

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

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SC SUPREME COURT

TERON JACKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001690

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 5

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

ISSUE PRESENTED

Whether trial counsel's performance was constitutionally deficient for failing to call a witness to support Petitioner's defense where trial counsel admitted he was aware that the witness could not identify Petitioner as the perpetrator of the crime and where no other witnesses saw the crime.

STATEMENT

On February 19, 2009, the Sumter County Grand Jury indicted Petitioner Teron Jackson for murder, two counts of attempted armed robbery while armed with a handgun, possession of a firearm during the commission of a violent crime, possession of a pistol by a person less than eighteen years of age, and first degree lynching. App. 592—App. 594. On April 15, 2009, Petitioner proceeded to trial before The Honorable Ferrell Cothran, Jr. and a jury. Timothy Murphy represented Petitioner and Harry Conner represented the State. App. 1.

The State alleged that around two o'clock on the morning of June 18, 2007, Petitioner and a codefendant, both wearing ski masks and armed with pistols, approached a couple sitting in a parked car at the Poplar Square Apartments. Petitioner and the codefendant went to either side of the cars at the front doors and presented their pistols in an attempt to rob the male in the driver's seat. The male wrested away the codefendant's pistol, and Petitioner fired into the vehicle multiple times from the passenger side. The female passenger, Toni Wilson, and the male victim fled to an apartment where the male later died waiting for medical help. App. 124, line 19—App. 127, line 20; App. 592—App. 594.

After the State presented its evidence, trial counsel rested Petitioner's case without presenting any evidence. App. 408, line 13—App. 412, line 6. During deliberation, the jury asked Judge Cothran in a note, "[W]hy didn't Toni Wilson testify?" Judge Cothran instructed the jury, "[Y]ou have got to decide this case based on the evidence you heard and speculate on things you didn't hear. . . . You have heard the evidence and you have got to decide based on what you heard" App. 480, line 17—App. 482, line 23. The jury found Petitioner guilty on all counts except attempted armed robbery of the passenger and lynching. App. 485, line 7—App. 487, line 15. Judge Cothran sentenced him to thirty-seven years' incarceration for murder; twenty years

concurrent for attempted armed robbery; five years concurrent for possession of a weapon during the commission of a violent crime; and five years concurrent for possession of a pistol by a person less than eighteen years of age. App. 506, line 100—App. 507, line 11.

On October 2, 2012, Petitioner filed an application for post-conviction relief (“PCR”) claiming ineffective assistance of counsel. App. 511—App. 524. The State filed a return on March 22, 2013. App. 525—App. 532. On July 24, 2014, Petitioner filed an amendment to the application. App. 534. On April 14, 2015, Petitioner appeared at an evidentiary hearing before The Honorable George C. James, Jr. Charles T. Brooks represented Petitioner and Daniel F. Gourley represented the State. App. 536.

Petitioner testified that counsel should have called the Toni Wilson to testify in his defense. App. 542, line 9—App. 544, line 14. Petitioner said her testimony would have helped his case:

I feel it would have helped my case as far as the jury, once they deliberated, they came back out and they asked why she didn't testify. So I felt like, they wanted to know what she had to say. That could have changed their outlook on the other evidence they had. That could have made them look different on something else.

App. 544, lines 17-23.

Trial counsel testified that he was not sure he could correctly recall the circumstances surrounding Wilson's failure to testify. He believed that he understood that the solicitor at some point did intend to call her. He acknowledged that she could not have identified Petitioner, but in the same breath claimed she would not have provided any helpful information. App. 562, lines 2-15.

On July 20, 2015, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 575—App. 591. Specifically, the order stated trial

counsel's decision not to call Wilson was reasonable, and Petitioner showed no prejudice from any alleged deficiency because Wilson did not testify at the PCR hearing. App. 584—App. 585.

ARGUMENT

Trial counsel's performance was deficient due to his failure to call Toni Wilson to testify, which was without question unreasonable.

Trial counsel's performance was deficient due to his failure to call Toni Wilson to testify, which was without question unreasonable. 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.

“The validity of counsel's strategy is reviewed under ‘an objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Lounds* at 460, 670 S.E.2d at 649 (quoting *Ard v. Catoe* at 331-32, 642 S.E.2d at 597); *see also Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)). Counsel must be found deficient when “the trial transcript and . . . PCR testimony

inescapably point to the conclusion that [counsel] simply had not adequately prepared the defense case.” *Lounds* at 462, 670 S.E.2d at 650.

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 South Carolina Supreme 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.” *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

In this case, trial counsel's failure to investigate and call Toni Wilson was unreasonable. The record shows trial counsel was aware of Wilson as a witness to the crimes. He also explicitly stated that he understood the perpetrators wore masks, and Wilson could not identify them. Trial counsel had the duty to interview Wilson and to make an independent investigation of whether her testimony would help Petitioner's case. However, trial counsel could not even recall the circumstances surrounding Wilson's failure to testify, recalling only that he understood that the solicitor at some point did intend to call her. Thus, the record shows that contrary to the PCR court's conclusion, trial counsel never made an affirmative, reasoned decision not to call Wilson. Instead, trial counsel simply never fully considered her as a witness, which resulted from his altogether failure to investigate and consider whether she would be helpful as a witness.

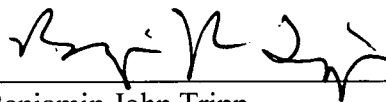
The record also shows Wilson's failure to testify prejudiced Petitioner. The jury was uncertain as to whether to find Petitioner guilty as shown by its question to the trial court asking why Wilson did not testify. When the trial judge told the jurors they could not consider any evidence from her based on her failure to appear, they decided to find Petitioner guilty. Thus, Wilson's testimony could have affected the jury's decision and helped Petitioner's defense.

The PCR court ruled that Petitioner failed to show prejudice because Wilson did not personally appear to give live testimony. However, South Carolina law did not require Petitioner to present her for live testimony. Instead, presentation of her testimony in the form of trial counsel's testimony that she could not identify Petitioner was sufficient to show not that the matter asserted was but to show that information did in fact exist that trial counsel unreasonably failed to take into account or investigate for purposes of establishing prejudice.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his petitioner for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2016.

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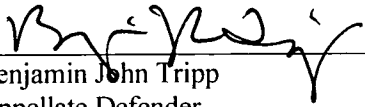
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Teron Jackson states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 14, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Teron Jackson.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of January, 2016

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire and Teron Jackson, #334394, at Lee Correctional Institution this 27th day of January, 2016.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of January, 2016.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.