

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

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SEP 01 2017

MICHAEL ROBERT BISHOP,

PETITIONER
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000058

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to challenge the authenticity of the tape recording that contained petitioner's alleged reference to the missing money during the pretrial suppression hearing held in the matter as a ground upon which to argue the inadmissibility of the tape into evidence at trial.

STATEMENT

Petitioner Michael Robert Bishop was convicted of grand larceny per jury trial held during the July 2014 term of the Greenville County General Sessions Court before Judge C. Victor Pyle, Jr. and sentenced to imprisonment for a period of ten years. App. 1-113. Timothy Sullivan represented petitioner at trial, and Assistant Solicitor Sloan Ellis appeared on behalf of the state. Petitioner appealed, but his appeal was dismissed by the South Carolina Court of Appeals. See State v. Bishop, Op. No. 2015-UP-200 (S.C. Ct. App. filed on April 15, 2015).

On April 26, 2016, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 115-142. The respondent filed a return dated August 29, 2016, requesting that a hearing be held in response to petitioner's application. App. 143-147. A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App. 149-165. Petitioner was present at the hearing and represented by R. Mills Ariail, Jr., and Assistant Attorney General Patrick Schmeckpeper appeared on behalf of the state.

On December 20, 2016, Judge Hayes filed an Order dismissing petitioner's PCR action. App. 167-172. Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to challenge the authenticity of the tape recording that contained petitioner's alleged reference to the missing money during the pretrial suppression hearing held in the matter as a ground upon which to argue the inadmissibility of the tape into evidence at trial.

The state alleged that petitioner took \$32,000.00 from a safe in the back of the Any Kind Checking Cashing Store in Greenville, South Carolina, on October 4, 2010, as he waited in the back of the store while his girlfriend Cathy Smalley Oliver, who was an employee at there, worked at the front entrance of the store. App. 38, l. 7- p. 41, l. 19. Cathy Smalley Oliver testified that petitioner was with her in the store on the day in question; and that the money at issue was missing from the safe on that same date. App. 46, l. 14 – p. 55, l. 17. Then, three or four day later, she confronted petitioner and petitioner admitted in effect that he was connected to the missing money. App. 55, l. 18 – p. 56, l. 25; App. 56, l. 11 – p. 69, l. 22.

Mathew Chavis testified on behalf of the state and explained that he heard about the missing money at the store in question and talked about it to petitioner, who admitted in effect that he took the money. Chavis reported this admission to police and thereafter he (Chavis) talked to petitioner again on a later date while armed with a tape recorder and recorded petitioner discussing what happened with the money. App. 77, l. 17 – p. 82, l. 6.

Prior to trial, trial counsel moved to suppress Chavis' tape recording because Chavis, who was a private citizen, acted as an agent of police in violation of S.C. Code Ann. § 17-30-30, and because the chain of custody on the tape was incomplete since the officer who received the tape recording was unavailable to testify at trial. App. 23, l. 2-18; App. 9, l. 10-22; App. 11, l. 12 – p. 12, l. 13. Also, counsel added there was a reasonable expectation of privacy on petitioner's

behalf that was violated as well. Chavis testified during a pretrial hearing held in the matter and stated he called the police and told them he could get petitioner to confess and record it for them, but the officers rejected the idea. Chavis explained that he decided thereafter that he would do it anyway for himself and submitted the recording to the officers afterwards. The solicitor argued that no state action was connected to this recording and that no Fourth Amendment violation occurred under the circumstances surrounding the recording. App. 21, l. 24 – p. 22, l. 25.

The trial judge denied counsel's motion to suppress the tape recording. App. 23, l. 19-21.

During the PCR hearing, petitioner testified that counsel was ineffective in failing to move to suppress the tape recording on the ground that authenticity had not been proved. App. 154, l. 15-17. Petitioner testified as follows:

Q. In regards to (the recording)...what do you think that [trial counsel] did that was ineffective in your case.

A. Well, I don't think the recording was authenticated. I never spoke...there was nobody but Matthew Chavis to say that that was me he was having a conversation with.

Q. [Counsel] tried to exclude that (recording) and he made certain arguments in regards to that...[counsel] did something in those arguments or should have done something differently about that?

A: There was no authenticity [argument] of the recording.
App. 154, l. 11 – p. 155, l. 3.

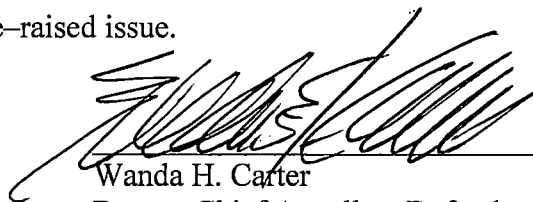
Trial counsel testified during the PCR hearing and admitted in effect that he did not raise the authenticity issue as a ground to suppress the recording. App. 163, l. 21-24.

The PCR judge ruled that “[petitioner's] claim...that trial counsel failed to argue that the recording was not authenticated is also without merit,” and in effect that this claim did not establish ineffective assistance of counsel. App. 171.

Rule 901, SCRE, requires that exhibits be authenticated. Clearly, evidence must be authenticated before admitted. See State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (2012), citing to Rules 1001, 1002, and 1003, SCRE. Here, counsel's move to suppress the recording based on a police-based action made by a private citizen ground and under grounds including a defective chain of custody and a privacy expectation, without an additional argument referencing the question of the authenticity of the recording as a ground for suppression constituted deficient representation at trial. This authenticity argument omission by counsel constituted ineffective assistance of counsel at trial in violation of petitioner's Sixth Amendment right to effective assistance of counsel in a criminal proceeding under Strickland v. Washington, 466, U.S. 668 (1984). Petitioner was prejudiced by counsel's error as outlined above because the state's case hinged primarily on the tape recording; and therefore, there was a reasonable likelihood that the recording would have been suppressed had counsel not omitted the authenticity argument in this regard, which in turn meant that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that the Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of September, 2017.

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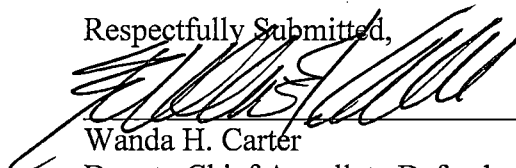
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Robert Bishop states that:

1. She is Deputy Chief 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 John C. Hayes, which was held on December 9, 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 Michael Robert Bishop.

Respectfully Submitted,



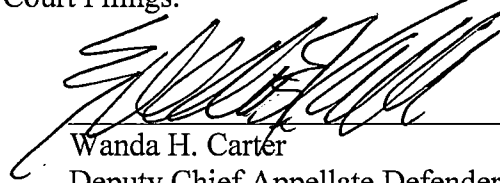
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of September, 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."



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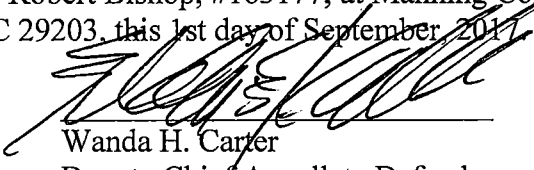
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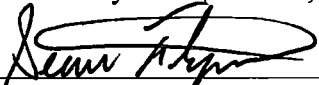
CERTIFICATE OF SERVICE

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 DeShawn H. Mitchell, 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 Michael Robert Bishop, #163177, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 1st day of September, 2017.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of September, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022