STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Brooks P. Goldsmith, Circuit Court Judge

JOEL ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000575

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated by trial counsel's failure to properly argue in a suppression motion and that the State did not meet its burden of proving that the initial stop of petitioner was valid because the State did not call the officer who stopped petitioner and relied on inadmissible hearsay that violated the Confrontation Clause to prove the stop's validity?

STATEMENT

On February 11, 2009, a Richland County grand jury indicted petitioner for murder, assault and battery with intent to kill, a weapons charge, and drug offenses. App. 1119-31. On March 3, 2009, petitioner was tried before the Honorable J. Michelle Childs and a jury. App. 1. Vanessa Shipley and Seth Rose represented the State. App. 1. Jennifer Davis and Micah Leddy represented petitioner. App. 1. The jury convicted petitioner. App. 851, l. 14 – 853, l. 1. Judge Childs sentenced petitioner to life imprisonment for murder and concurrent terms of twenty years' imprisonment for ABIK, five years' imprisonment on the weapons charge, and time served on the drug charges. App. 864, ll. 14 – 25. The Court of Appeals affirmed petitioner's convictions in an unpublished opinion and the South Carolina Supreme Court denied certiorari. App. 1048.

On October 16, 2013, petitioner filed a PCR application. App. 867. On August 25, 2015, a hearing was held before the Honorable Tanya A. Gee. App. 881. Tara D. Shurling represented petitioner. App. 881. J. Clayton Mitchell represented the State. 881. Judge Gee reconvened the hearing on October 19, 2015. App. 1017. On January 25, 2016, the court denied petitioner's application. App. 1047. On March 8, 2016, Judge Gee denied petitioner's Rule 59(e), SCRCP motion to reconsider in a Form 4 Order. App. 1098. This petition follows.

ARGUMENT

Petitioner's Sixth Amendment right to the effective assistance of counsel was violated by trial counsel's failure to properly argue in a suppression motion and that the State did not meet its burden of proving that the initial stop of petitioner was valid because the State did not call the officer who stopped petitioner and relied on inadmissible hearsay that violated the Confrontation Clause to prove the stop's validity.

In this murder case, the police officer who initially stopped petitioner—a stop which led to incriminating statements, a show-up identification, and discovery of drugs and the gun—never testified. The officer who stopped petitioner was named Dutton. App. 75, l. 7 – 77, l. 13. The State initially said it was not calling Dutton as witness because she was no longer with the Columbia Police Department. App. 75, ll. 7 – 10. The solicitor said, "We don't have a clue where that witness is." App. 75, ll. 7 – 10. This statement by the solicitor was the all of the evidence offered by the State about whether Dutton was available as a witness or could be found.

The State offered this explanation during the first of the three pretrial hearings before Judge Childs—a Neil v. Biggers, 409 U.S. 188 (1972) hearing concerning the admissibility of a show-up identification by Jeffrey Smith, who witnessed the shooting. App. 17, ll. 7 – 11. App. 75, ll. 7 – 10. Trial counsel argued that without Dutton's presence, they could not meaningfully cross-examine her on the identification issues. App. 75, l. 15 – 76, l. 1. The solicitor then stated, "We were never going to call Dutton to testify anyhow because **all she did was stop the individual that fit the description that was heard on the radio, Your Honor.**" App. 76, ll. 18 – 21. The State continued its argument that Dutton was unnecessary for the purpose of the Biggers hearing, ultimately telling the court that "Dutton has nothing to do with the identification procedures in this case." App. 76, l. 18 – 78, l. 11.

Trial counsel Davis argued that Dutton's presence was necessary for the Biggers hearing to determine whether the show-up identification was accidental, as claimed by some of the officers, or intentional as stated in Dutton's report. App. 78, l. 13 – 79, l. 4. Trial counsel Leddy then argued that if the State did not "think they need to bring Sergeant Dutton in for the suppression hearing, then they're not prepared for this case. The whole detainment issue starts and ends with her." App. 79, ll. 5 – 12. Trial counsel Leddy argued that Dutton "is going to have to come in this courtroom if they're going to proceed on any evidence that was obtained pursuant to that detention." App. 79, ll. 5 – 12.

