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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GEORGETOWN COUNTY
Court of Common Pleas
John C. Hayes, Circuit Court Judge

Appellate Case No. 2017-000828

JOHN JABBAR GREENE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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RESPONDENT'S ISSUES PRESENTED

Did the PCR Court properly deny post-conviction relief where the trial judge was in no way obligated to recuse himself and where no evidence exists in the record to show any deficiency or prejudice resulting from trial counsel's decision to not seek recusal?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Petitioner was indicted at the May 2008 term of the Georgetown County Grand Jury for two counts of kidnapping (2008-GS-22-00456; -00457), two counts of armed robbery (2008-GS-22-00458; -00459), and burglary, second degree (2008-GS-22-00460).

J. Eric Fox, Esq. represented Petitioner, and Will Andrew, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 28, 2009, Petitioner proceeded to trial before the Honorable William Jeffrey Young and a jury. The jury found Petitioner guilty as indicted on May 1, 2009. Judge Young sentenced Petitioner to imprisonment for concurrent terms of 30 years for each kidnapping, 30 years for each armed robbery, and 15 years for burglary.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., who raised two issues to the South Carolina Court of Appeals:

1. Did the trial judge err in refusing to suppress DNA results when the buccal swabs were obtained through a purported "voluntary consent to search" form generated by the Georgetown County Sheriff's Department that failed to comply with the safeguards against unreasonable searches and seizures[?]
2. Did the trial judge err in refusing to suppress statements made as the result of an impermissible interrogation made after Greene exercised the right to remain silent?

By opinion decided November 15, 2011, the Court of Appeals affirmed Applicant's convictions. State v. Greene, Op. No. 2011-UP-507 (S.C. Ct. App. 2011). The Remittitur was issued on December 2, 2011.

Petitioner filed his first application for post-conviction relief on February 21, 2012 (2012-CP-22-00164). He alleged the following grounds for relief in his application:

1. "ineffective assistance of trial counsel; Appellate counsel;"

a. "Trial Counsel refuse to recuse trial Judge, Because trial Judge stated that he knew one of the victims for years;"
b. "Appellate Counsel never try to [appeal] the trial court's denial of directed verdict;"

2. "conflict of interest; judicial bias; defective chain of custody;"
    a. "The gun never made it to (S.L.e.d.) as the source of the samples (defective chain of custody);"
    b. "The Trial Judge knew one of the victims for years."
3. "fourth amendment violation; fifth amendment violation."
    a. "The intrusions into my body without probable cause;"
    b. "Miranda violation, officer testified that he Continued to question me when I invoked fifth amendment right to remain quiet."
    c. "Under the fifth amendment the defendant is protected from self [incrimination]. At the time the buccal swabs was taken from me the State didn't have probable cause to believe that I or the two other individual in the home who were also swabbed, had committed a crime. The defendant was asked to Submit this d.n.a to the Georgetown Sheriffs Dep. before the fact or proof of d.n.a being [extracted] from this gun. The defendant submitted d.n.a could have been used in altering evidence to look like the d.n.a came off this gun when in fact this gun never accompanied the swabs to Sled as the source of the samples. In my motion to discovery it is stated that all items processed in house will be sent to the South Carolina law enforcement Division or (s.l.e.d) for further examination. further it is Stated that on 2/20/08 items collected at the scene were sent to sled for testing;"
    d. "This gun never made it to S.l.e.d (Defective Chain of Custody.)"

Respondent made its return on June 1, 2012, and an evidentiary hearing into the matter was convened on October 27, 2014, before the Honorable John C. Hayes, III. Petitioner was present at the hearing and represented by Robert Mason, Esq. Josh Thomas, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf, and J. Eric Fox, Esq., also testified. By written order dated November 16, 2014, and filed December 5, 2014, Judge Hayes denied and dismissed the application. No notice of appeal from Judge Hayes' order was ever filed.

Petitioner filed his second application for post-conviction relief on October 20, 2015 (2015-CP-22-00949). He alleged the following grounds for relief in his application:

1. "prior post-conviction relief counsel failed to file an appeal from Judge Hayes order."
    a. "A copy of this order was sent to counsel of record Robert C. Mason on December 10, 2014. Mr. Mason died on December 24, 2014. See Rule 31(c), RLDE, Rule 407, SCACR."

Respondent made its return on or about February 17, 2016, consenting to review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). By consent order dated March 24, 2017, and filed March 28, 2017, the Honorable Benjamin H. Culbertson granted Petitioner relief pursuant to Austin and dismissed any other allegations with prejudice.

