

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable John C. Hayes

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Appellate Number 2017-000268

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Trico Ladson,

Appellant,

v.

The State of South Carolina,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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Respectfully Submitted,

William G. Yarborough, III  
Attorney for Appellant  
522 N. Church Street  
Greenville SC, 29601  
Telephone (864) 331-1612  
Fax (864) 370 0022

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JUN 21 2017

S.C. SUPREME COURT

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT OF COMMON PLEAS ERR IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE FACTS AND CIRCUMSTANCES SURROUNDING THE ATTEMPTED ROBBERY?
  
- II. DID THE COURT OF COMMON PLEAS ERR IN HOLDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE WHEN TRIAL COUNSEL'S PERFORMANCE DURING THE GUILT-OR-INNOCENCE PHASE OF APPELLANT'S TRIAL WAS BOTH UNREASONABLE AND PREJUDICIAL?

## STATEMENT OF THE CASE

On December 3, 2013, an unidentified assailant attempted to rob Leroy Thomas in front of Appellant's house. Thomas accused Appellant of aiding his assailant in the attempted robbery. Appellant was subsequently arrested and indicted in May 2015 on one count of criminal conspiracy nonviolent, one count of attempted armed robbery, and one count of attempted murder.

Appellant pled not guilty and a trial was held before the Honorable R. Scott Sprouse on November 4, 2015. Kenneth C. Gibson represented the Appellant, and Kristie B. Hodge represented the State. Appellant was convicted of conspiracy and attempted robbery. Judge Sprouse sentenced Appellant to five years for conspiracy and ten years for the attempted robbery. Both of these sentences were to run concurrently and would be suspended on the service of two years active time and five years probation. Appellant did not appeal his sentence.

On March 28, 2016, Appellant filed an application for Post-Conviction Relief (PCR) (App. P. 227-228). Appellant then filed an amended PCR on May 31, 2016 (App. P. 239-250). Appellant's amended PCR raised the following issues: trial counsel was ineffective by denying the Appellant his Constitutional right to testify in his own defense; by failing to remedy severe factual inconsistencies in the victim's testimony; by failing to use the victim's police statement to impeach him; and by failing to investigate and call witnesses. Additionally, Appellant claimed trial counsel failed to file a timely notice of appeal.

A hearing was held on December 8, 2016, before the Honorable John C. Hayes in the Greenville County Court of Common Pleas. William G. Yarborough argued on behalf

of Appellant and Patrick Schmeckpeper represented the State. At the close of the hearing, Judge Hayes denied the Appellant's amended application for post-conviction relief (App. P. 361-368). This appeal followed.

## ARGUMENT

### I. THE COURT OF COMMON PLEAS ERRED IN HOLDING THAT TRIAL COUNCIL WAS NOT INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE FACTS AND CIRCUMSTANCES SURROUNDING THE ATTEMPTED ROBBERY.

Counsel is ineffective when “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has recognized that “the proper standard for attorney performance is that of reasonably effective assistance.” *Id.* at 687. There is a two-prong test for determining ineffective assistance of counsel. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984)). First, a defendant must show that counsel’s performance was deficient, the standard being whether counsel’s conduct was reasonable under prevailing professional norms. *Id.* Second, counsel’s deficient performance must have prejudiced the defendant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” (internal citations and punctuation omitted). *Id.* Reasonable probability is defined as “probability sufficient to undermine confidence in the outcome of a trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). Additionally, “when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt” (internal quotations omitted). *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 649 (2008).

When investigating the facts of a case, at a minimum, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary.” *Strickland*, at 691. Although heavy deference is given to counsel’s judgment, “counsel’s decision not to investigate should be assessed for reasonableness under all the circumstances....” *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014) (citing *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)).

