

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

J. Mark Hayes, II, Circuit Court Judge

TREMAINE WRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2015-000758

PETITION FOR WRIT OF CERTIORARI

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Did the PCR judge err in refusing to find trial counsel ineffective in failing to cross examine the State's sole eye witness about the fact that he initially did not identify Petitioner or his co-defendant by name despite knowing both of them, and described the suspects involved in the shooting as one black male with dreadlocks and one black male with a close cut haircut and a striped shirt driving a white SUV, possibly a Nissan with a black stripe down the side, descriptions that matched two other individuals stopped shortly after the shooting took place in a white Isuzu Rodeo SUV with ammunition consistent with the shell casings found at the scene of the shooting?

STATEMENT

In August of 2007, the Richland County Grand Jury indicted Petitioner Wray for murder, indictment #2007-GS-40-5914. On October 5, 2009, Wray and his co-defendant, Taurus Watts, proceeded to jury trial before the Honorable Michelle J. Childs. Jack Swerling and Arie Bax represented Wray at trial. Vanessa C. Shipley and Joanna A. McDuffie prosecuted the case. On October 15, 2009, the jury returned verdicts of guilty for both men. Judge Childs sentenced Wray to forty (40) years in prison and sentenced Watts to thirty five (35) years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected by Appellate Defender Elizabeth Franklin-Best with the South Carolina Commission on Indigent Defense. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Wray, 2012-UP-477 (S.C.Ct.App. filed August 8, 2012).

On November 29, 2012, Wray filed an application for post conviction relief. The State filed a return on February 19, 2013. On July 7, 2014, Wray filed an amended application. On November 3, 2014, an evidentiary hearing was held before the Honorable J. Mark Hayes, II. L. Marshall Coleman Newton represented Wray at the PCR hearing. Megan E. Harrigan and J. Clayton Mitchell of the South Carolina Attorney General's office represented the State. In a written order signed February 2, 2015, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 10, 2015. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to cross examine the State's sole eye witness, Ricky Jacobs, about the fact that he initially did not identify Petitioner or his co-defendant by name despite knowing both of them, and described the suspects involved in the shooting as one black male with dreadlocks and one black male with a close cut haircut and a striped shirt driving a white SUV, possibly a Nissan with a black stripe down the side, descriptions that matched two other individuals stopped shortly after the shooting took place in a white Isuzu Rodeo SUV with ammunition consistent with the shell casings found at the scene of the shooting

In the early morning hours of June 30, 2007, Demuria Hank Johnson was shot in the leg outside of the H&J Club, a night club in Northeast Columbia. Johnson died as a result of the gun shot wound. At trial, the club's owner, Ricky Jacobs, was the State's key witness and the sole eyewitness to the shooting. Jacobs testified that after a fight started inside the club, he stepped outside and saw Petitioner Wray and his co-defendant, Taurus Watts, approaching the club. He told the two men that he was closing the club as a result of the fight. (App. p. 667, lines 17 – p. 668, lines 1-17). There was no evidence that Wray and Watts were involved in the fight inside the club. Jacobs testified that the two men returned to their car, a tan Suburban. (App. p. 669, lines 12-18). Petitioner Wray got into the driver's side and co-defendant Watts got into the passenger side. (App. p. 669, line 19 – p. 670, lines 1-3). According to Jacobs, Watts was holding a gun. (App. p. 670, lines 4-10). Jacobs testified that the tan Suburban drove towards Farrow Road. Then, according to Jacobs, shots were fired from the driver's side of the tan Suburban towards the club. (App. p. 676, lines 2-13). Jacobs testified that a shot was also fired from a white Rodeo as it was leaving the club. (App. pp. 676 - 680).

