

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

MATTHEW FRAZIER,

V.

STATE OF SOUTH CAROLINA,

ORIGINAL

RECEIVED

PETITIONER

MAR 23 2017

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2016-001665

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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INDEX

INDEXi

ISSUE PRESENTED1

STATEMENT2

ARGUMENT5

CONCLUSION7

PETITION TO BE RELIEVED AS COUNSEL8

ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where trial counsel provided ineffective assistance of counsel by failing to adequately investigate the issue of vehicle ownership which would have highlighted inconsistencies in law enforcement officers' testimony at trial?

STATEMENT

A Beaufort County grand jury indicted Petitioner for eight crimes in late 2010 and early 2011: trafficking between ten and twenty-eight grams of cocaine, trafficking between ten and twenty-eight grams of cocaine within the proximity to a school or park, possession with intent to distribute marijuana, possession with intent to distribute marijuana within the proximity to a school or park, possession with intent to distribute crack, possession with intent to distribute crack within the proximity to a school or park, possession of a weapon during a violent crime, and possession of a stolen pistol. App. 9 ll. 2 – 12. The State would later dismiss the charge of possession of a stolen handgun. App. 97 ll. 13 – 15.

Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury on May 25, 2011. App. 1. Bill Shipley and Meredith Bannon represented the State, and Ian Deysach and Matthew Walker represented Petitioner. The evidence offered by the State which allegedly gave rise to these indictments was as follows:

On October 11, 2010, Officer Jason Rodriguez with the Beaufort County Sheriff's Office executed a search warrant on a 1999 maroon four-door Dodge Intrepid. App. 222 ll. 3 – 11. Upon arriving at the location where the Intrepid was parked, Rodriguez claimed to have observed a group of people standing outside of the car. App. 222 ll. 22 – 24. Rodriguez testified that some of these individuals ran away after noticing his presence. App. 222 l. 24 – 223 l. 2. Rodriguez asserted that he collected evidence, including an orange medicine bottle, a cellular phone, and U.S. currency. App. 224 ll. 5 – 11. The medicine bottle allegedly contained a "yellow rock-like substance" that Rodriguez asserted was crack cocaine. App. 225 l. 3 – 226 l.

8.

He also claimed to have obtained a clear plastic bag containing a white powdered substance which he suspected to be cocaine. App. 227 ll. 2 – 25. Rodriguez also allegedly seized marijuana from the Intrepid. App. 230 l. 3 – 231 l. 10. Additionally, Rodriguez stated that he located a purple Crown Royal bag containing \$11,040 in U.S. currency. App. 239 ll. 20 – 23. He further testified that he located a black Highpoint .9mm pistol in the floorboard on the passenger side of the Intrepid. App. 234 l. 21 – 253 l. 7.

On cross-examination Rodriguez stated that the Intrepid was registered to a man named Derrick Fields. App. 257 l. 25 – 258 l. 3. He also testified that during the five years spanning his employment as a law enforcement officer with the Town of Bluffton, he had heard monthly reports regarding the sale of controlled substances involving Petitioner and the Intrepid. App. 27 ll. 6 – 13; App. 34 l. 17 – 35 l. 2.

At the conclusion of trial, the jury found Petitioner guilty of trafficking between ten and twenty-eight grams of cocaine, possession with intent to distribute marijuana, and possession with intent to distribute cocaine base. App. 150 ll. 1 – 15. On the charges of possession with intent to distribute marijuana within a one-half mile proximity radius of a park, possession with intent to distribute cocaine within a one-half mile proximity radius of a park, possession of intent to distribute crack cocaine within a one-half proximity radius of a park, and possession of a weapon during a violent crime, the jury found Petitioner not guilty. App. 45 l. 15 – App. 451 l. 11.

Judge Russo sentenced Petitioner to thirty days' imprisonment on the possession with intent to distribute marijuana charge, ten years' imprisonment on the possession with intent to distribute cocaine base, and fifteen years' imprisonment on the trafficking charge. App. 470, ll.