Here, the court erred in finding that trial counsel for the Appellant was not ineffective due to the fact that he failed to adequately investigate or even visit the crime scene. When crucial facts of the case are associated with the location where the crime was committed, it is a reasonable professional norm for counsel to investigate that scene of the crime. In this case, a cursory examination of the scene would have revealed the existence of a separate, sheltered lane near the driveway where the incident took place. This lane could have easily sheltered the unknown masked gunman of this case, supporting the Appellant’s story that the unknown man acted alone. The presence of this lane is so obvious that after the Appellant’s trial one of the jurors found it by viewing the scene with his smart phone. Later, the juror visited the scene and confirmed that this lane was the perfect hideout to shelter a would-be robber. These facts tend to show that counsel could have easily discovered the existence of this critical detail had he not been deficient in investigating the circumstances of the case.

The existence of this lane was a critical factor that should have been presented at trial to bolster the Appellant’s defense. By not presenting it, trial counsel was deficient, and his deficient performance substantially prejudiced the Appellant. At least one juror testified that had the existence of this lane where a lone robber could hide been presented at trial, he would have had reasonable doubt regarding Appellant’s guilt. Thus, the result

of the proceeding would have been different had trial counsel presented this fact to the jury. The only reason it was not presented was because trial counsel failed to investigate the scene adequately. This unreasonable failure to investigate led to the omission of a crucial, potentially exonerating detail, and trial counsel's error here resulted in Appellant's conviction. Therefore, Defense Counsel's assistance was ineffective, and the Court erred in holding that Defense Counsel was not ineffective.

II. THE COURT OF COMMON PLEAS ERRED IN HOLDING THAT TRIAL COUNCIL WAS NOT INEFFECTIVE WHEN TRIAL COUNSEL'S PERFORMANCE DURING THE GUILT-OR-INNOCENCE PHASE WAS BOTH UNREASONABLE AND PREJUDICIAL.

As stated above, trial counsel is ineffective when 1) his performance was deficient as compared with reasonable professional norms, and 2) his deficient performance so prejudiced the Appellant that there is a reasonable probability that the proceeding would have turned out differently but for counsel's error. *See Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Moreover, under *Lounds v. State*, the pertinent question is whether, but for trial counsel's errors, the jury would have had reasonable doubt regarding a defendant's guilt. *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 649 (2008).

In this case, Appellant's counsel rested immediately after the State and did not present an adequate defense (App. P. 158, lines 10-12). Counsel did not call any witnesses on Appellant's behalf even though two witnesses, Appellant's father and uncle, were near the Appellant when the crime took place and wanted to testify on Appellant's behalf. Counsel did not obtain Appellant's phone records which could have been crucial evidence to show that the Appellant was talking on the phone with his father both before and during the attempted robbery.

Perhaps most concerning of all, trial counsel's examination of the chief witness in this case, the victim Mr. Leroy Thomas, was both inadequate and confusing, an assertion that the lower court itself acknowledged. (App. P. 361-368). On several occasions throughout the victim's cross-examination, counsel and the victim confused the Appellant with the unknown assailant. (App. P. 64-70). For example, during one exchange, trial counsel and the witness referred to both the Appellant and the unknown assailant using only the pronoun "he," making it difficult to differentiate between the two men. For example:

Trial Counsel: And how long did he (Appellant) stand there?

State's Witness Thomas: I'd say about two or three seconds and then he said wait a minute and went running back in the house.

Trial Counsel: Okay. And then what happened?

State's Witness Thomas: When he came back out, *he still stood right there. Right on this side. By that time, that's when this one came up. He jumped back and was laughing and going on.*

Trial Counsel: Who jumped back laughing?

State's Witness Thomas: He did.

Trial Counsel: He jumped back where laughing?

State's Witness Thomas: Laughing on the right side, still on that side.

Trial Counsel: You said he jumped back, he jumped away from your car?

State's Witness Thomas: He was hollering whoa, whoa, whoa, whoa. Just like that and, uh, he was laughing. I said y'all ain't playing no joke on me.

Trial Counsel: He was laughing?

State's Witness Thomas: *Yeah, he was laughing. He was laughing. This guy with the gun, he went to – he was on my side pointing at me first.*

Trial Counsel: Uh – huh.

State's Witness Thomas: I was going to move my truck. He ran around the front of the truck.

Trial Counsel: The – the – the – the one with the gun?

