

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

APR 06 2017

STEVIE AIKEN,

PETITIONER SC. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001707

JOHNSON PETITION FOR WRIT OF CERTIORARI

Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding that trial counsel did not render ineffective assistance of counsel where he failed to call Petitioner to testify during the pre-trial *Denno* hearing?

STATEMENT OF THE CASE

Indictment and Trial

Petitioner Stevie Aiken was indicted by the Hampton County grand jury for assault and battery with intent to kill, possession of a weapon during a violent crime, armed robbery, kidnapping, and first degree burglary during the March and November terms of 2010. App. 611 – 620. The incident related to break-in of an elderly woman's home. The woman opened fire on the intruders, who shot her and stole her checkbook from inside the home.

On March 7-9, 2011, Aiken appeared for trial before the Honorable Perry M. Buckner, III and a jury. He was represented by Stephen Plexico, and the state was represented by solicitor Isaac McDuffie Stone and assistant solicitor Sean P. Thornton. App. 1. Aiken was convicted and sentenced to thirty-five years for burglary, thirty years for kidnapping, twenty years for armed robbery, twenty years for assault and battery with intent to kill, and five years for possession of a weapon during the commission of a violent crime. App. 436; App. 451 – 452. The sentences were ordered to run concurrently to each other. App, 542, ll. 6-7.

Direct Appeal

Aiken filed a timely notice of appeal, and was represented on direct appeal by appellate defenders Elizabeth-Franklin Best and Susan Hackett. App. 454; App. 449. The state was represented by assistant attorney general Mark Farthing. App. 468. On November 28, 2012, the Court of Appeals affirmed Aiken's convictions and sentences in an unpublished decision. State v. Aiken, 2012-UP-632 (Ct. App. filed Nov. 28, 2012); App. 497. Ms. Hackett filed a petition for rehearing, which was denied by order of the Court of Appeals dated January 25, 2013. App. 499; App. 504. The petition for writ of certiorari, to which the state filed a return, was denied by

order of the Supreme Court dated May 7, 2014. App. 505; App. 519; App. 549. The remittitur was sent on May 15, 2014. App. 550.

Post-Conviction Relief Proceedings

On May 30, 2014, Aiken filed an application for post-conviction relief with the Clerk of Court in Hampton County. App. 551. The state filed its return on November 2, 2015. App. 559. An evidentiary hearing was held on May 18, 2016, before the Honorable Brooks P. Goldsmith. App. 565. Aiken was represented by Tristan M. Shaffer, and the state was represented by assistant attorney general J. Rutledge Johnson. App. 566.

At the outset of the hearing, PCR counsel clarified that Aiken would be pursuing claims of ineffective assistance of trial counsel for failing to call Aiken as a witness at the Jackson v. Denno¹ hearing and advising Aiken not to testify during his trial. App. 570, l. 8 – 571, l. 15. Trial counsel, Stephen Plexico, and Petitioner Aiken testified at the hearing. App. 567.

Trial counsel testified that Aiken did not deny his involvement in the underlying incident and told trial counsel the he was advised of his rights, understood them, but signed a written statement “by a lady detective, Jamison.” App. 572, l. 14 – 574, l. 19; App. 576, l. 24 – 577, l. 5. Trial counsel could not recall any specific discussion with Aiken about his right to testify, but submitted that he did not think Aiken should testify in light of Aiken’s statements to him about his involvement. App. 580, ll. 4-13; App. 582, l. 18 - 583, l. 3.

Aiken testified that he told trial counsel that he did not confess to anything but that counsel did not seem interested in anything that he had to say. App. 583, l. 22 - 584, l. 9. Aiken described how officers called and told him that they needed to talk to him. They picked him up and took him to the Colleton County police annex. Aiken was then placed in handcuffs and

¹ 84 S.Ct. 1774 (1964).

taken to Hampton County. He sat in a room in Hampton County for approximately one hour before SLED agents arrived. Aiken said that they turned a video recorder on and began asking him about the victim. Aiken admitted that he had cut the grass for her but denied going to her house since then. Despite the fact that the victim was alive, the agents told Aiken that he would be charged with murder. App. 577, l. 6 - 579, l. 23; App. 584, l. 22 - 585, l. 23; App. 589, ll. 7-18. Aiken testified that he never prepared or signed a written statement, which he told trial counsel during their first meeting and continually during the trial. App. 586, l. 14 - 587, l. 8; App. 590, ll. 1, App. 593, l. 21 - 594, l. 2.

Following arguments by counsel, the PCR judge orally pronounced his denial of Aiken's PCR application. He asked the assistant attorney general to prepare a written order. App. 596, l. 6 - 599, l. 23. Judge Goldsmith filed a written order of dismissal on July 12, 2016. App. 602. While the Order contained credibility findings in favor of trial counsel and against Aiken, it is notable that the Order also found that the applicant's "father's testimony" not credible. App. 607. Aiken's father did not testify at the PCR hearing. Regarding the failure to call Aiken at the Denno hearing, the court found: "Counsel based his trial strategy on the information supplied by Applicant and on his statement to law enforcement. Counsel challenged this statement and the trial judge ruled it admissible. Since Counsel performed above and beyond during the *Jackson v. Denno* hearing, he cannot be said to be ineffective." App. 608. Thus, the court found that Aiken failed to meet his burden of proving that trial counsel was deficient or that he was prejudiced. App. 609.

This appeal follows.

ARGUMENT

The PCR court erred in finding that trial counsel did not render ineffective assistance of counsel where he failed to call Petitioner to testify during the pre-trial *Denno* hearing.

