

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable G. Thomas Cooper, Circuit Court Judge

MICHAEL D. JACKSON,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000012

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

PETITIONER,

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ISSUE PRESENTED

Whether trial counsel was ineffective in failing to object to petitioner being tried in front of the jury in shackles?

STATEMENT

Petitioner was convicted of armed robbery after a jury trial held before the Honorable I. Casey Manning on June 22, 23, and 25, 2009, in Richland County. Petitioner was sentenced to life imprisonment without the possibility of parole. Carol A. McCurry, Esquire was trial counsel. Kathryn Luck Campbell, Esquire and Joanna McDuffie, Esquire were the solicitors. (App. p. 1 – p. 348).

Petitioner appealed his conviction and sentence and the court of appeals affirmed them on December 1, 2011. State v. Jackson, No. 2011-UP-522.

Petitioner filed an application for post-conviction relief on September 4, 2013. (App. p. 349 – p. 353) Respondent filed a return dated January 7, 2014. (App. p. 354 – p. 359) An evidentiary hearing was held on July 14, 2015, before the Honorable G. Thomas Cooper. Petitioner was present and was represented by Anna R. Good, Esquire. Respondent was represented by J. Clayton Mitchell, Assistant Attorney General. Petitioner testified in his own behalf at the hearing. (App. p. 360 – p. 401) On December 10, 2015, Judge Cooper issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 407 – p. 417).

A petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988) was submitted on June 6, 2016. On January 23, 2018, this court issued an order directing the parties to brief the issue that was originally raised.

This petition follows.

ARGUMENT

Trial counsel was ineffective in failing to object to petitioner being tried with shackles on in front of the jury.

Prior to taking testimony from the petitioner the following was put on the record concerning trial counsel who was not present. The assistant attorney general led off:

MR. MITCHELL: And I note for the record that Ms. Carol McCurry is not present today. We've made - - Ms. Good and I both made numerous attempts to contact her and to review her file. We had a hearing in January of this year where Judge Goodstein ordered Ms. McCurry to turn over her file within 30 days. She failed to do so. She's moved to Washington State and I think is no longer practicing law.

She noted her files are still in the area. I believe her office is out of Lexington, but she did not have anyone that she could send over there to make copies or make the file available. She also said she was uncomfortable testifying by phone or by any other method without the file in front of her. She's not willing to have the files mailed to her in Washington. I put this on the record because last hearing with - - before Judge Goldsmith, which I believe was April 2nd or 3rd of this year, Mr. Jackson indicated he would be okay going forward without her testimony and we're prepared to go the same.

THE COURT: Did you issue a subpoena to her?

MR. MITCHELL: I believe Ms. Good did. I issued numerous subpoenas we mailed out to - - -

THE COURT: She ignores them?

MR. MITCHELL: She's contacted me sporadically when this has been scheduled. It's been hard to pin her down.

THE COURT: Isn't she the one that was in the military?

MR. MITCHELL: I believe she is in the Guard.

THE COURT: I meant the Guard.

MR. MITCHELL: I believe duty now as well. She did end up calling me about a month ago or so. I talked to her a couple times but to be frank was not very co-operative in this matter.

THE COURT: That surprises me because I've always felt that she was respectful of the Court and certainly would obey a subpoena. I don't know. I can't walk in her shoes.

MR. MITCHELL: At this point we're ready to go forward and turn it over to Ms. Good at this time.

THE COURT: All right. Ms. Good, do you understand what Mr. Mitchell just told me, is that - - the fact that she's not here in anyway impair your ability to represent you client?

MS. GOOD: No, sir, I've discussed with him the different options of her being here versus not being here. And he's ready to go forward because it's pretty clear that she's not planning on coming back.

(App. p. 364, line 1 – p. 365, line 23)

With the above background in mind, petitioner took the stand and testified about how he appeared at his trial with no objection from trial counsel. While trial counsel did have petitioner dressed in a suit, he still had shackles on in the courtroom. Counsel never requested to have the shackles removed. The hand shackles were left on and the ones on the feet/ankles were taken off.

(App. p. 378, line 25 – p. 380, line 23)

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

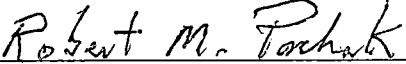
a finding of ineffectiveness.” Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object 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 this case, petitioner was denied the right to a fair trial and the presumption of innocence by being displayed to the jury in shackles. Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691 (1976). In Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007 (2005) the Court held again that the Due Process Clause prohibits the use of physical restraints visible to the jury during the guilt phase of a criminal trial. A showing of prejudice is not required to make out a due process violation. In Carey v. Musladin, 549 U.S. 70, 127 S.Ct. 649 (2006), the Court declined to extend Estelle v. Williams to spectator conduct but it in no way overruled the holding concerning the use of shackles.

Trial counsel was ineffective in failing to object to petitioner being displayed to the jury in shackles. The fact she could not show up for petitioner’s hearing or even take a telephone deposition only confirms her ineffectiveness.

CONCLUSION

Petitioner's conviction should be reversed.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Richland County

Honorable G. Thomas Cooper, Circuit Court Judge

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MICHAEL D. JACKSON,

PETITIONER,

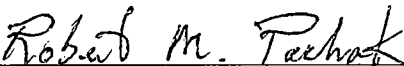
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon Clay 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 has been served on Michael D. Jackson, #294410, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 22nd day of February, 2018.


Robert M. Pachak
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 22nd day of February, 2018.

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