –

524, l. 6. Buchanan admitted the color copy of Petitioner's booking photograph, which was admitted as Applicant's Exhibit No. 3 and is on file with this Court, showed "some kind of discolorations right on his cheeks below his eyes." He further admitted that the color copy of Petitioner's booking photograph would have corroborated Petitioner's testimony and self-defense argument if it had been presented at trial. App. 524, ll. 11-23.

Order of Dismissal

The PCR court found Petitioner failed to meet his burden of proving trial counsel was ineffective for failing to introduce a color copy of his booking photograph at trial. App. 591. The court stated, "[C]ounsel had access to the smaller, black and white version of the booking photograph. That photograph does not appear to show the presence of any marks or scars, and in fact the report that is attached indicates [Petitioner] had no marks or scars at the time of arrest." App. 591.

Moreover, the court found Petitioner failed to prove any prejudice. App. 592. Specifically, the court found Petitioner failed to present any evidence that the marks on his face in the booking photograph "are consistent with finger nail scratches" or prove when the marks "were made in relation to the time the photograph was taken." App. 592. Additionally, the court stated Petitioner failed to show "that the marks were actually on his face, rather than simply marks on the photograph." App. 592.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to introduce a color copy of Petitioner's booking photograph at trial when the picture, which showed marks or scratches on Petitioner's face, would have corroborated Petitioner's testimony that he acted in self-defense after Johnson "jumped" on him and

“clawed” his face, mouth, and nose. Moreover, counsel’s failure to introduce the colored booking photograph left the testimony elicited from Petitioner by the state that his booking report did not indicate he had any injuries to his face unchallenged since, while the report did state he had no “Scars/Marks/Tattoos,” the booking photograph clearly shows marks or scratches on Petitioner’s face. See App. 370.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686; also Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

Here, trial counsel’s performance was deficient when he failed to obtain and present a color version of Petitioner’s booking photograph from the date of his arrest for this offense. The color version of Petitioner’s booking photograph clearly shows marks or scratches on Petitioner’s face. The PCR court even noted the color booking photograph showed Petitioner had “some sort of facial lacerations.” App. 592. This photograph would have corroborated Petitioner’s testimony

that Johnson “jumped” on him and “clawed” his face during the altercation. It would have also supported Petitioner’s defense that he “slapped” Johnson in self-defense after she attacked him. Therefore, this photograph was crucial to Petitioner’s defense.

Additionally, the PCR court’s finding that “the smaller, black and white version” of Petitioner’s booking photograph, which trial counsel had access to before trial, “does not appear to show the presence of any marks or scars” is without evidentiary support. Even this smaller, black and white version shows a distinctive mark under Petitioner’s right eye. This fact should have put counsel on notice that further investigation was needed to confirm the presence of injuries on Petitioner’s face from Johnson’s attack.

Even if the smaller, black and white version of Petitioner’s booking photograph did not show any marks or scratches on his face, this does not excuse trial counsel’s failure to properly investigate and obtain a color copy of the photograph to present to the jury. A thorough investigation would have revealed this crucial piece of evidence.

Counsel’s failure to obtain the color photograph and present it to the jury constituted deficient performance.

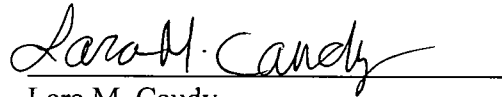
Petitioner was prejudiced because this additional evidence, which corroborated Petitioner’s testimony and supported his defense of self-defense, likely would have tipped the scales in favor of an acquittal. This evidence, if presented, would have created a reasonable doubt that caused the jury “to hesitate to act.” See State v. Johnson, 315 S.C. 486, 487, 445 S.E.2d 637, 637 (1994) (quoting State v. Manning, 305 S.C. 413, 417, 409 S.E.2d 372, 375 (1991)) (A “reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.”); see also Holland v. United States, 348 U.S. 121, 140 (1954).

Therefore, this Court respectfully should hold the PCR court erred, reverse Petitioner's conviction, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
D. Craig Brown, Circuit Court Judge

BENNIE GOLSTON,

PETITIONER,

V.

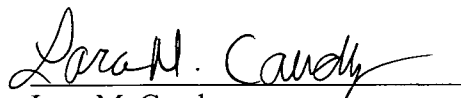
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000289

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 Patrick Schmeckpeper, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of June, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of June, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.