

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Larry B. Hyman, Circuit Court Judge

---

BERT WAYNE FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001667

---

PETITION FOR WRIT OF CERTIORARI

---

WANDA H. CARTER  
Deputy Chief 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

**ORIGINAL**

**RECEIVED**

**MAR 23 2017**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Larry B. Hyman, Circuit Court Judge

---

BERT WAYNE FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001667

---

PETITION FOR WRIT OF CERTIORARI

---

WANDA H. CARTER  
Deputy Chief 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

**INDEX**

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

Trial counsel erred in advising petitioner not to testify at trial because petitioner’s defense was that he was merely present at the crime scene and therefore, his testimony would have lended credence to his mere presence defense, particularly in light of the fact that three co-defendants testified against him implicating him in the two armed robberies, and where the defense had already forfeited the last argument at closing due to the presentation of only one defense witness who contributed zero value to the case for the defense.....3

CONCLUSION.....8

### **ISSUE PRESENTED**

Trial counsel erred in advising petitioner not to testify at trial because petitioner's defense was that he was merely present at the crime scene and therefore, his testimony would have lended credence to his mere presence defense, particularly in light of the fact that three co-defendants testified against him implicating him in the armed robberies, and where the defense had already forfeited the last argument at closing due to the presentation of only one defense witness who contributed zero value to the case for the defense.

## STATEMENT

Petitioner Bert Wayne Foster was convicted of two counts of armed robbery during the December 2010 term of the Spartanburg County General Sessions Court before Judge Roger L. Couch, who sentenced him to consecutive twelve-year prison terms in the case. App. 1-207 Melinda Butler represented petitioner at trial, and Assistant Solicitor Abel Gray and Dan Cude appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed on appeal. Katherine Hudgins, Esquire, of the South Carolina Office of Appellate Defense represented petitioner on direct appeal. See State v. Foster, Op. No. 2012-UP-485 (S.C. Ct. App. filed August 8, 2012).

On August 6, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 209-214. The respondent filed a return requesting that a PCR hearing be held in the case. App. 215-219.

A PCR hearing was convened on November 10, 2015, at the Spartanburg County Courthouse before Larry B. Hyman. App. 221-254. Petitioner was present at the hearing and represented by Christopher D. Brough, and Assistant Attorney General Alicia A. Olive appeared on behalf of the state.

On July 15, 2016, Judge Hyman issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 256-264.

Petitioner appealed Judge Hyman's Order of Dismissal. This brief follows.

## ARGUMENT

Trial counsel erred in advising petitioner not to testify at trial because petitioner's defense was that he was merely present at the crime scene and therefore, his testimony would have lended credence to his mere presence defense, particularly in light of the fact that three co-defendants testified against him implicating him in the two armed robberies, and where the defense had already forfeited the last argument at closing due to the presentation of only one defense witness who added contributed value to the case for the defense.

In this case, the state charged petitioner and co-defendants Steven Rogers, Adam Suchil, and Shannon Varner with the armed robberies of Freddie Robinson and Rigoberto Sanchez on September 21, 2009, that occurred in Spartanburg County. Shannon Varner was the get-a-way driver. Neither Robinson nor Sanchez could identify the three men charged as the robbers because their faces were covered. At petitioner's trial, Steven Rogers, Adam Suchil, and Shannon Varner testified on behalf of the state against petitioner. Petitioner did not testify in his defense at trial. Only one witness appeared on behalf of the defense during petitioner's trial.

Freddie Robinson testified that he was walking home on September 21, 2009, on Seminole Drive in Spartanburg County around 8:30 p.m. when someone driving a Black SUV Durango pulled up beside him, and then someone from inside pulled out a gun and told him that he was about to be "jacked." Immediately thereafter, a tall guy got out of the SUV and ordered him to surrender his money. After Robinson surrendered his money, the perpetrators fled. Robinson stated that the perpetrators' faces were covered and that they could not make any identifications in the case. App. 55, l. 18 – p. 60, l. 22.

Rigoberto Sanchez testified that around 9:00 p.m. on September 21, 2009, two men holding guns entered his home located on Prince Street in Spartanburg County. Sanchez stated

that one man put a gun to his chest and asked for money, and that another man grabbed one of his cousins who was in the house. Sanchez added that after he gave them the money (approximately \$2,000.00), they fled. Sanchez admitted that he could not give police any identifications because the perpetrators' faces were covered. App. 71, l. 16 – p. 24, l. 7.

