

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Brooks P. Goldsmith, Circuit Court Judge

LEXIE JAMES TURNER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000648

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT
PETITIONER,

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where trial counsel failed to employ an expert witness to counter the testimony of the State's expert witness concerning intoxicating doses and possession of crack cocaine?

STATEMENT

Petitioner proceeded to a two-day jury trial in front of the Honorable Steven H. John beginning on February 26, 2013 after being indicted for possession with intent to distribute crack cocaine (2012-GS-46-2872) and distribution of cocaine base (2012-GS-46-4278) by a grand jury in August 2012. Christopher Epting and Jenny Desch represented the State, and Melissa Inzerillo represented Petitioner.

Using a confidential information, law enforcement executed a controlled buy involving crack cocaine in York County on May 18, 2012. App. 70 line 6 – App. 71 line 7; App. 73 line 23 – App. 74 line 16. Petitioner was in the passenger seat of a Suburban which pulled into a liquor store parking lot where the informant was waiting. App. 77 line 22 – App. 21. Law enforcement was actively monitoring the situation and took action when an alleged drug transaction was observed. App. 82 line 23 – 25. Officers with the York County Drug Enforcement Unit blocked the Suburban in its parking spot and approached the driver and Petitioner. Officer Brown handcuffed Petitioner to the Suburban and then noticed a bag of crack cocaine in the console of the Suburban. App. 84 line 19 – App. 85 line 19.

After reading from his “Constitutional Rights” card, Brown sought to determine ownership of the cocaine. App. 85 line 25 – App. 88 line 13. Petitioner confessed that it belonged to him, and he was arrested. App. 88 lines 14 – 15. During the booking process at the Rock Hill Police Department, Brown asked Petitioner how much the cocaine weighed. App. 90 line 9 – App. 91 line 7. Petitioner responded, “about two grams.” App. 91 line 8. The serial numbers on the twenty dollar bill recovered from Petitioner matched that of the bill used by the confidential informant during the controlled buy. App. 91 line 16 – App. 91 line 7.

The State sought to have Brown qualified as an expert witness in the realm of crack cocaine packaging, dosage, and possession. App. 100 line 21 – App. 101 line 3; App. 105 lines 9 – 22. The trial court qualified Brown as an expert in the proposed topics. App. 107 lines 11 – 19; App. 112 lines 16 – 18. Brown testified regarding the appearance, packaging, and dosage of crack cocaine. App. 112 line 22 – App. 116 line 21. Additionally, he testified about the cost of the crack cocaine recovered from the Suburban and general distribution tactics. App. 117 line 8 – App. 118 line 3.

Including Brown, a total of six witnesses testified on behalf of the prosecution. Defense counsel did not call any witnesses during Petitioner's case in chief. Following closing arguments, the jury found Petitioner guilty of possession with intent to distribute cocaine base (2012-GS-46-02872). App. 279 lines 4 – 7. The jury found Petitioner not guilty of distribution of cocaine base (2012-GS-46-04278). App. 279 lines 8 – 11. The Honorable Steven H. John sentenced Petitioner to eleven years' imprisonment. App. 285 lines 5 – 15. Petitioner's conviction was affirmed. No. 2015-UP-168 (Filed April 1, 2015). The Remittitur was issued on April 17, 2015.

Petitioner filed a timely application for post-conviction relief on May 28, 2015. App. 288. Petitioner's application contained an allegation that he was provided with "insufficient counsel". The State made its Return on or about October 22, 2015. App. 295. An evidentiary hearing was conducted on November 4, 2015 before the Honorable Wesley Brown. Nathan J. Sheldon represented Petitioner, and Justin Hunter represented the State. Petitioner, defense counsel, and the driver of the Suburban testified during the hearing.

On December 12, 2015, Judge Brown issued his order denying Petitioner relief. App. 336. The Order was filed March 10, 2016. This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel failed to employ an expert witness to counter the testimony of the State's expert witness concerning intoxicating doses and possession of crack cocaine.

