

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Diane Schafer Goodstein, Circuit Court Judge

TYRIK GERRARD BRIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001683

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where trial counsel failed to request an on-the-record ruling following an objection to testimony which constituted improper character evidence where a witness testified about a pre-release program?

STATEMENT

Officer Christopher Walker with the Aiken Department of Public Safety responded to a burglary call on December 25, 2011. App. 80 l. 20 – App. 81 l. 13. He arrived at All-Star Rentals where the alleged break-in occurred and viewed surveillance tapes from the previous night. App. 82 ll. 2 – 10; App. 85 ll. 7 – 11. According to Walker, Mike Fanning and Mary Wolf identified an individual from the surveillance tapes.¹ App. 91 l. 21 – App. 92 l. 10. Fanning testified that Petitioner lived across the street from the business and was employed as a seasonal employee. App. 102 ll. 2 – 14. He claimed to have recognized Petitioner from the surveillance tapes. App. 107 l. 14 – App. 108 l. 5. Wolf also allegedly recognized Petitioner from the video. App. 122 ll. 6 – 10.

An Aiken County Grand Jury indicted Petitioner for burglary in the second degree on March 12, 2012. App. 285. Petitioner proceeded to trial before the Honorable J. Derham Cole and a jury on June 10, 2013. App. 1. Nick McCarley and Elizabeth Young appeared on behalf of the State, and Dave Hayes and Michael Routzong represented Petitioner. App. 1.

At trial, Wolf testified that she put together a list of employees who worked at All-Star Rentals during the time period spanning July 2011 to December 2011. App. 126 ll. 16 – 19. The list was used to “consider all of [the] people [who were employed at All-Star Rentals] and the possibility of their involvement in [the alleged burglary]. App. 126 ll. 22 – 24. During redirect examination, Wolf testified about the creation of the list:

Well, I started by the females, took them off the list. And then I had no choice but to segregate the number of blacks that were on the list and the number of whites. And then I took those names of males because at that time we had a pre-

¹ Mike Fanning was the co-owner of All-Star Tents and Events. App. 99 ll. 15 – 20. Mary Wolf is Fanning’s sister and business partner. App. 100 ll. 7 – 10.

release program where we brought gentlemen from the pre-release program for work - -

App. 127 ll. 12 – 17.

Defense Counsel objected, and an off-the-record discussion took place between opposing counsel and the judge. App. 127 ll. 19 – 23. Following the sidebar, Wolf was asked about the list again with specific instructions to avoid mentioning Petitioner. App. 127 ll. 22 – 23. A ruling regarding Wolf's testimony and the pre-release work program was not made on the record, and the objection was not revisited later during the trial.

The jury convicted Petitioner as indicted. App. 180 ll. 9 – 12. Judge Cole sentenced Petitioner to a term of twelve years' imprisonment. App. 185 ll. 5 – 9. Petitioner's conviction was affirmed by the South Carolina Court of Appeals on May 6, 2015. State v. Bright, Op. No. 2015-UP-222 (S.C. Ct. App. filed May 6, 2015). Notably, in discussing Wolf's testimony, the South Carolina Court of Appeals' opinion cited State v. Varil which stated that constitutional issues must be raised to and ruled on by the trial court to be preserved for appeal. 338 S.C. 339, 526 S.E.2d 248, 250 (Ct. App. 2000).

Petitioner filed an application for post-conviction relief on or about June 19, 2015. App. 186 – 191. The State filed a Return and Motion for a More Definite Statement on or about July 9, 2015. App. 193 – 196. A subsequent amendment to Petitioner's application for post-conviction relief was filed by Lance Boozer on or about September 28, 2015. App. 197. Counsel Boozer included three additional grounds for relief, including trial counsel's failure to object to Wolf's testimony which "constitut[ed] improper character evidence." App. 197.

An evidentiary hearing was conducted on May 26, 2016 before the Honorable Diane Goodstein. App. 199. Lance Boozer represented Petitioner, and Justin Hunter and Julie

Coleman appeared on behalf of the State. Petitioner and trial counsel testified during the hearing.