Co-defendant Steven Rogers testified at trial and stated that he, petitioner, and co-defendant Adam Suchil and co-defendant Shannon Varner were all riding in a black Durango on September 21, 2009, when they saw a black male, later identified as Freddie Robinson, walking along Seminole Road. Rogers stated that at that time, petitioner told Varner to stop. Then, petitioner and Suchil got out of the vehicle and ran up to Robinson and robbed him. Rogers stated that by the time he made his exit from the vehicle, the robbery had already taken place and petitioner and Suchil were putting their guns away. Rogers stated that petitioner and Suchil were wearing bandanas (presumably on their faces) on that day. Rogers added that minutes later on the same day, they were driving on Prince Street and stopped at a particular house and committed robbery there also. Rogers claimed that petitioner got out of the vehicle in front of the house and pulled out a gun on the occupants, but that he (Rogers) stayed inside the vehicle. App. 99, l. 11 – p. 112, l. 18.

Co-defendant Adam Suchil testified that he committed the two armed robberies in question on September 21, 2009, and that Steven Rogers, and petitioner, and driver Shannon Varner were present when both of the crimes occurred. Co-defendant Suchil stated that he, Rogers, and petitioner jumped out of the vehicle when they saw Robinson walking on Seminole Drive. Suchil stated that he and petitioner held guns and that Rogers held a baseball bat as they took Robinson's money. Suchil added that he held a gun on the occupants in the house when they took money from Sanchez later on that same date. Suchil stated that Rogers had a gun at

the second robbery, but that petitioner did not have a gun during the second robbery. App. 119, l. 9 – p. 127, l. 5.

Note that co-defendant Shannon Varner testified at trial and included petitioner as a willing participant in the robberies. App. 140, l. 14 – p. 145, l. 24. Also, Kasey Davis stated she was in the vehicle when all three men robbed Sanchez and that she witnessed that particular robbery. App. 81, l. 7 – p. 91, l. 16.

Petitioner was convicted of two counts of armed robbery at the close of his jury trial. App. 198, l. 5 - 19. Co-defendants Varner and Rogers, both of whom pled guilty, stated that the state offered him no deal on the charges in exchange for testifying at petitioner's trial. App. 118, l. 9 – 16; App. 109, l. 18 – 23; App. 155, l. 12 – 17. However, co-defendant Suchil had one of his armed robbery charges dropped and he pled guilty to only one armed robbery charge. App. 121, l. 22 – p. 122, l. 13.

During the PCR hearing held in the case, petitioner admitted that he was guilty of the Sanchez armed robbery, but swore that he did not commit the Robinson armed robbery. App. 229, l. 21 – p. 231, l. 4. Petitioner stated that he was in the car when Robinson was robbed, but that he was merely present during the Robinson's robbery, and was not guilty of participating as an accomplice or a principle in the Robinson robbery. App. 238, lines 7 – 12. Petitioner complained that he did not testify at trial, but that he wanted to testify in his defense. Petitioner added that he did not testify because counsel advised him not to testify since he seemed nervous (nervous smile) and that the jury would not believe him. App. 232, l. 15 – p. 233, l. 7. Petitioner elaborated regarding this matter as follows:

Q. And so everybody in the [vehicle] with the exception of you testified?

A. That's correct.

Q. So at trial...your lawyer involved you being the only person who could deny if that was in that vehicle to not testify?

A. That's correct. App. 234, lines 2 – 9.

Q. ...They chose not to call you, you were advised not to testify, being the only person that could give any testimony that would support that you were merely present from the robbery of Freddie Robinson, correct?

A. Correct. App. 236, lines 10-14.

Trial counsel testified that the state's case against petitioner was "pretty compelling," but that the theory the defense used as its best bet was the "mere presence" defense. App. 241, lines 10 – 25. Counsel admitted in effect that petitioner's testimony would have likely supported the "mere presence" defense. Counsel's testimony follows:

Q...[S]ince he was the only person in the case and...was merely there during the Freddie Robinson robbery, did not take any participation, did not act...in fact actually said not to rob Mr. Robinson...the only thing that would have even come into evidence is by you calling him?

A. That is true...Mr. Foster and I discussed me calling him and after giving him all of the risks and the benefits [petitioner] decided to not testify. Tr. 247, lines 9-19.