At Petitioner's trial, Commander Brown discussed the difference between users and dealers of cocaine. App. 115 line 16 – App. 116 line 21. He testified that users generally have pipes and lighters; dealers sell cocaine out of automobiles. App. 115 line 19 – App. 116 line 5. Brown also explained that it was neither common nor necessary for dealers to have scales or “baggies” in the car. App. 116 lines 6 – 15. The crux of his testimony was as follows:

Q: Based upon your experience and your training as an officer, would twenty-five dosage units be more typical in your mind of a crack user or a crack dealer?

A: A crack dealer is five hundred - - that's five hundred dollars worth of crack cocaine, sold as twenty dollar rocks, like we purchased that particular day.

App. 116 lines 16 – 21.

Based on his experiences in law enforcement, Brown testified that 10 out of the 11 crack cocks recovered from the Suburban constituted a “forty dollar rock” which was usually broken in half into a twenty dollar intoxicating dosage unit. App. 117 lines 10 – 23.

Petitioner correctly asserted that Counsel was ineffective, because she did not employ an expert witness to counter the testimony offered by Commander Brown. 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 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2)

the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel failed even to consult with an expert witness in order to determine the accuracy and validity of Brown’s testimony. Further, she was unaware that Brown was going to be utilized as an expert witness. App. 306 line 25 – App. 307 line 4. In fact, Counsel testified that she has never used an expert to counteract a Drug Enforcement Unit expert like Brown:

Q: And so - - but you have, at trial during the testimony, you have Commander Brown giving expert testimony as to intoxicating doses and things like that, is that right?

A: Yes, that’s what he did.

Q: But you called no expert to counteract that, is that right?

A: That’s correct.

Q: Have you ever used an expert to counteract the DEU expert?

A: No, not for that. I don’t think I ever have actually.

App. 311 lines 3 – 12.

Counsel also testified that she did not believe that it was necessary to call a rebuttal expert witness because she was “able to bring out the fact that there were no bags, no pipes, scales, that essentially just the crack [was present]”. App. 312 lines 22 – 25. However, Brown testified that neither pipes nor bags were necessary in order to qualify an individual as a dealer.

App. 116 lines 6 – 15. An expert witness testifying on behalf of Petitioner would have offered a reliable opinion and cast doubt in the mind of the jury regarding Petitioner's status as an alleged dealer. Failing to call a rebuttal expert witness constituted deficient conduct which prejudiced Petitioner.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The prejudice in Petitioner's case manifests itself in the jury's verdict. Petitioner testified that he believed the outcome of the trial could have been different if Counsel hired an expert:

Q: Was there an expert witness hired to try and combat the State's expert witness?

A: No, sir.

Q: Do you believe that had you hired an expert witness to combat the State's expert that the outcome of the trial could be different?

A: I do. I believe it would have give[n] the jury a different aspect to look at things.

App. 323 lines 9 – 16.

It is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to

properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996). Through his own testimony at the evidentiary hearing, Petitioner testified that he was prejudiced as a result of Counsel's deficiencies. According to Jackson, supra, Petitioner's self-serving statements prove that he was prejudiced by the lack a rebuttal expert witness during his 2013 trial.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2016.

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IN THE SUPREME COURT

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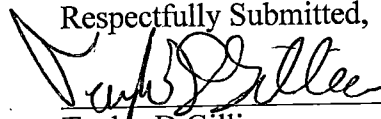
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lexie James Turner states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's trial before Judge Brooks P. Goldsmith, which was held on November 3, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Lexie James Turner.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of 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."



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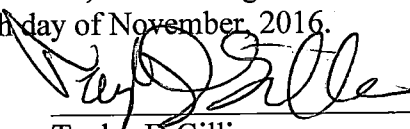
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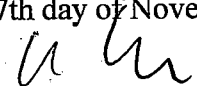
CERTIFICATE OF SERVICE

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 Justin Hunter, Esquire, at the Rembert 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 Lexie James Turner, #249878, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 17th day of November, 2016.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of November, 2016.



(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025