Shortly after the shooting, Deputy Galinski stopped a white Rodeo matching the vehicle identified by Jacobs. The driver was identified as Luther Centural Landrum, Jr. and the passenger was identified as Earl Jerome Green. (App. p. 2379). Landrum was uncooperative with police. (App. p. 2381). Deputy Galinski found one round of 38 caliber ammunition and some rounds of 9

millimeter ammunition in the white Rodeo. (App. p. 837, lines 18-23.). At the hospital, another officer recovered a fired 9 millimeter bullet from the pants of the deceased. (App. p. 885, lines 4-24; App. p. 1583, lines 4-6). Investigator Collins, an expert in firearms and tool mark examination, testified that the bullet recovered from the hospital matched two fired bullet jackets recovered at the scene and all three had been fired by the same gun. (App. p. 1583, lines 2-6; p. 1585, lines 13-17). Investigator Collins also examined ten fired 9 millimeter Luger caliber cartridge cases recovered from the scene of the shooting. (App. p. 1583, lines 6-7). Investigator Collins testified that the ten cartridge cases were fired by one gun but he could not say that the same gun fired the cartridge cases and the three recovered bullets because no firearm was submitted for comparison. (App. p. 1598, lines 4-17).

Investigator Bouknight conducted GSR tests on the Isuzu Rodeo. The investigator, however, left the GSR kit in his locker for 7 months and when it was tested, it tested negative for gunshot residue. (App. pp. 905-923; App. p. 1515, lines 12 – p. 1516, lines 1-6). Five hours following the shooting, GSR tests were conducted on the hands of Landrum and Greene, the driver and passenger of the white Isuzu Rodeo. (App. p. 1548, line 22 – p. 1549, lines 1-7). When Deputy Galinski initially stopped the white Isuzu Rodeo, he did not have paper bags to place on the hands of the stopped subjects to preserve any possible gun shot residue. (App. p. 844, lines 6-22). Deputy Galinski was instructed to simply make sure the subjects did not wash their hands. (App. p. 844, lines 8-13). Landrum and Greene were finally swabbed for GSR and when the results were examined, not surprisingly, both tested negative for gunshot residue. (App. pp. 1477-1481). The State's GSR expert conceded that the fact that the subject's hands were not bagged could effect the reliability of the test. (App. p. 1547, lines 1-21). The occupants of the white Isuzu Rodeo were not charged in connection with the shooting. A search warrant was executed on the tan Suburban, and a

GSR kit obtained. This test revealed the existence of 16 rounded lead particles in the interior of the Suburban. No weapons or ammunition were located in the Suburban.

In May of 2009, almost two years after the shooting at the H&J club, Brian Watson, who was in jail for armed robbery, claimed to have information in regard to the shooting. At trial Watson testified that on June 30th, 2007, he looked out his back door and saw a truck at his neice, Rashonda Simpson's house. Later, Jarrell Dansby, Simpson's husband at the time, called Watson and asked him to come to the house. He claimed he needed help with something. He showed him a book bag, and there was a gun inside. (App. p. 1145, lines 1-16). Watson testified that he and Dansby decided to get rid of the gun. (App. p. 1147, lines 6-8). Watson testified that he, Dansby and Simpson drove to a creek and disposed of the gun. (App. p. 1149, line 17 – pp. 1150-1152). Officers were unable to find the gun, two years later when Watson came forward. (App. pp. 1310 - 1317).

Dansby testified that on the Saturday either before or after July 4th, his cousin, Petitioner, called and asked if he could leave his gun at Dansby's house. (App. p. 1070, lines 15 – 23). Warrants had been drawn charging Dansby with accessory after the fact of murder but the warrant had been withdrawn in exchange for Dansby's cooperation. (App. p.1066, lines 1-16). In contradiction to Watson's testimony, Dansby and Simpson both denied disposing of a gun with Watson. The jury found both Petitioner and his co-defendant Watts guilty of murder.

In the amended application for post conviction relief Petitioner asserts:

Trial counsel was ineffective in not interviewing or investigating the initial responding officer to the scene Weldon Gregory and his handwritten police report. The officer had evidence favorable to Applicant and not discussing it with him before trial prejudiced Applicant such that he did not receive a fair trial.

a. Weldon Gregory was the first officer to arrive to the crime scene and was the first officer to interview Ricky Jacobs, which was approximately one and a half hours before Officer Don McRae arrived to the scene and interviewed Jacobs.

b. Jacobs told Gregory that two suspects attempted to enter the club and he told them it was closed. He said one of the suspects made a comment to the effect "I've got something for you." The suspects left and then drove by in a white vehicle SUV shooting towards the club. He described the vehicle possibly being a White Nissan with black stripe down the side. He said Suspect 1 had dreadlocks in his hair and Suspect 2 had a close haircut with striped shirt. This description matches the two people who were later pulled over and found to have shell casings in the car matching those found in the road at the crime scene.