During the jury charge, the trial judge instructed the jury on the mere presence law as follows:

Mere presence at the scene of the crime is not sufficient to convict one as a principle on the theory of aiding and abetting. App. 184, l. 7-9.

In State v. Dennis, 321 S.C. 413, 468 S.E.2d 674 (S.C. Ct. App. 1996), the Court held that mere presence is generally applicable in instances where there is some doubt over whether a person is guilty of a crime by virtue of accomplice liability, and that the trial court may be required to instruct the jury that a person must personally commit the crime or be present at the scene of the crime intentionally, or through a common design, aid, abet, or assist in the

commission of that crime through some over act. See also State v. James, 386 S.C. 650, 689 S.E.2d 643 (2010). Since mere presence was applicable in the case, petitioner should have been allowed to testify in support of his defense at trial. Petitioner's testimony would have supported his defense.

The right to testify is an essential component of the Due Process Clause and in the Compulsory Process Clause of the Sixth Amendment, and is also a corollary to the Fifth Amendment's guarantee against compelled testimony. Rock v. Arkansas, 483 U.S. 44 (1987); Faretta v. California, 422 U.S. 806 (1975). See also State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). Defense counsel argued that Robinson and Sanchez had "no idea who robbed them" (App. 168, l. 2-4), and that the co-defendants who placed petitioner at the crime scenes might have been motivated to do so because they had a stake in the outcome of petitioner's trial that would have favored them at their sentencing hearings. App. 168, l. 2 - 4; App. 168, lines 15-19. Clearly, petitioner did not have to prove his innocence. Rather, the state has to prove every element of the offenses charged against a defendant beyond a reasonable doubt in a criminal case. See Jackson v. Virginia, 443 U.S. 307 (1979). However, would the benefit of testifying have offset the disadvantages of testifying, particularly when three state's witnesses placed petitioner at the Robinson crime scene, and where petitioner could have explained that he was merely present at the scene and not an accomplice or principle in connection with the Robinson robbery? The answer weighs heavily in favor of the position that petitioner should have been allowed to testify at trial.

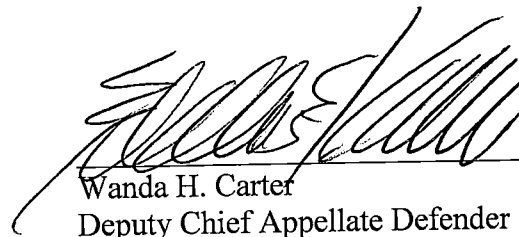
Additionally, note that there was only one defense witness (Cassie Cardoza) who testified at trial. Cardoza stated that petitioner lived with her in September of 2009, but that she could not be sure that petitioner was at her home on September 21, 2009. App. 160, l. 2 - p. 162,

1. 19. Cardoza's testimony was not good alibi testimony and it did not establish that petitioner had any motivation to rob because he had a place to live. Since the defense lost the last argument due to the calling of this frivolous witness who contributed nothing to the case for the defense, then why not lose the last argument by the presentation of the most important witness in the case, i.e., petitioner, in support of his mere presence defense in this case.

Counsel erred in advising petitioner not to testify in his defense at trial when his testimony provided the most beneficial proof of the mere presence defense in his case. This was deficient legal representation at trial, which in turn violated petitioner's Sixth Amendment right to competent legal counsel in a criminal case. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). Petitioner was prejudiced due to his failure to testify at trial based on counsel's misadvice regarding the matter because his testimony would most probably have added credence to his mere presence defense; and but for this omission as a result of counsel's error, a reasonable likelihood exists that the outcome of the trial would have been different.

### CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow briefing on the above raised issue.

  
Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 23rd day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_

Certiorari to Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

\_\_\_\_\_

BERT WAYNE FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

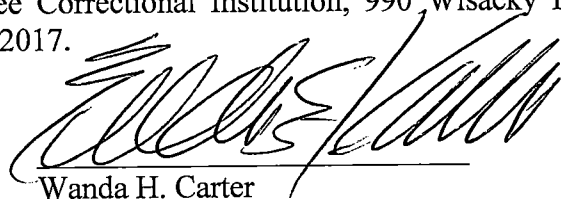
RESPONDENT

\_\_\_\_\_

CERTIFICATE OF SERVICE

\_\_\_\_\_

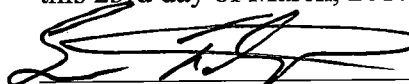
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Bert Wayne Foster, #325398, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 23rd day of March, 2017.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S)

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