

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

JOSHUA RAY GREER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000377

AUSTIN PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to argue third party guilt, failing to preserve for appellate review the trial judge's exclusion of third party guilt evidence and failing to proffer the evidence to prove prejudice in regard to the exclusion of third party guilt evidence?

STATEMENT

In November of 2002, the Spartanburg County Grand Jury indicted Petitioner Greer for murder, indictment #02-GS-42-5209. In June of 2003, the Spartanburg County Grand Jury indicted Petitioner for armed robbery, indictment #03-GS-42-2201. On September 20, 2005, Petitioner proceeded to jury trial before the Honorable Wyatt T. Saunders. Jason Chehoski represented Petitioner at trial. James Donald Willingham, II and Melissa Millican prosecuted the case. The jury returned verdicts of guilty and Judge Saunders sentenced Petitioner to thirty (30) years for murder and a consecutive twenty (20) years for armed robbery. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Greer, No. 2007-UP-512 (S.C.Ct.App. November 7, 2007).

On August 21, 2008, Petitioner filed an application for post conviction relief, 2008-CP-42-4438. On May 26, 2009, an evidentiary hearing was held before the Honorable J. Mark Hayes, II. Franklin M. Mann, Jr. represented Petitioner at the PCR hearing. Karen C. Ratigan represented the State. In a written order signed July 24, 2009, Judge Hayes denied relief and dismissed the application. Counsel for Petitioner did not file a notice of intent to appeal. On August 17, 2009, Petitioner filed a *pro se* notice of intent to appeal with the Spartanburg County Clerk of Court but not with the appellate court. The appeal was not perfected. (App. p. 899- 900).

On April 13, 2012, Petitioner filed a second application for post conviction relief, 2012-CP-42-1605. In the second application Petitioner requested a belated appeal from the denial of post conviction relief. (App. pp. 892-898). On August 23, 2013, the State filed a return and motion to dismiss. (App. p. 901). On October 3, 2013, the Honorable Roger L. Couch signed a conditional order of dismissal. (App. p. 907). Petitioner, acting *pro se*, objected to the conditional order of dismissal. (App. p. 913). ON September 16, 2014, an evidentiary hearing was held before Judge

Couch. J. Brandt Rucker represented petitioner at the PCR hearing. J. Clayton Mitchell represented the State. In a written order signed December 9, 2014, Judge Couch granted the belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). A timely notice of intent to appeal was filed and this Austin petition for writ of certiorari as well as a separately filed petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to argue third party guilt, failing to preserve for appellate review the trial judge's exclusion of third party guilt evidence and failing to proffer the evidence to prove prejudice in regard to the exclusion of third party guilt evidence

The jury found Petitioner guilty of the murder and armed robbery of Paul "Doc" Reagan. In opening statement trial counsel stated, ". . . I believe there are two people who knew what happened that night and neither one of them are in this courtroom." (App. p. 180, lines 4-7). Based on this statement, the State made a motion to preclude the defense from arguing third-party guilt. (App. pp. 216-217). The judge ruled that "counsel for the defense will be prohibited from casting doubt upon the guilt of his client simply by pointing to third-party guilt ... by conjecture or speculation that the commission of the crime was by another person." (App. p. 216, lines 11-17).

At trial William "Butch" Green was called as a witness by the State. (App. p. 710). Green lived in a trailer behind Doc Reagan's house. (App. p. 711, line 18 – p. 712, lines 1-19). At the time of Doc Reagan's death, Green was a fugitive from justice and wanted for manufacturing methamphetamine in Colorado. (App. p. 720, line 20 – p. p. 721, lines 1-19). At trial Green admitted that on the morning Doc Reagan was found in his home with fatal blunt force trauma to his head, Green had been in the home. (App. pp. 715-718). In his written statement to police, Green did not divulge that he had been in the home that morning. (App. p. 722, lines 8-11). Trial counsel did not proffer any evidence linking Green to the murder of Doc Reagan

The trial judge's exclusion of third party guilt evidence was raised on direct appeal. The Court found the issue unpreserved writing, "Greer contends the trial court erred by excluding third-party guilt evidence. In response, the State maintains Greer never sought to argue evidence of third-party guilt and, therefore, failed to preserve this issue for our review. We agree with the

State and decline to address the merits of Greer's appeal." State v. Greer, No. 2007-UP-512 (S.C.Ct.App. November 7, 2007).

During the PCR hearing trial counsel was asked about third party guilt evidence and testified, "No. I never objected on the record to my inability to introduce third party guilt." (App. p. 872, lines 17-18). Trial counsel admitted this was error. (App. p. 872, lines 19-21). In the order of dismissal the PCR judge wrote, "This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued third party guilt at trial. This Court finds trial counsel made a strategic decision not to argue third party guilt and instead argue that Applicant was innocent of the crimes. This Court finds this was a legitimate trial strategy because, as the Applicant gave a confession to police, it would have been extremely difficult to also present a third-party guilt analysis to the jury." (App. pp. 888-889). The PCR judge erred.

Trial counsel admitted error in failing to object to the judge's exclusion of third party guilt evidence, especially when Green, during trial, for the first time, admitted being in Doc Reagan's home the morning he was found. Any strategy to not pursue third party guilt in light of the unidentified bloody shoe print not connected to Petitioner and the trail of blood leading out of the house (App. p. 879, lines 17-20; p. 877, lines 1-5; p. 875, lines 6-9) could not be a valid trial strategy and is certainly not inconsistent with arguing that Petitioner was innocent. In regard to the statements provided to police by Petitioner, trial counsel testified that the statements were "incredible" and did not pass the laugh test. (App. p. 876, lines 12-25). The evidence does not support the PCR judge's finding.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations

of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was deficient in failing to pursue the guilt of Green, failing to proffer evidence linking Green to the murder and in failing to preserve for appellate review the trial judge’s exclusion of third party guilt evidence. A defendant may introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence meets the following criteria:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. 198 S.C., at 104-105, 16 S.E.2d, at 534-535 (quoting 16 C.J., Criminal Law § 1085, p. 560 (1918) and 20 Am.Jur., Evidence § 20 265, p. 254 (1939); footnotes omitted).

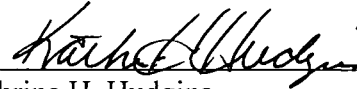
State v. Holmes, 547 U.S. at 328, 126 S.Ct. 1727 (quoting State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)).

The evidence discussed at the PCR hearing, the bloody shoe print and the trail of blood, combined with Green's revelation that he in fact had been in Doc Reagan's home the morning he was found all qualify for admission as third party guilt. The evidence against Petitioner was not overwhelming. As noted by the PCR judge in the order of dismissal, there was no physical evidence linking Petitioner to the crime scene. (App. p. 889). The State's case against Petitioner was based primarily on questionable inculpatory statements. Trial counsel was deficient in not fully pursuing the third party guilt of Green, not preserving the issue for appellate review and not making a proffer of the evidence linking Green to the murder. There is a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2015.

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JOSHUA RAY GREER,

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CERTIFICATE OF SERVICE

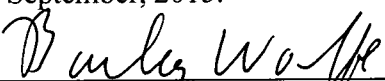
I certify that a true copy of the Austin petition for writ of certiorari and a copy of the appendix in this case have been served on J. Clayton Mitchell, Esquire this 25th day of September, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of September, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021