After further argument about the show-up identification issue, Judge Childs asked, "And then where is—is it Investigator Dutton?" App. 81, ll. 9 – 10. Instead of answering the court's question, the solicitor immediately read Dutton's report into the record. App. 81, l. 11 – 83, l. 5. Trial counsel objected, arguing that "We don't do trials on statements that are written down two years ago," and asked Judge Childs to strike the reading of her report from the record. App. 83, ll. 11 – 24. Trial counsel did not obtain a ruling from Judge Childs on this issue, as the court stated that the solicitor had "given me some factual background to understand what occurred at that point in time. I still have not ruled on whether or not that officer is necessary." App. 85, ll. 6 – 8. Then, with no challenge from trial counsel, the solicitor argued that "hearsay evidence is permissible in a pretrial hearing under the rules of evidence so that the court can make an informed and intelligent decision." App. 85, ll. 10 – 17. The State then immediately called its next witness. App. 85, ll. 18 – 23.

After further testimony, the State and trial counsel argued the Biggers issue with respect to another witness, which Judge Childs denied. App. 97, l. 17 – 102, l. 14. The court then held a Jackson v. Denno, 378 U.S. 368 (1964) hearing on the voluntariness of statements

made by petitioner immediately after his detention by Dutton and subsequent arrest. App. 102, l. 12 – 144, l. 16. The court ruled the statements were admissible. App. 144, ll. 9 – 16.

The solicitor then stated the next matter was the defense's motion to suppress. App. 144, ll. 17 – 19. Trial counsel immediately stated, "I guess we're going to have to subpoena Sergeant Dutton, Your Honor." App. 144, ll. 20 – 21. Trial counsel explained that he did not know Dutton no longer worked for the police department, did not anticipate the issue, and "that's why I don't have her under subpoena." App. 145, ll. 1 – 13. Trial counsel recognized that Dutton's testimony was crucial because "if the first stop was unlawful, then everything that is found pursuant to it is fruit of the poisonous tree and not admissible," but told then ultimately told the trial judge, "That's an issue, and I don't know the answer to that issue." App. 145, ll. 1 – 16. The trial court held a bench conference, took a recess, then selected the jury without making a ruling or hearing any further argument on Dutton's presence. App. 145, ll. 17 – 25.

After selecting the jury, the trial court heard further testimony on the pretrial matters. App. 180, l. 10 – 192, l. 3. The State and defense argued the show-up identification issue, which the trial court denied. App. 192, l. 7 – 199, l. 18. The solicitor told the court that the next matter was the defense's motion to suppress the evidence. App. 199, ll. 22 – 23. Trial counsel Leddy and Judge Childs then discussed Dutton's statement and Crawford v. Washington, 541 U.S. 36 (2004). App. 199, l. 25 – 203, l. 18. However, trial counsel appears to concede that Dutton's statement was admissible under the hearsay rules. App. 200, ll. 19 – 21. Trial counsel did not challenge whether the State had shown Dutton was unavailable or argue that the State had failed to meet its burden once the legality of the stop had been challenged. App. 199, l. 25 – 203, l. 18.

Judge Childs did not rule and the State called an additional witness. App. 203, ll. 13 – 22. After testimony concluded, trial counsel again failed to argue that the State had failed to

meet its burden by not calling Dutton. App. 210, l. 19 – 212, l. 12. Judge Childs denied the suppression motion by simply stating "Motion to suppress denied," and trial counsel failed to obtain any specific rulings regarding the burden of proof and Dutton's unavailability. App. 212, ll. 13 – 23.

At the PCR hearing, petitioner argued trial counsel was ineffective for:

> . . . failing to make a motion to suppress the Applicant's statement and any evidence flowing from his stop by Sergeant Dutton on the ground that the State failed—by failing to call Sergeant Dutton, failed to meet its burden of proof with regard to the fact that there in fact existed probable cause for the stop.