At the Denno hearing conducted pre-trial, Hampton County Sheriff's Deputy Chauncey Solomon testified that the video recording of Aiken's interrogation "cut off," possibly because the tape ran out. App. 11, l. 25 - 15, l. 25. Solomon agreed that Aiken did not make any incriminating statements during the videoed portion of the interrogation, but maintained that Aiken later gave "a full confession" in the form of a written statement. App. 16, ll. 1-19. Solomon said that the statement "came from Ms. Stevie Aiken" but was written by detective Leslie Jamison. App. 17, l. 1 - 18, l. 10. Though Solomon was not present during the writing of the statement because he left to retrieve a gun, Solomon said that he went over it with Aiken when he returned. He clarified that he asked Aiken if he wrote the statement, to which he responded "no," and asked its contents were true, to which Aiken allegedly said "yes." App. 23, l. 12 - 24, l. 1; App. 27, l. 16 - 29, l. 16.

On cross-examination, Solomon said that he recalled asking Aiken about his level of education, but could not recall Aiken's response. App. 24, l.21 - 25, l. 10. He said that all four pages of the written statement were given at the same time, but admitted that the first three pages were captioned as being taken at 8:40 p.m. and the fourth page was captioned "10:10 p.m." App. 25, l. 15 - 26, l. 19. Though not on the video, Solomon claimed that Aiken looked at him and said "Chauncey, sir, you got me" and started telling him "exactly what happened." App. 26, l. 10-25.

Deputy Perry Singleton testified that he was present for the Miranda warnings and a portion of Aiken's verbal statement. He averred that at some point, Aiken said he was "willing

to cooperate and tell them what happened.” App. 32, l. 12 - 37, l. 6. Detective Leslie Jamison testified that she prepared Aiken’s written statement, read it back to him, and allowed him to read over it. She said that Aiken initialed by corrections that she made as she wrote the statement and signed the each page of the statement. While only Jamison and deputy Halbert Mungin were present during the writing of the statement, there were five members of law enforcement involved throughout the interrogation. App. 39, l. 1 - 52, l. 10. Deputy Mungin testified that he came in the interrogation room when the other deputies left and remained there as Jamison “wrote [the statement] as he [Aiken] told her.” App. 54, l. 19 - 58, l. 25.

The defense did not present any witnesses or evidence. App. 59, ll. 7-9. Defense counsel argued that the statement should be suppressed because of a lack of continuity in the interrogating officers such that no one could confirm that no promises or threats were made to induce the statement. App. 59, l. 12 - 60, l. 8. The solicitor responded that no such continuity was required and noted that the defense presented no contrary evidence regarding the voluntariness of Aiken’s statement. App. 60, l. 13 - 61, l. 24. The trial judge denied the motion to suppress the statement. App. 61, l. 25 - 63, l. 12.

Under Jackson v. Denno, a defendant is entitled to a “reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence.” State v. Fortner, 266 S.C. 223, 226 (1976). In South Carolina, the judge makes this initial determination of voluntariness required by Denno. Id. “A defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury.” State v. Salisbury, 330 S.C. 250, 271, 498 S.E.2d 655, 666 (Ct.App.1998), *aff’d as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001); see also State v. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 639

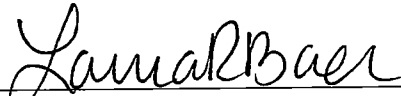
(Ct.App.1993). The trial judge must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

The State bears the burden of showing the statement was voluntary by preponderance of the evidence. State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 694 (1986) ("In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with *Miranda*."). If the trial judge determines that the statement is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made. State v. Von Dohlen, 322 S.C. at 243, 471 S.E.2d at 695; State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974); State v. Clinkscales, 231 S.C. 650, 653, 99 S.E.2d 663, 664 (1957).

Here, the failure to call Aiken as a witness at the Denno hearing was a fatal error, making admission of Aiken's alleged statement inevitable. While the burden was on the state, they presented the Miranda waiver, a written statement purportedly signed by Aiken, and the testimony of four members of law enforcement. Without Aiken's testimony regarding his intellectual abilities and testimony regarding an actual threat made and that he did not sign the statement, the defense presented nothing more than speculation, at best. This failure cannot be excused as trial strategy. Had Aiken testified at the Denno hearing, there is a reasonable probability that the statement would have suppressed. With little more than the self-serving testimony of Aiken's co-defendant to support the conviction, Aiken's alleged confession was a crucial piece of evidence against him. Thus, Aiken was prejudiced by trial counsel's failure to call him as a witness at the Denno hearing.

CONCLUSION

Based on the foregoing, Petitioner Stevie Aiken respectfully requests that this Court grant the petition for writ of certiorari and order further briefing on the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2017.

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IN THE SUPREME COURT

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Stevie Aiken states:

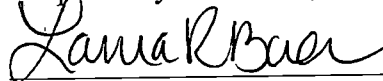
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's trial before Judge Brooks P. Goldsmith, which was held on May 18, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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 her as counsel for Stevie Aiken.

Respectfully Submitted,



Laura R. Baer

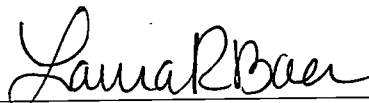
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."



Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent
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This 6th day of April, 2017.

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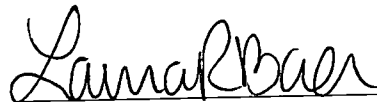
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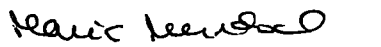
CERTIFICATE OF SERVICE

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. Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Stevie Aiken, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of April, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023