ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chester County

R. Knox McMahon, Circuit Court Judge

CASEY RAYMOND PERKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000270

JOHNSON PETITION FOR WRIT OF CERTIORARI

Susan B. Hackett
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ISSUE PRESENTED

Did trial counsel provide ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, by failing to object to inadmissible hearsay where the testimony linked Petitioner to the only physical evidence in the case?

STATEMENT

On October 4, 2005, a Chester County grand jury indicted Petitioner for murder (2005-GS-12-438). App. 1841-1842. Prior to trial, the state sought Petitioner's major case prints and a buccal swab from which to develop a DNA profile. App. 1. On October 21-22, 2008, and November 21, 2008, the state moved, pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to admit multiple statements made by Petitioner to multiple police officers. App. 35; App. 397. On November 21, 2008, the Honorable Brooks P. Goldsmith determined the statements were admissible. App. 426, l. 16 – App. 427, l. 15. The state, represented by Doug Barfield, called the case to trial before Judge Goldsmith and a jury on December 15, 2008. App. 430. Geoffry Dunn and Bradley Jordan represented Petitioner. App. 430. The jury found Petitioner guilty as charged. App. 1634, ll. 10-15. Judge Goldsmith sentenced petitioner to fifty years' imprisonment. App. 1648, ll. 1-2.

Petitioner filed a notice of appeal, which was perfected by Robert M. Dudek. App. 1650-1667. On appeal, Petitioner challenged the trial judge's refusal to instruct the jury concerning the lesser-included offense of voluntary manslaughter. App. 1650-1667. On September 12, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. App. 1698-1699; State v. Perkins, 2012-UP-525 (S.C. Ct. App. filed Sept. 12, 2012). Remittitur was sent on September 28, 2012. App. 1700.

On June 21, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 1701-1708. On that same date, Petitioner filed amendments to his application. App. 1709-1715. Petitioner also requested the appointment of counsel and for appointed counsel to amend the PCR application. App. 1716-1718. On March 6, 2014, Petitioner, through counsel James Goldsmith, Jr., amended the application. App. 1724-1738. On January 5, 2015, Petitioner,

through counsel Adam Owensby and Wendy Keefer, filed a supplemental petition for PCR. App. 1739-1753. On August 12, 2015, the matter proceeded to an evidentiary hearing before the Honorable R. Knox McMahon. App. 1754. Guy J. Vitetta and Owensby represented Petitioner. App. 1754. J. Croom Hunter represented the state. App. 1754. By an order filed December 18, 2015, Judge McMahon denied relief. App. 1829-1840.

Petitioner filed a timely notice of appeal. This petition follows.

ARGUMENT

In violation of the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to object to inadmissible hearsay where the testimony linked Petitioner to the only physical evidence in the case.

Relevant facts

Trial

On August 26, 2005, Petitioner was visiting and eating supper at his neighbor Bob Rush's home. App. 538, l. 6-15; App. 549, ll. 2-7; App. 556, l. 15 – App. 557, l. 2; App. 623, ll. 6-11; App. 1071, ll. 6-17. Around 10:30 p.m., another neighbor, John Bernat, called asking for Petitioner's assistance with two cars that were not working. App. 538, l. 25 – App. 539, l. 24; App. 558, ll. 3-24; App. 623, ll. 12-25; App. 1071, ll. 14-17. Shortly thereafter, Petitioner arrived at Bernat's house. App. 539, l. 24 – App. 540, l. 12; App. 551, ll. 8-22; App. 558, ll. 3-24; App. 624, ll. 3-23; App. 1071, ll. 19-21. After working on the car diligently, Petitioner left Bernat's home around 1:30 a.m. on August 27, 2005, and returned to his residence just a few doors down. App. 628, ll. 12-23; App. 1071, l. 22 – App. 1072, l. 2.

