

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

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CHAVIS ODELL PULLEN,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001398

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in failing to address the issue of identification?

STATEMENT

Petitioner was convicted of three (3) counts of armed robbery, first degree burglary, and assault and battery of a high and aggravated nature (ABHAN) after a jury trial held before the Honorable J. Mark Hayes, II on March 9-10, 2011, in Spartanburg County. Petitioner was sentenced to twenty-five (25) years on each of the armed robberies and the first degree burglary and to ten (10) years for ABHAN. Robert B. Hall, Esq. was defense counsel. Derrick Balsa, Esq. was the assistant solicitor. (App. p. 1- p. 274).

Petitioner appealed his convictions and the appeal was dismissed by the South Carolina Court of Appeals on October 9, 2013. State v. Pullen, Op. No. 2013-UP-387. (App. p. 282- p. 283).

Petitioner filed an application for post-conviction relief on July 21, 2014. (App. p. 275- p. 281). Respondent filed a return dated December 31, 2014. (App. p. 282- p. 286). An evidentiary hearing was held on June 13, 2016, before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and was represented by J. Brandt Rucker, Esq. Respondent was represented by Alicia Olive, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing. (App. p. 287- p. 321). On February 3, 2017, Judge Cothran issued an order denying and dismissing the application for post-conviction relief. (App. p. 322- p. 328).

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance in failing to address the issue of identification.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In some instances counsel may be held ineffective without a showing of prejudice when he fails to subject the prosecution's case to a meaningful adversarial testing. In such cases prejudice is presumed. Nance v. Ozmit, 367 S.C. 547, 626 S.E.2d 878 (2006).

The evidence in this case linking petitioner to the incident was premised upon one of the two masked assailants saying "Koolaid" during the robbery of the apartment. One of the occupants assumed the second masked robber was someone she knew as "Koolaid." This identification of petitioner based on one person's assumption amounts to mere suspicion of guilt rather than substantial evidence reasonably tending to prove the guilt of the accused.

At the evidentiary hearing petitioner explained as follows:

Q. Okay. Specifically, at trial what do you allege that Mr. Hall did incorrectly?

A. Well, going into the -- the identification thing is the -- the one of the victims put in her statement that she could tell it was me because we supposed to have had on masks, she said she could tell it was me because of my eyes. So he argued it in trial, but I felt if he'd brought forth the issue before trial I would have never made it to trial.

Q. All right. Do you believe that -- did ya'll have -- did you have a hearing in front of a judge about the lineup?

A. No, sir.

Q. Okay. Was there a lineup introduced at trial in your case?

A. Yes, sir.

Q. And to your knowledge did the witnesses or alleged victims use that lineup to identify you?

A. No, sir.

Q. Okay. How many people identified you in court?

A. Just two.

(App. p. 293, line 19- p. 294, line 14).

Petitioner added the following later:

Q. Mr. -- Mr. Burgess is an investigator with the sheriff's office?

A. Yes, sir.

Q. Okay. What did he do as part of this case?

A. He investigated the case, but as far as in the trial, he stated that -- about the going back to the lineup that he never heard of that type of lineup being presented with everything covered up except your eyes.

Q. Okay. So to your knowledge the lineup -- and in the discovery it showed a lineup of masked people with just eyes.

A. Yeah.

Q. Did you participate in any kind of lineup like that?

A. No, sir.

Q. Okay. To your knowledge did they put these masks on other people? Was it some kind of computer like a --

A. This is something that Mr. Hall made.

(App. p. 296, lines 3- 19)

As can be seen from petitioner's own testimony, trial counsel was ineffective in failing to pursue the identification issue.

CONCLUSION

Petitioner's convictions should be reversed.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2017.

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Certiorari to Spartanburg County

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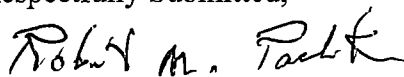
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chavis Odell Pullen 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 R. Ferrell Cothran, which was held on June 13, 2016, 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 Chavis Odell Pullen.

Respectfully Submitted,

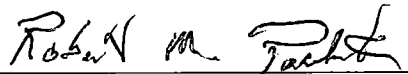


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of November, 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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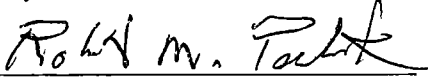
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CERTIFICATE OF SERVICE

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 Valerie Garcia Giovanoli, 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 Chavis Odell Pullen, #345139, at Lee Correctional Institution, 990 Wisacky Way, Bishopville, SC 29010, this 9th day of November, 2017.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of November, 2017.


Notary Public for South Carolina (L.S)
My Commission Expires: July 5, 2027.