

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

\_\_\_\_\_

Certiorari to Greenville County

Honorable R. Knox McMahon, Circuit Court Judge

\_\_\_\_\_

WILLIAM ANTHONY BUTTS,

RECEIVED  
PETITIONER  
JUN 16 2017  
S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001851

\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_

KATHRINE H. HUDGINS  
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

ISSUES PRESENTED.....1

STATEMENT.....2

ARGUMENTS

**I.**

The PCR judge erred in refusing to find trial counsel ineffective for failing to cross examine witnesses in regard to the height of the robbers when the witnesses described the robbers as shorter than Petitioner. ....3

**II.**

The PCR judge erred in refusing to find trial counsel ineffective for failing to call an expert witness to testify that the robbers depicted in the video tapes are shorter than Petitioner. ....8

CONCLUSION.....13

## **ISSUES PRESENTED**

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to cross-examine witnesses in regard to the height of the robbers when the witnesses described the robbers as shorter than Petitioner?
  
2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to call an expert witness to testify that the robbers depicted in the video tape are shorter than Petitioner?

## STATEMENT

In July of 2011, the Greenville County Grand Jury indicted Petitioner Butts for three counts of armed robbery and three counts of possession of a weapon during the commission of a violent crime, indictments #2011-GS-23-5149, 50, 51. On October 17, 2011, Petitioner proceeded to jury trial before the Honorable Robin B. Stilwell. Scott D. Robinson represented Petitioner at trial. W. Walter Wilkins, III and Sloan P. Ellis prosecuted the case. The jury found Petitioner guilty as charged. Judge Stilwell sentenced Petitioner to twenty (20) years concurrent for each armed robbery charge and five (5) years concurrent for each weapons charge. A timely notice of intent to appeal was filed and the direct appeal perfected. In an unpublished opinion the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Butts, Op. No. 2014-UP-141 (S.C.Ct.App. filed April 2, 2014).

On February 10, 2015, Petitioner filed an application for post-conviction relief [PCR]. On July 17, 2015, the State filed a return. On August 12, 2015, Petitioner filed an amended application for post-conviction relief. On August 25, 2015, the State filed an amended return. On November 19, 2015, Petitioner submitted a memorandum in support of post-conviction relief. On April 19, 2016, an evidentiary hearing was held before the Honorable R. Knox McMahon. Frank L. Eppes and Peter Smith represented Petitioner at the hearing. Patrick L. Schmeckpeper represented the State. In a written order signed July 29, 2016, Judge McMahon denied relief and dismissed the application. A timely notice of intent to appeal was served on September 6, 2016. This petition for writ of certiorari follows.

## ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to cross examine witnesses in regard to the height of the robbers when the witnesses described the robbers as shorter than Petitioner.

The jury found Petitioner guilty of three separate robberies of the same Citgo Corner Mart on October 18, 2009, October 30, 2009 and November 5, 2009. All three robberies were captured on videos that were introduced in evidence at trial. When asked on direct examination how tall the robber was, the clerk working at the time of the October 18<sup>th</sup> and November 5<sup>th</sup> robberies testified, “He was taller than me. I really, you know, it was quick.” (App. p. 115, lines 22-24). Trial counsel failed to ask the clerk any questions in regard to the height of the robber. (App. pp. 125-129). The clerk working at the time of the October 30<sup>th</sup> robbery testified, “I would say he’s probably, I don’t know, between five-eight, maybe six foot tall. I’m not sure.” (App. p. 132, lines 14-15). Trial counsel failed to ask this clerk any questions in regard to the height of the robber and failed to capitalize on his uncertainty. (App. pp. 136-138). Additionally, trial counsel failed to question David Weiner, the detective from the Greenville County Sheriff’s Department, about the height of the robber provided by the clerks. (App. pp. 297-305). The mother of Petitioner’s child testified that Petitioner was six feet one inches tall. (App. p. 206, lines 17-18).

During the PCR hearing Petitioner called Detective Weiner as a witness and asked him about the physical descriptions of the robber provided by the clerks. (App. p. 433, lines 7-8).

The detective testified:

The first one, October 18, 2009. This one the clerk is William Flynn. Black male, 18-25, 5-7, 120, white hood sweatshirt, jeans, black mask and gloves. October 30<sup>th</sup>, just after midnight. The clerk is Victor Campbell. Black male,

twenties, six-foot, 170, gray hoodie, black sweatpants, black shoes. And then the last one, November 5<sup>th</sup>. This one is Mr. Flynn again. Black male 20 to 30s, 5-9 to 10, 150 to 160, white hood under black shirt, blue jeans, black shoes, mask.

(App. p. 433, lines 9-19).