The current petition follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular

act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE THE TRIAL JUDGE WAS UNDER NO OBLIGATION TO RECUSE HIMSELF AND BECAUSE NO EVIDENCE EXISTS ON THE RECORD TO SHOW THAT THE TRIAL JUDGE WAS ANYTHING OTHER THAN FAIR AND IMPARTIAL

The PCR Court's Order of Dismissal meets the "any evidence" standard because Petitioner failed to present to the Court any compelling basis upon which to seek the trial judge's recusal and offered no evidence that the trial judge was anything other than fair and impartial during the entire duration of trial. Accordingly, the Petition should be denied.

The relevant portions of the judicial canons provide that:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

Rule 501, Canon 3(E)(1)(a), SCACR. Where a party opts to seek the judge's disqualification, it is not enough to merely allege bias or prejudice, but rather the party must show some evidence of that bias or prejudice. State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003).

After *voir dire* and jury selection, Judge Young indicated on the record that he recognized one of the victims, Mr. Harby Moses:

> [THE COURT:] Now, Mr. Moses and I we go back a long way, but we – I mean, he was a number of years younger than I was. We went to the same high school. Mr. Moses has lived down here for probably 30 years, not in Sumter, but when I saw he was one of the victims I just wanted to disclose that to both of you all. Again, we have no professional connections other than the fact that I've known him for a long time. That would be the only thing, but I wanted to bring that up before we bring the jury out. Do you have any objection, Mr. Fox?
>
> MR. FOX: None, Your Honor.

THE COURT: Anything from the State?

MR. ANDREW: No, sir, do you think you could be fair and impartial?

THE COURT: I really do. Well, I'm glad you asked so I could put it on the record that I do. All right.

MR. ANDREW: No objection, Your Honor

(Appx. 40-41). At the evidentiary hearing, Petitioner merely recited a portion of the above quotation and asserted Judge Young's "impartiality was questioned, so he's supposed to step down from my case, but he didn't." (Appx. 382-83). Trial counsel Eric Fox ("Counsel") testified the judge's remarks did not seem to indicate any kind of personal connection, but only that he knew of the victim. (Appx. 390-91). Counsel, on cross-examination, denied there was any indication Judge Young would be unfair. (Appx. 410).

No evidence exists in the record to show even a fleeting hint of any bias, partiality, or unfairness on the part of Judge Young. No evidence exists in the record to show that Counsel knew at the time of trial any facts to support a motion to disqualify Judge Young from presiding, aside from the Judge's own disclosure. To the contrary, the evidence in the record shows only that the Judge possessed a neighborly familiarity with the victim, and that all involved believed Judge Young could, would, and did preside in a fair and impartial manner. Judge Young granted Counsel's motion to sequester witnesses over the State's objection (Appx. 25-27), fully entertained Counsel's objections to admissibility outside the presence of the jury and provided thoroughly reasoned rulings on the record (Appx. 126-128), granted Counsel any time necessary to confer with Petitioner (Appx. 275), denied requests by the State in consideration of Counsel's arguments during the charge conference (Appx. 284-87), and sustained at least one objection by Counsel (Appx. 305). No evidence exists in the record to show what, if anything, would have occurred differently at trial had Judge Young recused himself.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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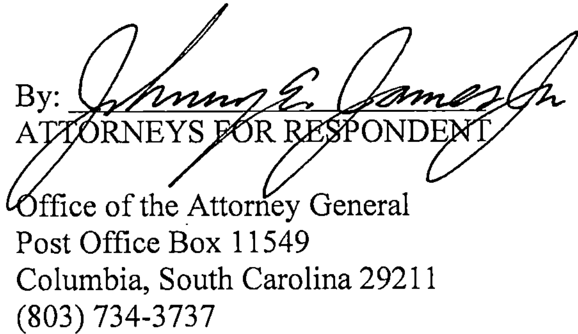
S.C. Bar No. 101260
Assistant Attorney General



By: ______________________
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5 March, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GEORGETOWN COUNTY
Court of Common Pleas
John C. Hayes, Circuit Court Judge

Appellate Case No. 2017-000828

JOHN JABBAR GREENE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

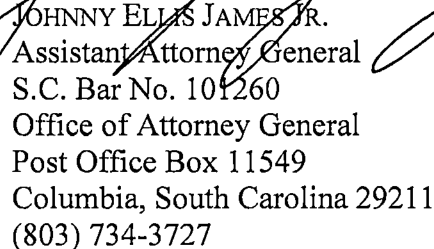
PROOF OF SERVICE

I, Johnny Ellis James Jr., certify that I have served the within **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas, Esquire
7588 Woodrow Street
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served.

This 5th day of March, 2018



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MAR 05 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

March 5, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **John Jabbar Greene v. State of South Carolina**
Appellate Case No. 2017-000828
Lower Court Case No. 2012-CP-22-0164, 2015-CP-22-0949

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Tommy A. Thomas, Esquire