App. 909, ll. 2 – 10. Petitioner also argued that trial counsel made no challenge to the solicitor's naked assertion that Dutton's report was admissible hearsay and that Dutton was an unavailable witness. App. 909, l. 22 – 911, l. 2.

The PCR court denied relief, holding that because trial counsel challenged the stop, the issue could have been raised on appeal and not properly raised in a PCR. App. 1052-53. The PCR court did not address the State's failure to call Dutton in its Order of Dismissal. App. 1052-53. Petitioner filed a Rule 59(e) Motion seeking a specific ruling on this issue. App. 1056-69. The PCR court summarily denied the Rule 59(e) Motion in a Form 4 Order. App. 1098.

The PCR court erred in denying relief on this issue. Trial counsel failed to properly argue the issue to preserve it for appeal. A party must clearly present his grounds at trial to preserve it for appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised

by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004).

Appellate counsel could not have raised the Fourth Amendment issue because trial counsel did not argue that the State failed to meet its burden and never obtained a ruling from Judge Childs on the violation of petitioner's Confrontation Clause rights. The issue raised on appeal was the trial court's failure to charge voluntary manslaughter. State v. Robinson, No. 2012-UP-202 (Mar. 21, 2012).

It is undisputed that Dutton seized petitioner without a warrant. The Fourth Amendment protects citizens from warrantless searches and seizures, which are presumed unreasonable absent exception. U.S. Const. amends. IV, XIV. State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). "The prosecution bears the burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." Id.

In this case, the State failed to meet even its basic burden under the Fourth Amendment. Dutton was the officer who stopped petitioner and did not testify. Trial counsel never argued that the State had the burden of proof and Dutton's absence meant the State could not meet this burden. The State never made any showing that Dutton was an unavailable witness and her inadmissible hearsay report went unchallenged. Rule 803(8), SCRE. Rule 804(a), SCRE (defining "unavailability"). The State's sole explanation for not calling Dutton was that she had left the employment of the police department. The State never mentioned any effort whatsoever it made to find Dutton.

Furthermore, the consideration of Dutton's hearsay report violated petitioner's rights under the Confrontation Clause. U.S. Const. amends. VI, XIV. Her report was testimonial

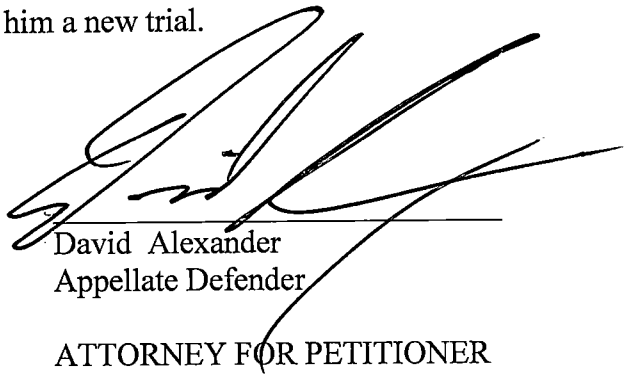
hearsay of the type expressly condemned by Crawford. While trial counsel discussed Crawford, he never obtained a ruling from the trial court on this issue. This failure constitutes ineffective assistance. Strickland v. Washington, 466 U.S. 668 (1984).

Trial counsel's deficient performance severely prejudiced petitioner. 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 v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The PCR court's finding of lack of prejudice because of overwhelming evidence of guilt is error in this case because the failure to properly argue the suppression motion led to the admission of eyewitness identifications, drugs, the fun, and petitioner's incriminating statements. All of this evidence was fruit of the poisonous tree and should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). Without this massive amount of evidence that flowed from the illegal stop, there is more than a reasonable probability petitioner would not have been convicted. This Court should grant certiorari and reverse petitioner's convictions.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and granting him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served via U.S. Mail and a copy of the Appendix has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari has been served via U.S. Mail and a copy of the Appendix on Joel Robinson, #251879, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of January, 2017.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of January, 2017.

Maria Hendrick (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.