On July 27, 2016, Judge Goodstein issued her order denying Petitioner relief. App. 274. She ruled that trial counsel was not ineffective as it related to the four claims raised by Petitioner.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where trial counsel failed to request an on-the-record ruling and preserve an issue following an objection to testimony which constituted improper character evidence where a witness testified about a pre-release program.

When asked about the pre-release program at the evidentiary hearing, Petitioner stated that he believed Wolf was referencing him: “She was basically saying, basically stating that she had to really segregate the people, the people that [were] criminals, just the people that [were] basically ... capable of committing this crime.” App. 216 ll. 8 – 17. Petitioner responded in the affirmative when asked if those remarks prejudiced his case. App. 214 ll. 18 – 20.

Trial counsel testified that Petitioner was not involved in the work release program at the time of the burglary. App. 244 l. 15 – App. 245 l. 6. The purpose of his objection was to prevent the State from “bring[ing] out that [Petitioner] had previously been to work release or was involved with any priors or incarceration.” App. 245 ll. 2 – 6. Following the objection, however, there was not a ruling made on the record by the judge. App. 254 ll. 13 – 15. Counsel admitted that he “failed to put it on [the] record though at some later time.” App. 254 ll. 10 – 12.

Petitioner’s PCR counsel argued at the close of the evidentiary hearing that because trial counsel did not obtain an on-the-record ruling that the matter was not preserved for appellate review:

[T]hat was an appellate issue that was raised by his appellate counsel during his appeal. And even the State in its argument, in its brief to the Court, to the appellate court said, ... this issue isn’t properly before the appellate court because the issue’s not preserved for appeal because there was no ruling on it by the trial court.

And looking at the transcript it's obvious that [trial counsel] made the objection. He indicated why he objected but for whatever reason there was just no ruling made. And at that point the cat's kind of out of the bag and now you've got pre-release [in the open].

App. 264 ll. 4 – 17.

Petitioner correctly asserted that Counsel was ineffective, because he did not request and/or receive an on-the-record ruling regarding Wolf's testimony surrounding the work release program. 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 admitted that he failed to put anything on the record following a sidebar conversation with counsel and the judge. App. 254 ll. 5 – 12. Petitioner's testimony, as outlined above, indicated that on appeal, the State argued that the issue was unpreserved due to the lack of a ruling on the record. Such conduct falls within the gamut of deficiency.


“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 Petitioner’s case manifested itself in the resulting conviction and accompanying sentence as well as the inability to contest Wolf’s testimony on appeal.

The unavoidable result of Wolf’s testimony was that Petitioner was characterized as an individual who probably had a history of incarcerations and “here he is [at trial] again with another burglary.” App. 264 ll. 18 – 21. Because trial counsel failed to secure an on-the-record ruling, the South Carolina Court of Appeals did not consider this issue, citing State v. Varil, in the unpublished opinion affirming Petitioner’s conviction and sentence. 338 S.C. 335, 399, 526 S.E.2d 248, 250 (Ct. App. 2000) (stating constitutional issues must be raised to and ruled on by the trial court to be preserved for appeal). Had trial counsel obtained an on-the-record ruling, Petitioner could have raised this issue on appeal.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to 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 6th day of April, 2017.

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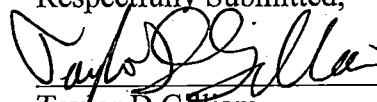
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrik Bright 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 Diane Schafer Goodstein, which was held on May 26, 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 Tyrik Bright.

Respectfully Submitted,



Taylor D Gilliam

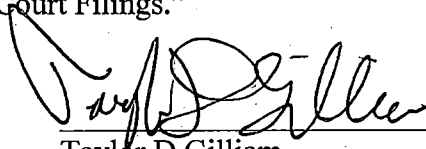
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 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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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 Julie Coleman, 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 Tyrik Bright, #272194, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of April, 2017.

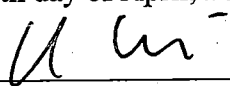


Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

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



Notary Public for South Carolina

(L.S)
My Commission Expires: 5/12/2025