Between 1:30 a.m. and 2:00 a.m. on August 27, 2005, Danielle Brodeur, her sister, Amanda Hinson, and her fiancé, Albert Amman, returned home after a late night out with friends. App. 654, ll. 5-12; App. 695, ll. 2-21; App. 696, ll. 20-21; App. 1386, l. 2 - App. 1387, l. 9. The three of them lived with Danielle and Amanda's mother, Judy Hinson. App. 644, ll. 1-18; App. 1385, ll. 7-25. Upon their arrival, Danielle and Albert took the dogs for a walk while Amanda went to her room to talk to her boyfriend. App. 655, ll. 19-24; App. 656, ll. 1-5; App. 697, ll. 1-19; App. 1388, ll. 17-21. Upon re-entering the home with the dogs, Danielle noticed that one dog was acting unusual by barking at the door of Danielle's mother's bedroom. App.

658, ll.9-23; App. 661, ll. 3-6; see also, App. 1390, ll. 2-9. Danielle entered her mother's room and found her mother in a large pool of blood. App. 663, ll. 12-24; App. 1390, ll. 10-21. While Albert attempted CPR, Danielle called 911. App. 665, ll. 2-24; App. 701, ll. 2-24; App. 1394, ll. 5-25.

When emergency medical personnel arrived, it was determined that Hinson was deceased. App. 577, ll. 23-24. The pathologist's examination of the body revealed "tooth marks on the decedent's lower lip, some minor abrasions around her upper lip that were consistent with pressure being forced on her mouth. And along with that there was some vomit that had come into her mouth and into her nose, it was not expelled from her mouth." App. 751, ll. 18-25. Based upon these observations, the pathologist opined that there was some degree of asphyxiation involved in Hinson's death. App. 751, ll. 2-15; App. 751, ll. 22-25. Further, the pathologist concluded Hinson died as a result of "[b]lood loss due to penetrating trauma of the rectovaginal area." App. 758, ll. 1-8. He opined the injury may have been caused by the use of a hand in the area. App. 759, ll. 17-23.

The police quickly focused the investigation on Petitioner in light of his prior conviction for a sex-related offense. R. 46, ll. 11-25; R. 48, l. 19 – R. 49, l. 25. In fact, the police arrested Petitioner for failure to register as a sex offender in hopes of linking Petitioner to Hinson's death. App. 23, ll. 12-25; App. 49, ll. 22-25; App. 169, ll. 9-25. Although Petitioner initially and repeatedly denied any involvement, on September 7, 2005, Petitioner told the Sheriff that he and Hinson engaged in consensual sexual activity, including oral sex, use of a dildo, and fisting. App. 1312, ll. 3-12; App. 1321, l. 15 – App. 1322, l. 22; App. 1327, ll. 1-2; App. 1332, l. 3 – App. 1333, l. 5; App. 1335, l. 15 – App. 1336, l. 1; App. 1337, l. 5 – App. 1338, l. 5. During this

sexual activity, Hinson began bleeding. App. 1327, ll. 3-11. Petitioner was scared and left. App. 1322, l. 23 – App. 1323, l. 2.

Although the police had Petitioner's "confession," the prosecution was short on any other evidence connecting Petitioner to the crime. The crime scene was devoid of Petitioner's DNA or fingerprints. App. 867, ll. 4-7; App. 1353, ll. 1-22. The police found a knife and a cigarette lighter outside the window where it appeared the perpetrator left. App. 669, ll. 22-25; App. 843, ll. 5-25; App. 848, ll. 19-23. However, the items had no fingerprints or DNA to connect Petitioner to them. Most specifically, the police recovered no fingerprints from the lighter or knife. App. 860, ll. 1-6; App. 1057, ll. 5-6. Although the police found a fingerprint near the window, the police were unable to identify the print to anyone, and, in fact, the police eliminated Petitioner as the one who left the print. App. 862, ll. 5-11. During the lengthy interrogation, one officer noted Petitioner had not mentioned anything about the knife. App. 1250, l. 24 – App. 1251, l. 123. To ensure the "confession" matched the evidence, the officer asked Petitioner about the knife during one of the breaks. App. 1250, l. 24 – App. 1251, l. 23. According to the officer, Petitioner said he got a knife from Hinson's kitchen, but did not use it. App. 1251, l. 24 – App. 1252, l. 2; App. 1252, ll. 12-23.