State's Witness Thomas: *With the gun, with the mask on. He was still standing on the side right there laughing and going on like he knew what was going on.*

Trial Counsel: At the fender.

State's Witness Thomas: Right.

(App. P. 68, lines 18-25-p. 69, line 25) (emphasis added).

During this short excerpt, counsel and the victim continuously use the pronoun “he” to refer to both the Appellant and the unknown attacker, confusing their respective actions during the incident. Instead of clarifying the victim’s ambiguous answers, trial counsel contributed to the confusion by continuing to refer to both men collectively. These errors prejudiced the Appellant to the jury. Appellant’s main defense was that he was a spectator as opposed to a participant of the crime. It was crucial to this defense that Appellant’s actions would be distinguished from those of the gunman. By conflating Appellant’s actions with the gunman’s, trial counsel confused the jury and prejudiced the Appellant by giving the impression that Appellant was involved in the crime. *See Lounds v. State*, 380 S.C. 454, 465, 670 S.E.2d 646, 651–52 (2008) (finding that trial counsel’s statements in closing argument implying that defendant was an active participant in crime was a departure from the defendant’s story and both deficient performance and prejudicial).

In addition to these errors, trial counsel implied at other intervals of the trial that Appellant was an active participant in the robbery rather than a bystander. During cross-examination, trial counsel stated that the Appellant was pushing on the truck door pinning the victim in his vehicle. (App. P. 74, lines 5 – 6). The victim denied that this was the case, (App. P. 74, lines 13 – 15), but trial counsel’s assertion that the Appellant was taking an active role in the robbery damaged the defense case by undermining the credibility of the Appellant’s story.

Later, trial counsel also noted the disparities between the Appellant’s age and size and those of the victim’s before suggesting that Appellant had wrestled the victim to the ground. (App. P. 75, lines 4 – 24). Again, trial counsel is corrected by the witness regarding this discrepancy, (App. P. 76, line 20), but this statement still implies that the Appellant was guilty of participating in the crime.

These errors during the trial were the result of counsel’s deficient performance, and counsel’s failure to present the Appellant’s alternative narrative of the events coherently, confusion of the Appellant with the unknown assailant, and implications that the Appellant took an active role in the robbery prejudiced the Appellant. According to *Lounds*, a trial counsel’s improper characterization of events surrounding a crime can be prejudicial enough to support a finding of ineffective assistance of counsel. *Lounds v. State*, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008). In this case, had Appellant’s counsel presented the Appellant’s story coherently, at least one juror stated with certainty that he could have had reasonable doubt regarding Appellant’s guilt, and there is a reasonable probability that other jurors would have felt the same. Counsel’s failure to do so constituted ineffective assistance of counsel for the Appellant.

**CONCLUSION**

For the foregoing reasons, the PCR court's order should be overturned and Appellant should be awarded a new trial.

RESPECTFULLY SUBMITTED THIS

19<sup>th</sup> June of 2017.

William G. Yarborough

William G. Yarborough, III  
Attorney for Appellant  
Bar# 10271  
522 North Church Street  
Greenville, SC 29601  
(864)331-1612 Office  
(864) 370-0022 Fax  
WGYarborough@gmail.com

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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POST CONVICTION RELIEF APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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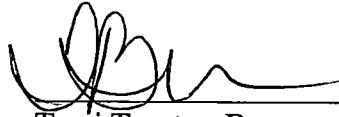
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I, Traci Trouton-Burr, certify on this date, June 19, 2017 I served the Petition for Writ of Certiorari and the Appendix in this action, dated June 19, 2017 on The Honorable Daniel E. Shearouse, Clerk of Court-Supreme Court and Mr. J. Benjamin Aplin Senior, Assistant Deputy Attorney General by mailing it to him at his work address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

The Honorable Daniel E. Shearouse  
Clerk of Court-SC Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

J. Benjamin Aplin  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

Respectfully submitted,



Traci Trouton-Burr  
Paralegal to William G. Yarborough, Esquire

SWORN TO before this 19<sup>th</sup>  
Day of June, 2017.

  
Notary Public for South Carolina

My Commission expires: 06-08-2022