(App. p. 2074). During the evidentiary hearing trial counsel admitted that he did not question Jacobs about what he initially told Officer Weldon Gregory. (App. p. 2292, line 8 – p. 2293, lines 1-24). When asked if he questioned Jacobs about the statement he provided to Officer Gregory, trial counsel testified, "No, I did not. As I said, I think it came out in other ways, with the exception of the thing about firing into the club. I just did not. In the scheme of things, I thought that was a minor point." (App. p. 2293, lines 10-13). The inconsistencies from Officer Gregory's report did not come out in other ways. The failure to cross examine Jacobs, a key State's witness and the only eye-witness to the shooting, about his initial statement to Officer Gregory was not "a minor point."

Officer Gregory did not testify at trial but did testify at the PCR hearing. Officer Gregory read his initial report into the record during the evidentiary hearing and the report was introduced in evidence as Respondent's #7 (App. pp. 2394-2395). Officer Gregory confirmed that he was the first officer to speak with Jacobs. (App. p. 2186, lines 4-6). Officer Gregory read his report as follows:

The complainant, the complainant [sic] states that the two suspects attempted to enter the club and the complainant [Jacobs] told suspects he was closed. Complainant states one of the suspects made a comment to – made a comment to the effect that I've got something for you. Complainant stated suspects left the location and a few minutes later, complainant states a white vehicle SUV with the suspects in it began shooting toward the, toward the club. The complainant [Jacobs] described the vehicle possibly being a white Nissan with a black stripe down the –around the side. Complainant states that one of the suspects fired over the top of the vehicle toward the club.

(App. p. 2184, lines 2-19). Officer Gregory confirmed that Jacobs did not provide him with any names for the suspects. Officer Gregory's report describes one subject as a black male with dreadlocks and the second suspect as a black male with close cut hair wearing a striped shirt. (App. pp. 2394-2395). Deputy Galinski, the deputy who stopped the white Isuzu Rodeo, testified at trial that the Rodeo and the Nissan Pathfinder are very similar in model and style. (App. p. 845, lines 6-9).

Jacobs' testimony at trial contained critical inconsistencies with the initial statement he provided to Officer Gregory. Trial counsel failed to cross examine Jacobs in regard to those inconsistencies. The first inconsistency counsel failed to raise is the fact that Jacobs did not identify Petitioner Wray or his co-defendant Watts despite the fact that Jacobs admitted knowing both men. Jacobs admitted that he has known Petitioner for several years, knew his uncles and knew where he lived. (App. p. 764, lines 14-25). Jacobs admitted that he has known the co-defendant, Taurus Watts, for twenty years and his mother actually worked for Jacobs. (App. p. 698, lines 13-16; p. 718, line 11 – p. 719, lines 1-14).

The second inconsistency counsel failed to raise is the fact that Jacobs initially told Officer Gregory that someone in the white SUV fired over the top of the vehicle toward the club. In contrast, at trial Jacobs claimed that the passenger in the white Isuzu Rodeo sat up on the door of the car but only shot one time up in the air. (App. p. 678, line 22 – p. 679, lines 1-23). Jacobs did not tell Officer Gregory there was a second vehicle that fired one shot into the air.