22 – 24; App. 471 l. 15 – 21. Judge Russo ruled that those sentences were to run consecutive.

App. 471 ll. 21 – 22.

Petitioner's convictions were affirmed by the South Carolina Court of Appeals. State v. Frazier, No. 2013-UP-280 (S.C. Ct. App. June 26, 2013). He filed a timely application for post-conviction relief on March 12, 2014. App. 473 – 479. It contained allegations of ineffective assistance of counsel, including claims of newly discovered evidence and counsel's failure to present all evidence at trial. App. 475.

The State made its Return on or about February 6, 2015. App. 480 – 485. An evidentiary hearing was conducted on May 19, 2016 before the Honorable Brooks P. Goldsmith. App. 486. Tristan Shaffer represented Petitioner, and the State was represented by J. Rutledge Johnson. App. 437. Petitioner and Counsel Deysach testified during the hearing.

On July 2, 2016, Judge Goldsmith issued his order denying Petitioner relief. App. 514 – 521. In particular, he found that Petitioner “failed to produce any witnesses to show how Counsel's alleged failure to research the ownership of the vehicle prejudiced his case.” App. 519.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where trial counsel provided ineffective assistance of counsel by failing to adequately investigate the issue of vehicle ownership which would have highlighted inconsistencies in law enforcement officers' testimony at trial.

Counsel Deysach admitted that he did not perform any investigation regarding the Intrepid. App. 503 ll. 5 – 8. He did not recall whether he had any conversations with Petitioner regarding that matter. Petitioner, on the other hand, testified that he told Counsel how he came to be driving the Intrepid. App. 508 ll. 14 – 25. The Intrepid belonged to Petitioner's cousin, who was present prior to the execution of the search warrant but fled the scene after the police arrived. App. 508 ll. 19 – 25. Petitioner's cousin obtained the vehicle "a couple [of] months" prior to the execution of the search warrant. App. 509 ll. 1 – 9.

Therefore, Officer Rodriguez's claim that he recalled seeing and/or hearing about Petitioner selling controlled substances out of the Intrepid for five years preceding the search warrant execution was subject to impeachment. Petitioner's cousin did not come to own the Intrepid until a few months prior to Petitioner's arrest. Therefore, Rodriguez's testimony was in direct contravention with vehicle ownership records. Had Counsel investigated the ownership of the Intrepid, he would have discovered this inconsistency and been able to utilize it during Petitioner's case.

Petitioner correctly asserted that Counsel was ineffective, because he did not investigate the ownership of the Dodge Intrepid. 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 to investigate ownership of the Intrepid, the vehicle which was the subject of the search warrant. Counsel never requested sales and/or ownership information regarding the Intrepid.

“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 his case manifested itself in Petitioner’s conviction, which could have been avoided if Counsel had investigated the ownership of the Intrepid and discovered that Petitioner’s cousin had only owned it for a few months prior to the search warrant execution. Therefore, Petitioner could not have been selling controlled substances out of it for five years.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari and allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of March, 2017.

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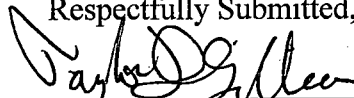
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Matthew Frazier 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 May 19, 2016 (Evidentiary Hearing), 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 Matthew Frazier.

Respectfully Submitted,



Taylor D Gilliam

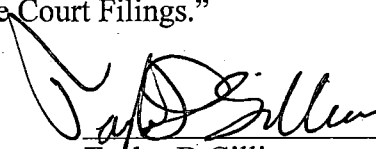
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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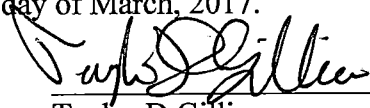
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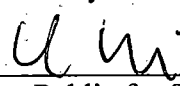
CERTIFICATE OF SERVICE

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 Ruston W. Nealy, 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 Matthew Frazier, #346254, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 23rd day of March, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of March, 2017.



Notary Public for South Carolina
My Commission Expires:

(L.S)