After the interrogation, the police searched Petitioner's residence. App. 907, ll. 1-4. The police found Petitioner's blue shirt and blue jeans in a tire beside the garage. App. 907, ll. 5-18; App. 955, l. 10 - App. 956, l. 20. According to the officers, the clothing smelled of gasoline. App. 962, ll. 1-2. A trace evidence analyst determined gasoline was on the jeans. App. 982, ll. 18-24.

In an effort to connect Petitioner to the lighter found at the scene, the state called three witnesses – a family from the neighborhood – to testify about seeing Petitioner with a particular

brand of lighter prior to Hinson's death. One of the neighborhood kids, Zack W. claimed Petitioner used a DJeep lighter. App. 562, ll. 2-15. He also recalled that Petitioner gave him a lighter to give to his mother, Mary, which was the same brand and color as the one Petitioner had. App. 559, l. 14 - App. 562, l. 15. Additionally, he claimed the lighter was the same brand and color as the one found at the crime scene. App. 561, ll. 7-21.

The state also called Zack's mother, Mary, to testify. According to Mary, Petitioner gave her a DJeep lighter the Wednesday before Hinson's death. App. 569, ll. 3-13. She recalled that she was working in Rock Hill at the time and that her husband arrived with several people, including Petitioner and her son, Zack, to pick her up from work. App. 569, ll. 13-17. She told the jurors that Zack said to Petitioner, "Don't forget to give my mom the gift you got her." App. 569, ll. 17-18. The gift referred to the lighter. App. 569, l. 19. According to Mary, Petitioner handed the lighter to Zack, who passed it to her. App. 569, ll. 19-20. She recalled that Petitioner bought a lighter for himself and one for her husband. App. 570, ll. 8-11. While talking to law enforcement, Mary told the investigator that she was not sure what kind or color of lighter Petitioner used. App. 571, ll. 1-9. It was then, according to Mary, that Zack said, "Mom, [Petitioner] had the same color lighter as you." App. 571, ll. 11-12.

Zack's father, Don, claimed Petitioner gave him a DJeep lighter as well. App. 590, ll. 3-4; App. 604, ll. 8-12; App. 604, ll. 16-23. Don alleged he received the lighter within five days of Hinson's death. App. 590, ll. 5-7; App. 604, ll. 13-15.[1] However, Don denied ever seeing Petitioner with a DJeep lighter until shortly before Hinson's death because those lighters were "too expensive." App. 605, ll. 2-14. According to Don, Petitioner also bought a lighter for Don's wife, Mary. App. 606, ll. 1-17. Somewhat confusingly, Don claimed Petitioner kept a

[1] According to the police, Don said he got the lighter from Petitioner three weeks prior to Hinson's death. App. 960, ll. 5-12.

DJeep lighter for himself that was the same color as the one Petitioner gave his wife. App. 606, ll. 13-16.

PCR hearing

Petitioner maintained at the PCR hearing that the cigarette lighter found at the crime scene was not his. App. 1769, ll. 20-22. According to trial counsel, the only physical evidence presented by the state was a cigarette lighter found at the crime scene and Petitioner's clothes found at his home. App. 1776, ll. 19-21. The police found no fingerprints on the lighter. App. 1776, ll. 22-25. Additionally, trial counsel acknowledged he did not object to hearsay testimony linking Petitioner to the lighter, or one just like it, found at the crime scene. App. 1794, l. 15 – App. 1795, l. 14.

Order denying relief

In rejecting this claim, the PCR court stated that "[a] criminal defendant is entitled to a fair trial, not a perfect one." App. 1838. In the PCR court's view, "trial counsel vigorously challenged the state's case." App. 1838. The PCR court concluded Petitioner "did not demonstrate any deficiencies in counsel's representation." App. 1838. The PCR court continued, finding that "because counsel's representation was well within the range of competence required in criminal cases, [Petitioner] has further failed to make any showing that but for counsel's alleged deficiencies, the result of [Petitioner]'s case would have been any different." App. 1838-1839.