The third inconsistency involves the initial description of the shooters. Jacobs told Officer Gregory that one of the subjects who shot toward the club was a black male with dreadlocks and the other was a black male with a close cut haircut and a striped shirt. (App.

pp. 2394-2395). When Deputy Galinski stopped the white Isuzu Rodeo shortly after the shooting he reported that the driver was a black male with dread hair and the passenger was a black male with short hair wearing a yellow shirt with stripes. (App. p. 849, line 17 – p. 850, lines 1-6; p.2492). The initial description of the shooters Jacobs gave to Officer Gregory matched the individuals stopped in the white Isuzu Rodeo. In contrast, at trial Jacobs claimed that Petitioner and his co-defendant were the shooters but testified that Petitioner was wearing a white T-shirt and the co-defendant wore his hair in short dreads or twists and was also wearing a white T-shirt, not a striped shirt. (App. p. 674, line 22 – p. 675, lines 1-24). Jacobs told Investigator Don McRae that subject #1, the passenger in the tan suburban, had twists in his hair, not dreads.

At trial Jacobs testified that the first officer he spoke with after the shooting was Investigator McRae, in contrast to the testimony of Officer Gregory. Counsel failed to ask Jacobs about the statement made to Officer Gregory. Jacobs was a key witness for the prosecution and the sole eyewitness to the shooting. His credibility, or lack thereof, was a critical factor for the jury to determine. While counsel challenged statements Jacobs made to Investigator McRae, counsel failed to challenge the inconsistencies between the initial statement given to Officer Gregory and Jacobs' trial testimony.

In the order of dismissal the PCR judge wrote:

After reviewing the entire record and testimony presented, this Court finds that Applicant has failed to establish any deficiency of trial counsel in regards to his allegations involving Weldon Gregory. Trial counsel testified that as a general rule, he does not like to call members of law enforcement as defense witnesses because it is more harmful than helpful to defendants based on his more than forty years of experience. Additionally, he testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's incident report, although not all documents were admitted into the record at trial. This Court agrees with trial counsel's assessment as Jacobs was thoroughly examined as to his recollection of

events and his identification of Applicant and his co-defendant. Therefore, this court finds that trial counsel's performance was not deficient and that Applicant has failed to meet his burden of proof.

(App. pp. 2421-2422). The record does not support the PCR judge's finding. Trial counsel admitted that he did not question Jacobs about what he initially told Officer Gregory so he could not have impeached Jacobs with Gregory's incident report, as stated by the PCR judge. Counsel was ineffective in not questioning Jacobs about his initial statement to Officer Gregory.

The PCR judge additionally found that Petitioner failed to show prejudice writing, "This Court finds that Gregory's testimony added little to the overall presentation and likely would have had no impact on the result of the proceeding." (App. p. 2422). The PCR judge erred. Officer Gregory's testimony would have highlighted the inconsistencies in Jacobs' trial testimony. There is a reasonable probability that trial counsel's failure to cross examine Jacobs about his initial statement to Officer Gregory had an impact on the proceeding. Jacobs, the sole eye witness to the shooting initially did not identify Petitioner or his co-defendant by name despite knowing both of them, and described the suspects involved in the shooting toward the club as one black male with dreadlocks and one black male with a close cut haircut and a striped shirt driving a white SUV, possibly a Nissan with a black stripe down the side, descriptions that matched two individuals stopped shortly after the shooting took place in a white Isuzu Rodeo SUV with ammunition consistent with the shell casings found at the scene of the shooting. Jacobs' trial testimony was in stark contrast to the statements he initially gave Officer Gregory. Trial counsel was ineffective in failing to cross examine Jacobs about his initial statement to Officer Gregory. Petitioner was prejudiced by the deficient performance.

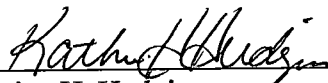
A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel 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 ineffective in failing to cross examine Jacobs about his initial statement to Officer Gregory. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Jacobs' initial statement to officer Gregory presents an even stronger third party guilt defense than the third party guilt evidence trial counsel failed to raise in the case of Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008). As in Miller there is no probative evidence to support the PCR court's decision to dismiss Petitioner Wray's application.

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 21st day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

J. Mark Hayes, II, Circuit Court Judge

TREMAINE WRAY,

PETITIONER,

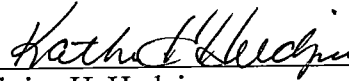
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

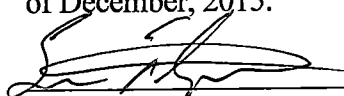
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Tremaine Wray, #337442, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 21st day of December, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of December, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.