

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

KENNETH JOWAN CRAIG,

RECEIVED

MAR 19 2018

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001616

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel for failing to preserve for appeal that appellant's arrest warrant was not issued by a neutral and detached magistrate because the issuing judge's son was a victim of the robbery, therefore requiring suppression of much of the State's evidence as fruit of the poisonous tree?

STATEMENT

In 2012 and 2013, Petitioner was indicted in Spartanburg County for eleven counts of attempted armed robbery, armed robbery, and a weapons charge. App. 772-99. On July 22, 2013, petitioner was tried before the Honorable Roger L. Couch and a jury. App. 1. Jennifer Jordan and Susan Reese represented the State. App. 1. Richard Welchel represented petitioner. App. 1. The jury convicted petitioner. App. 633, l. 11 – 637, l. 17. Judge Couch sentenced petitioner to a total of thirty years' imprisonment. App. 646, l. 21 – 647, l. 17. Petitioner's convictions were affirmed on appeal. State v. Craig, Op. No. 2014-UP-431 (S.C. Ct. App. Nov. 26, 2014).

On March 6, 2015, petitioner filed a PCR application. App. 649. On June 14, 2016, the Honorable R. Ferrell Cothran, Jr. held a hearing on petitioner's application. App. 665. J. Brandt Rucker represented petitioner. App. 665. Alicia Olive represented the State. App. 665. On June 27, 2017, Judge Cothran denied relief. App. 755. This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel for failing to preserve for appeal that appellant's arrest warrant was not issued by a neutral and detached magistrate because the issuing judge's son was a victim of the robbery, therefore requiring suppression of much of the State's evidence as fruit of the poisonous tree.

The State charged petitioner with the armed robbery of a Waffle House. App. 107, l. 11 – 110, l. 4. One of the patrons at the Waffle House, Justin Harrison (“Harrison”), had a concealed weapons permit. App. 155, ll. 6 – 12. Before going in the Waffle House, he took his pistol out of the glove box and put it in his holster. App. 155, ll. 6 – 9. Harrison heard two people come in the door shouting, telling people to “get down” and threatening to kill them. App. 155, ll. 21 – 25. One man had a gun and the other had a black trash bag. App. 156, ll. 8 – 15. Harrison shot one of the robbers and tried to apprehend the other one, but he escaped. App. 159, l. 13 – 161, l. 9. The robber Harrison shot died at the scene and was Dante Williams. App. 334, l. 22 – 335, l. 5.

Petitioner testified in his own defense. App. 481, ll. 1 – 9. He only met Dante Williams a week before the Waffle House robbery. App. 481, ll. 16 – 20. The night of the robbery, petitioner drove Williams and another man named “Slack” on what petitioner thought was a trip to Cowpens. App. 498, l. 10 – 499, l. 10. Slack told petitioner to stop at a gas station. App. 499, l. 11 – 500, l. 6. Slack was on the phone when petitioner got back in the car from paying for gas. App. 500, ll. 4 – 10. Slack then told petitioner to drop him and Williams off at the front door of Waffle House. App. 500, ll. 15 – 17. Petitioner never went in the Waffle House and had no idea that Slack and Williams intended to rob the restaurant. App. 501, ll. 5 – 23.

Harrison testified that he got a good look at the robber who escaped. App. 217, l. 19 – 218, l. 4. After the robbery, Harrison was watching the news and saw a story on the robbery. App. 219, ll. 13 – 25. The news showed a picture of the person police arrested (petitioner) and Harrison testified that, when he saw the picture, he was a “hundred percent” sure petitioner was the robber. App. 220, ll. 1 – 17. Harrison then testified he later saw petitioner at a bond hearing and was again certain of his identification. App. 220, ll. 6 – 17.

Before Harrison could testify about his identification, trial counsel objected. App. 162, ll. 19 – 22. The trial judge excused the jury and held an in-camera hearing to address trial counsel’s objection to the identification. App. 162, l. 23 – 215, l. 4. Trial counsel objected that the warrant was invalid for lack of probable cause and that the identification, along with the items seized when petitioner was arrested, were fruit of the poisonous tree and should be suppressed. App. 163, l. 5 – 180, l. 6. Judge Couch allowed trial counsel to proffer the investigating officer’s testimony to prove lack of probable cause for the arrest warrant. App. 180, l. 8 – 182, l. 16.

During trial counsel’s examination of the officer, it was revealed that the magistrate who signed the warrant had a son who was a victim of the Waffle House robbery. App. 182, l. 17 – 184, l. 23. The following colloquy occurred:

Q. You talked to a magistrate to obtain that warrant?

A. I did.

Q. Who—which magistrate gave you the warrant?

A. Judge Atkins.

Q. Nancy Atkins?

A. That’s correct.

Q. Were you aware, at the time that Nancy Atkins gave you the warrant, that Brent Atkins, one of the victims in this case, was her son?

A. Not at that time, no, sir.

App. 182, l. 21 – 183, l. 5. The solicitor objected, claiming that because petitioner had been indicted and the trial already begun, that trial counsel could no longer object to the arrest warrant. App. 183, ll. 6 – 16. Trial counsel replied, “Your Honor, probable cause has to be based on them obtaining information and going to a neutral and detached magistrate, I don’t think, can be the mother of one of the victims in the case.” App. 183, ll. 18 – 22.

The solicitor did not dispute that Judge Atkins was the mother of one of the victims. App. 183, l. 23 – 184, l. 8. The solicitor argued, “even if you took away Judge Atkins, who we do not even know if she knew at this point in time her son was a victim or not, you still have a separate judge in the Magistrate Court, Judge Tommy Wall, who did, at a probable cause hearing where [the officer] testified, issued probable cause at that point in time.” App. 184, ll. 3 – 8. Judge Couch recognized the solicitor’s point, but said he would allow trial counsel to continue to make his proffer. App. 184, l. 18 – 185, l. 3.