At trial, after both clerks had testified, both were excused from their subpoenas without objection from defense counsel. (App. p. 129, line 25 – p. 130, lines 1-3; p. 138, line 24 – p. 139, lines 1-2). After a short break in the proceedings, trial counsel decided that he should not have allowed the witnesses to be excused and told the judge, “Your Honor, one thing I wanted to take up. This is my fault. And I should have been a little more observant - -” (App. p. 139, lines 23-25). Trial counsel then talked about the clerk’s testimony and height descriptions and then stated, “And I wanted to recall them at a certain point to basically have my client stand up and say is this the – the height of the – because it’s just totally different height.” (App. p. 140, lines 14-17). The judge then advised that the clerks would remain under subpoena so that trial counsel could call them as witnesses during the defense case in chief. (App. p. 141, lines 2-9). Trial counsel told the judge that his examination would be limited to height. (App. p. 141, lines 23-25). Trial counsel, however, never called the clerks as witnesses.

During the PCR hearing trial counsel claimed that he did not call the clerks as witnesses as a trial strategy to not lose last closing argument. (App. p. 503, line 5 – p. 504, lines 1-2). When asked if he cross-examined the clerks about the height discrepancy, trial counsel answered, “I don’t know if I -- I’m looking at the transcript and I don’t think I did.” (App. p. 505, line 23 – p. 506, lines 1-12). Trial counsel was ineffective in failing to cross-examine the clerks in regard to the height discrepancy. If trial counsel had cross-examined the clerks about the height discrepancy when he had the opportunity, he would not have lost last closing argument.

In the order of dismissal the PCR judge wrote, “Counsel said that rather than focus on height in cross-examining several of the State’s witnesses, he wanted to highlight coercion.” (App. p. 546). There is no reason trial counsel could not have highlighted coercion as it applied to the testimony of the mother of Petitioner’s child and her mother **and** cross examined the clerks and the detective about the height discrepancy. The cross examinations were not contradictory and would have complimented one another. The PCR judge also wrote in the order of dismissal:

This Court finds counsel’s focus was objectively reasonable given the circumstances of the case. Further, his testimony and the record reflect that counsel also explored identity as a general matter, including height. Counsel elicited testimony and argued that the description given by the victims and as seen on the videos were inconsistent with Applicant’s physical characteristics. The jury heard testimony that the assailant was ‘between five eight and six foot,’ Tr. p. 132, l. 13-15, and that Applicant was ‘six-one.’ Tr. p. 206, l.17-19. Counsel further instructed the jury to ‘go back and look at it and see how tall this guy is’ during their deliberations. Tr. p. 340, l. 22-23. He asked that the jurors ‘[l]ook at the difference in height between [Applicant] and the six-one that they talked about and this alleged robber,’ Tr. p. 341, l. 3-4.

With this in mind, this Court finds counsel was not deficient in choosing to focus his theory on one issue over another – particularly when he actually addressed height and misidentification. Moreover, because these issues were before the jury and they still found Applicant guilty, this court finds he has failed to show prejudice.

(App. p. 547)(footnote #1 omitted). The PCR judge erred. Counsel’s focus on coercion but complete failure to cross examine about height discrepancy was not objectively reasonable. The jury never heard the testimony provided by Detective Weiner at the PCR hearing that the clerk working the night of the October 18<sup>th</sup> robbery described the robber as five feet seven, six inches shorter than Petitioner. The jury never heard that the same clerk, working the night of the November 5<sup>th</sup> robbery, described the robber as five feet nine inches tall, four inches shorter than Petitioner and two inches taller than the description he provided of the October 18<sup>th</sup> robber. The jury only heard that the clerk working the night of the October 30<sup>th</sup> robbery described the robber

as between five feet eight inches and six feet tall, but he was not sure. Trial counsel failed to capitalize on the uncertainty in this clerk's height description.

Trial counsel was ineffective for failing to cross examine the clerks in regard to the height of the robber when the clerks described the robber as being shorter than Petitioner. Trial counsel seemed to realize he made a mistake when he asked the judge to continue the subpoenas for the two clerks so that he could address height in the defense case in chief. Trial counsel, however, failed to correct the mistake and failed to call the clerks as witnesses. Trial counsel should have cross-examined the clerks in regard to the height discrepancy when he had the opportunity. Petitioner was prejudiced by the deficient performance. The evidence against Petitioner was not overwhelming. The clerks were unable to identify Petitioner as the robber. While counsel attacked the credibility of the identification made by the mother of Petitioner's child and her mother, trial counsel should have cross examined both clerks about the height discrepancy.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

In Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) this Court wrote:

“This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). We will uphold the findings of the PCR court when there is any evidence of probative value to support them. Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). However, this Court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. Id.; Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Although the Court in Miller noted the deferential standard of review, the Court found no evidence of probative value to support the PCR judge's finding that trial counsel was not ineffective in failing to cross-examine a witness about similar robberies committed by a third party.