Discussion

"The benchmark for judging any claim of ineffectiveness must be whether 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 v. Washington, 466 U.S. 668, 686 (1984).

In order to prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not alter the outcome in the case." Id. at 694. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel's failure to object to Mary's testimony fell below an objective standard of reasonableness. "Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Mary's testimony regarding what her son said was an out of court statement offered for the truth of the matter asserted; thus, it was the very definition of hearsay. An examination of the South Carolina Rules of Evidence, and the case law interpreting those Rules reveals the testimony did not fall within one of the exceptions.[2]

In light of Zack's availability to testify, Rule 804, SCRE, is not applicable. Thus, the only potential mechanism for the state to use to argue the admissibility of the hearsay testimony

[2] The statement allegedly made by Mary's son could not fall within the Rule 801(d)(1), SCRE, definition of statements by witnesses which are not hearsay because it was not inconsistent with his testimony, was not offered to rebut an express or implied charge of recent fabrication or improper motive, was not one of identification, and did not concern a sexual assault. Thus, Rule 801(d)(1), SCRE was inapplicable.

was Rule 803, SCRE, for which the availability of the declarant is not material. The Rules of Evidence permit the introduction of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" as an exception to the bar against hearsay. Rule 803(1), SCRE. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." State v. Hendricks, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014); see also, United States v. Mitchell, 145 F.3d 572, 576 (3rd Cir. 1998). The state failed to present evidence to satisfy any of the three elements.

The Rules of Evidence provide an exception for the admissibility of excited utterances as well. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. "The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication." State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006)(citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)). In State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), "the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault." The Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." Id. The Court also noted that the statements did not amount to an excited utterance because there was "a

great deal of time for reflection" before the victim made the statements to the police officer and nurse. Id. at 500, 492 S.E.2d at 413.

In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), the Court held the admission of the victim's statements to her stepmother regarding details of the assault under the excited utterance exception to the hearsay rule was reversible error where a considerable time period had passed between the assault and the statement giving the victim time to reflect. The Court further held the stepmother's testimony was cumulative because it mirrored that of the victim and improperly bolstered the victim's story in the minds of the jury. Id. at 156, 515, S.E.2d at 772.

The state presented no evidence that Zack's statement regarding the color of the lighter was an excited utterance. There was no evidence that he was experiencing an exciting or stressful event or that his words were uttered during such an event. By all accounts, his statements regarding the color of the lighter were provided during a police interrogation of his mother, and his statements were made to fill in holes of her memory.

Counsel's deficient performance prejudiced Petitioner because of the state's weak case against him. Certainly, the state presented his confession, but it was riddled with problems, including Petitioner's fatalism, Petitioner's repeated denials of conduct within the statement, internal inconsistencies, and the evidence presented by Petitioner's false confessions expert. The state had no fingerprints and no DNA. The only physical evidence in the case was a knife, the cigarette lighter, and Petitioner's clothing. The state could not link the knife to Petitioner. The state could not link Petitioner's clothing to the crime. The only link between Petitioner and the crime scene was the cigarette lighter, which the state was able to link to Petitioner through hearsay evidence. Trial counsel should have objected, and his failure to do so was prejudicial to

Petitioner. Had trial counsel objected, he would have been successful in having the testimony excluded or stricken. Without the evidence of Petitioner's ownership of the lighter found at the scene, there is a reasonable likelihood that the result of Petitioner's trial would have been different because that was the only physical evidence incriminating Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the petition and order full briefing on the issue presented.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chester County

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CASEY RAYMOND PERKINS,

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Casey R. Perkins 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 entire lower court record involving Petitioner's case, including Petitioner's PCR hearing before Judge R. Knox McMahon, which was held on August 12, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, Counsel requests that the Court relieve her as counsel for Casey R. Perkins.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Casey R. Perkins, #286100, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of October, 2016.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of October, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.