ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Eugene C. Griffith, Jr., Circuit Court Judge

EMILIO B. CRAIG PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE # 2015-000951

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for requesting the trial judge instruct the jury on strong arm robbery as a lesser included offense of armed robbery when there was only evidence of armed robbery and there was a reasonable probability that the jury would have found petitioner not guilty of armed robbery because no gun was recovered?

STATEMENT

In July 2011, the Darlington County Grand Jury indicted Emilio B. Craig on the charges of armed robbery (AR), possession of a weapon during the commission of a violent crime, pointing and presenting a firearm, and petit larceny. On August 29-31, 2011, Petitioner Craig and his co-defendant Mardrall D. Addison, proceeded to trial before the Honorable Howard P. King and a jury. Craig was represented by William Grove; Addison was represented by Emily Crayton; and the state was represented by John Holt, Patti McKenzie, and Christopher Jones. App. 1. The jury returned a verdict of guilty on the lesser included offense of strong arm robbery and guilty of petit larceny. The jury found Craig not guilty on the charges of pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime. App. 482, ll. 2 – App. 483, ll. 20. The trial judge sentenced Craig to fifteen years suspended to the service of eight years with three years probation. App. 500, ll. 1 – 8. Petitioner Craig appealed his conviction which was dismissed by the South Carolina Court of Appeals on June 19, 2013 following the filing of an Anders[1] brief. State v. Craig, Op. No. 2013-UP-255 (Court of Appeals filed June 19, 2013).

On April 22, 2014, Petitioner Craig filed an application for post-conviction relief (PCR). The state filed a return on November 19, 2014. An evidentiary hearing was held on January 21, 2013 before the Honorable Eugene C. Griffith, Jr. Petitioner Craig was represented by Tristan Shaffer, and the state was represented by Joshua L. Thomas. App. 516. On March 30, 2015, Judge Griffith issued an order denying Petitioner Craig's PCR application and dismissing it with prejudice. App. 537 – App. 543. Craig's attorney filed a notice of appeal. This petition follows.

[1] Anders v. California, 386 U.S. 738 (1967).

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for requesting the trial judge instruct the jury on strong arm robbery as a lesser included offense of armed robbery when there was only evidence of armed robbery and there was a reasonable probability that the jury would have found petitioner not guilty of armed robbery because no gun was recovered.

Morris Mazyck sold sneakers from his car as he was confined to a wheelchair from a motorcycle accident. App. 133, ll. 25 – App. 136, ll. 1. On January 13, 2011, he had gone to East Park Apartments to see his cousin and was sitting in his car with her talking. One guy came to the right side of his car and asked for white Air Force sneakers. Mazyck said he would get them later. Then another guy, whom Mazyck later identified as Craig, came to the driver's side, pulled out a gun, and demanded everything Mazyck had. The man got his money, cell phone, and the shoes in the car. The man allegedly told Mazyck that Mazyck was "already messed up so don't make him shoot him." Mazyck did not know the two men. App. 135, ll. 2 – App. 136, ll. 23.

The two men walked into an apartment and Mazyck watched. Mazyck then contacted the police, and went to the Hartsville Police Station. He selected the two men from a photo lineup. He then identified the two defendants in court as being the robbers. App. 137, ll. 1 – App. 140, ll. 5.

Mazyck admitted that he had been charged in 2009 with an armed robbery involving the sale of shoes. Those charges were dismissed but he could not say when. App. 170, ll. 13 – App. 171, ll. 20. He finally admitted on cross examination that the solicitor's office told him his charges would be dismissed if he testified at this trial. App. 175, ll. 2 – App. 176, ll. 3.

Emilio Craig testified that he saw Mazyck on January 13, 2011, and knew that he sold shoes from his car. Craig bought three pairs of sneakers which included white Air Force Ones, white Red Maxes, and black A.C. Juice Nikes. He and Mazyck argued back and forth about the price. Finally,

Craig put one hundred dollars for all of them together on the front seat of Mazyck's car and left with the shoes. Mazyck wanted one hundred fifty dollars for the shoes. App. 344, ll. 3 – App. 349, ll. 25.

Later that day, Craig let his friend drive Craig's girlfriend's car. The police started following them. Craig's friend was speeding but then stopped the car. The friend and Craig then ran on foot, but were arrested later that day. Craig ran because he did not know what was going on but ran when his friend ran. App. 348, ll. 23 – App. 351, ll. 24.

Craig denied having a gun that day; he denied threatening Mazyck; and hr did not point a gun. He bought shoes from Mazyck in the past. App. 352, ll. 1 – App. 353, ll. 14.

The police never found a gun. App. 421, ll. 19; App. 521, ll. 1 – 11; App. 524, ll. 10 – 23.

During the charge conference, defense counsel asked for a jury charge on strong arm robbery in addition to armed robbery. The judge replied that the defense position was that there was no robbery at all because Craig testified that he bought the shoes. So, according to the judge, it was either armed robbery or nothing. Defense counsel argued that Craig took "an amount that he did not contribute enough money to without a gun from the presence of the victim." Counsel argued that had all of the elements of strong arm robbery. App. 392, ll. 21 – App. 393, ll. 25.