The remainder of trial counsel’s questioning and argument during the in-camera hearing only dealt with the issue of the facts necessary to substantiate probable cause. App. 185, l. 7 – 215, l. 20. At no point did trial counsel return to the issue of the lack of a neutral and detached magistrate. App. 185, l. 7 – 215, l. 20. Judge Couch even gave trial counsel the opportunity to state all of his grounds for challenging the warrant, but trial counsel failed to argue that Judge Atkins was not neutral and detached:

THE COURT: I’m not telling you not to bring them up. I want to be sure I’m deciding what you want me to decide.

MR. WHELCHER: Yes, sir.

THE COURT: Okay. And, so, I'm trying to be sure that I'm addressing the issues you've asked me to address.

MR. WHELCHER: Yes, sir.

THE COURT: And my understanding is that you're challenging the warrant that was originally issued for his arrest, arrest based on a failure of probable cause that was presented to a magistrate?

MR. WHELCHER: Exactly, Your Honor.

THE COURT: And that's it?

MR. WHELCHER: Yes, sir.

THE COURT: And I've decided there was sufficient evidence—

MR. WHELCHER: Yes, sir.

THE COURT: --to justify a warrant to be—probable cause did exist.

MR. WHELCHER: Okay.

App. 213, 1.16 – 214, 1. 9 (emphasis added). Trial counsel did not ask for a specific ruling on whether Judge Atkins was neutral and detached and Judge Couch made no such ruling. App. 185, 1. 7 – 215, 1. 20.

Trial counsel was ineffective for failing to preserve the issue of the lack of a neutral and detached magistrate. U.S. Const. amend. VI. Strickland v. Washington, 466 U.S. 668, 687 (2011). Had trial counsel properly raised and preserved the invalid arrest warrant for appeal, there is a reasonable probability petitioner's convictions would have been reversed and he would have gotten a new trial. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 – 13 (Ct. App. 2004). Here, trial counsel raised the issue during questioning, but

failed to obtain a ruling from Judge Couch on whether the warrant was issued by a neutral and detached magistrate. Without a ruling from the trial judge, the issue could not be raised on appeal. The failure to preserve an issue for appeal is deficient performance. McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013).

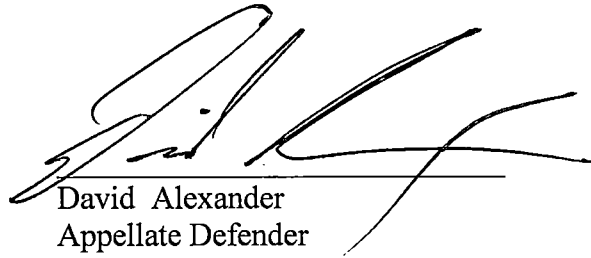
Petitioner proved prejudice under Strickland because had the issue been preserved, his convictions would have been reversed on appeal. The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause.” U.S. Const. amend. IV. “The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence.” Johnson v. United States, 333 U.S. 10, 13-14 (1948). “Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” Id. at 14.

Because petitioner’s warrant was not issued by a neutral and detached magistrate, his arrest was invalid. As petitioner testified at the PCR hearing, he was not arrested until approximately twenty-one hours after the robbery. App. 670, ll. 14 – 17. The magistrate judge’s son was a victim of the robbery and testified at petitioner’s trial. App. 182, l. 17 – 183, l. 22. App. 456, ll. 16 – 23. It is inconceivable that the magistrate did not know that her son had been a victim of the Waffle House robbery over twenty hours later when she signed the warrant. App. 684, ll. 11 – 16. When petitioner’s was arrested, the police collected his clothing. App. 345, ll. 6 – 25. The State called an expert from SLED who testified that he found gunshot residue on petitioner’s clothing. App. 381, l. 7 – 401, l. 22. These items were fruit of the poisonous tree and would have been suppressed. Wong Sun v. United States, 371 U.S. 471

(1963). This Court should grant certiorari with the ultimate result of reversing petitioner's convictions.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's convictions.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and extends to the right of the line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable R. Ferrell Cothran, Circuit Court Judge

KENNETH JOWAN CRAIG,

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V.

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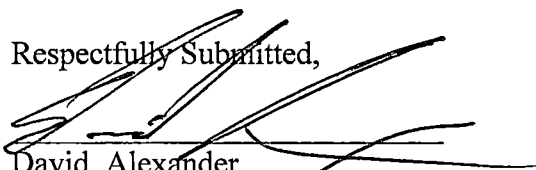
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Jowan Craig 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 Kenneth Jowan Craig.

Respectfully Submitted,

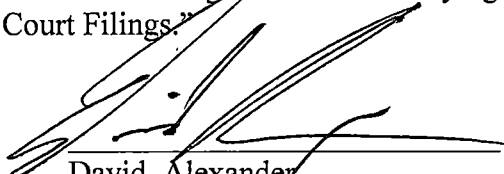


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of March, 2018.

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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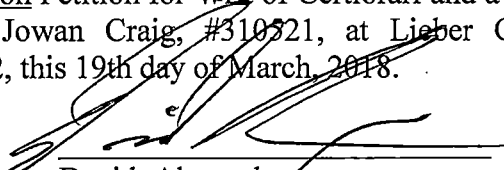
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CERTIFICATE OF SERVICE

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 Megan Harrigan Jameson, 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 Kenneth Jowan Craig, #310521, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of March, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023