Like Miller, in the present case there is no evidence of probative value to support the PCR judge's finding that trial counsel was not ineffective in failing to cross-examine witnesses in regard to height discrepancies. Trial counsel was ineffective for not cross-examining the clerk and the detective about the fact that the clerk described the October 18<sup>th</sup> robber as five feet and seven inches tall, six inches shorter than Petitioner. Trial counsel was ineffective for not cross-examining the clerk and the detective about the fact that the clerk described the November 5<sup>th</sup> robber as five feet and nine inches tall, four inches shorter than Petitioner and two inches taller than October 18<sup>th</sup> robber. Trial counsel was ineffective in not capitalizing on the uncertain height description of the October 30<sup>th</sup> robber. There is a reasonable probability that, if trial counsel had cross-examined the witnesses in regard to the height discrepancies, the result of the proceeding would have been different.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to call an expert witness to testify that the robbers depicted in the video tapes are shorter than Petitioner.

As discussed in issue one, trial counsel failed to cross-examine the clerks and the detective in regard to height discrepancies between the description given of the robbers and Petitioner. Despite the fact that trial counsel failed to cross-examine witnesses in regard to height discrepancies, the discrepancies were an important part of the case and in closing argument trial counsel told the jury:

First thing as far as reasonable doubt goes, the height. The testimony was that Mr. Butts is six-one and above. The clerks testified the robber – and you could – and I want you to do this for me seriously. I want you to go back and look at it and see how tall this guy is. And you’ll see – remember the smaller clerk? Remember the smaller clerk? The guy that’s got a little goatee or whatever it is? He’s small – he’s – he’s small. This guy – he’s a lot less than six foot. Look at the difference in height between Mr. Butts and the six-one that they talked about and this alleged robber. He’s a head shorter, if you look at it, than these clerks.

(App. p. 340, line 19 – p. 341, lines 1-5). First, the argument is confusing as one of the clerks at trial testified that the robber was taller than he was. (App. p. 115, lines 22-24). Second, as discussed in issue one, the jury never heard that the clerk working the night of the October 18<sup>th</sup> robbery described the robber as five feet and seven inches tall, six inches shorter than Petitioner. The jury never heard that the same clerk, working the night of the November 5<sup>th</sup> robbery, described the robber as five feet and nine inches tall, four inches shorter than Petitioner and two inches taller than the description he provided of the October 18<sup>th</sup> robber. There was little evidence to support trial counsel’s argument in closing because he failed to cross examine witnesses in regard to height discrepancies. Third, without testimony to support the closing argument, trial counsel needed an expert to explain extrapolated apparent heights. Trial counsel

failed to call an expert to help the jury determine the height of the robbers as depicted in the videos.

During the PCR hearing Jeff Spivack was qualified, without objection, as an expert in photogrammetry. (App. p. 471, lines 11-20). Based on photographs taken at the scene, height measurements extrapolated from still photos from the videos of the three robberies and a known still photo of Petitioner, Mr. Spivack concluded that Petitioner was not the individual depicted robbing the store on October 18<sup>th</sup>, October 30<sup>th</sup> and November 5<sup>th</sup>. (App. p. 479, lines 17-20). Mr. Spivack testified that the apparent height of the October 18<sup>th</sup> robber was five feet and 9.778 inches tall. (App. p. 477, lines 16-24). The expert testified that the apparent height of the October 30<sup>th</sup> robber was five feet and 8.958 inches tall. (App. p. 478, lines 1-5). The expert testified that the apparent height of the November 5<sup>th</sup> robber was five feet and 9.608 inches tall. (app. p. 478, lines 6-10). The expert testified that Petitioner's apparent height, based on the known still, is six feet and 3.221 inches tall. Trial counsel was ineffective in failing to call an expert to assist the jury in understanding the height of the robbers as compared to the height of Petitioner.

In the order of dismissal the PCR judge wrote:

This Court find counsel was not deficient in failing to call an expert witness. Counsel gave a number of objectively reasonable justifications for deciding not to use an expert. First, he said that he did not know how a jury would interpret an expert's findings on the issue. Counsel explained that expert testimony sometimes does not stand up well on cross-examination, and that an expert could have ultimately ended up giving a different opinion on the witness stand. He said he did not think the science behind photogrammetry was perfect, and that he did not believe the jury would have been convinced. In light of counsel's theory and strategy, this Court finds Applicant has failed to meet his burden to show deficient performance.