Counsel said that if Craig did not pay full price for the shoes, then he did not buy them. The judge did not see where there was any robbery at all. The judge continued that the state's position was that there was an armed robbery. The defense position was there was no robbery because it was a purchase. App. 394, ll. 1 – App. 395, ll. 25.

The state consented to the jury charge on strong arm robbery. Therefore, the judge said he would give that charge. When the defense thanked him, the judge said: "Don't thank me. I don't agree." App. 396, ll. 1 – 10. The judge charged the jury on both armed robbery and strong arm

App. 458, ll. 1 - App. 459, ll. 24. The jury found Petitioner Craig guilty of strong arm robbery. App.

At his PCR hearing, Petitioner Craig testified that he did not want the jury charge on strong arm robbery because that was the offense he was charged with and he knew he was not guilty of that charge. That was the reason he went to trial. If he had done something wrong, he would have taken the plea deal which was eight years. His trial counsel did not discuss with Petitioner Craig asking for the lesser included strong arm robbery. App. 528, ll. 1 – App. 529, ll. 21. Craig believed there was not any evidence to support the strong arm robbery charge. Mazyck said that Craig came to his car and put a gun to his side and took his money. App. 530, ll. 18 – App. 531, ll. 5.

Craig had bought shoes from Mazyck previously so had done business with him. Craig asked Mazyck to allow him to buy the three pairs of shoes for one hundred dollars. Mazyck told him he wanted one hundred and fifty. Craig gave Mazyck the one hundred dollars and left with the shoes. Craig believed that Mazyck would have given him his money back if he did not want Craig to have the shoes. App. 532, ll. 1 – 20.

Craig's trial counsel believed there was evidence of strong arm robbery based on the fact that there were two opposite stories. Mazyck said he was robbed at gunpoint, and Craig said he paid for the shoes but not full price. Therefore, the jury could believe half of each story: that there was no gun but there was a robbery since the shoes were not paid for. App. 521, ll. 1 – 21. He said he always discussed with clients on whether to pursue a lesser included offense. He thought the lesser included in Craig's case was advantageous to him. App. 525, ll. 6 –App. 526, ll. 8.

Trial counsel admitted on cross examination that the only evidence in the record supporting strong arm robbery "would be the jury adopting a hybrid version of events." App. 527, ll. 18 – 22.

PCR counsel argued that Craig was alleging ineffective assistance of counsel in asking for the jury charge on strong arm robbery. App. 533, ll. 17 - App. 534, ll. 9.

The PCR judge ruled that he found, on the issue of requesting the charge on the lesser included common law robbery, trial counsel's testimony credible and found Petitioner Craig's testimony not credible. App. 541. The PCR judge found that the record contained sufficient evidence to support the charge on the lesser included offense of common law robbery. The judge wrote that although the victim said there was a gun, a gun was never recovered. The jury could believe the victim that shoes were stolen from him but not believe that a gun was used. The jury decided what testimony to believe and what not to believe. App. 541- App. 542. The judge's order provided that trial counsel requested the lesser included jury instruction to give the jury an "alternative verdict if they disbelieved parts of the victim's story." App. 542.

The PCR judge rule that Petitioner Craig failed to meet his burden of proof that trial counsel was ineffective for requesting a charge on the lesser included offense of common law robbery. App. 541.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional

errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Strong arm robbery is defined under common law as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014). There was no evidence of this element under the defendant's testimony.

The PCR judge erred in failing to find trial counsel ineffective for requesting the jury charge on the lesser included offense of strong arm robbery. Trial counsel has the duty to keep his client informed of important developments at trial and to consult with him on important issues. Jones v. Barnes, 463 U.S. 745 (1983). Petitioner Craig's trial counsel was ineffective for not consulting with Craig on asking for the lesser included charge on strong arm robbery.

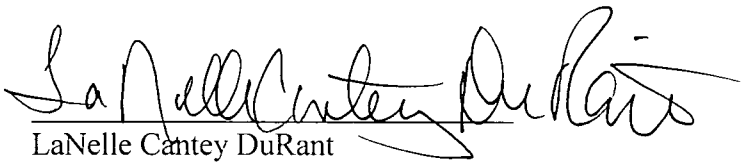
The trial judge did not believe there was sufficient evidence for the charge. He said it was armed robbery or nothing. The trial judge heard the evidence directly as opposed to the PCR judge who only heard some of the evidence second hand. The trial judge had the opportunity to judge the believability of all of the witnesses including the victim.

Craig was prejudiced by the judge instructing the jury on the lesser included because the jury obviously believed Craig did not have a gun by finding him guilty of strong arm robbery which did not require a gun. Therefore, there was a reasonable probability that the jury would have found him not guilty if the only choices were armed robbery or not guilty.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for the entry of a directed verdict.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of November, 2015.

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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 Jessica Kinard, Esquire, and Mr. Emilio Craig, #319662, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 30th day of November, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of November, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.