The PCR judge erred. The State cross-examined the expert at the PCR hearing and his opinion remained the same. Based on his expertise in photogrammetry, the expert was able to explain to the jury that the apparent heights of the robbers were much shorter than the apparent height of Petitioner. Counsel's purported reasons for failing to call an expert witness are not objectively reasonable. It appears that trial counsel erroneously believed that if he had hired an expert and the expert's findings were not helpful to the defense, that he would still be required to provide the prosecution with the expert's findings. When asked about hiring an expert trial counsel stated:

You can do that. But the only issue with the problem that I have with that, there's two things. You don't – if that expert comes back and says you're screwed. Basically, your guy is this, blah, blah, blah, and so forth, that could potentially be a problem. Because you've got to divulge this stuff to the State.

(App. p. 508, line 21 – p. 509, lines 1-2). Findings by a retained expert would only have to be provided to the prosecution pursuant to Rule 5, S.C.R.Crim.P., if the defense intended to introduce the findings in evidence at trial. Trial counsel was deficient in failing to call an expert witness

The PCR judge also erred in finding that Petitioner failed to show prejudice from trial counsel's deficient performance. The PCR judge wrote, "Applicant has also failed to show prejudice. As an initial matter, this Court finds that the report and opinion rendered by Jeff Spivack, Applicant's retained expert in the field of photogrammetry, do not rule out the Applicant as the assailant in each of the videos." This is not the proper standard. Pursuant to Strickland, prejudice is shown when, but for counsel's deficient performance, there is a reasonable probability the result of the proceedings would have been different.

Addressing prejudice the PCR judge also wrote:

Further, to the limited extent that Mr. Spivack's analysis actually touches on the issue of height, it does not meaningfully change the overall equation that was before the jury during their deliberations. As described above in more detail, counsel raised the issue of misidentification and height at trial. The jury heard testimony that the assailant was "between five eight and six foot," Tr. p. 132, l. 13-15, and that Applicant was "six-one." Tr. p. 206, l. 17-19. Clearly it dispensed with the height in issue in a way that was not favorable to Applicant. This Court finds Mr. Spivack's analysis fails to clarify the issue beyond what was already presented at trial, and is too tenuous to throw the outcome of the proceeding into question.

(App. p. 549). There is no evidence of probative value to support the finding by the PCR judge. The evidence in the record demonstrates that the jury never heard that the clerk working the night of the October 18<sup>th</sup> robbery described the robber as five feet and seven inches tall, six inches shorter than Petitioner. The jury never heard that the same clerk, working the night of the November 5<sup>th</sup> robbery, described the robber as five feet and nine inches tall, four inches shorter than Petitioner and two inches taller than the description he provided of the October 18<sup>th</sup> robber. The height discrepancy was not adequately addressed at trial. The expert testimony was needed.

The present case is distinguished from Legare v. State, 333 S.C. 275, 509 S.E.2d 472, (1998) where trial counsel made the decision not to call an expert as a witness because counsel found his testimony unpersuasive and found the expert to be belligerent and arrogant. Trial counsel in Legare got an "uneasy feeling" when he talked to the expert over the phone and concluded he would be "more damaging than if I left him alone." While trial counsel in the present case opined that the science behind photogrammetry was not perfect (App. p. 507, lines 17-18), there is no evidence that trial counsel ever consulted with an expert and no evidence that trial counsel made the decision not to call an expert because he found the expert to be belligerent, arrogant and more damaging than helpful.

The present case is also distinguished from Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008). In Lorenzen this Court wrote:

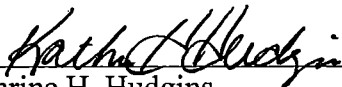
Secondly, counsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).

376 S.C. at 531, 657 S.E.2d at 777. In contrast, as discussed in issue one, trial counsel failed to cross-examine the witnesses in regard to the height discrepancies discussed by the expert.

Trial counsel was ineffective in failing to call an expert to assist the jury in deciding heights and determining that the robbers were shorter than Petitioner. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, if the jury had the benefit of the expert testimony, there is a reasonable probability that the outcome of the case would have been different.

**CONCLUSION**

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
Certiorari to Greenville County

Honorable R. Knox McMahon, Circuit Court Judge  
—————

WILLIAM ANTHONY BUTTS,

PETITIONER

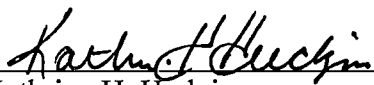
V.

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 DeShawn H. Mitchell, 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 William Butts, #348307, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of June, 2017.

  
Kathrine H. Hudgins  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 16th day of June, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023