IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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MAR 26 2018
S.C. SUPREME COURT

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-000547

Douglas M. Thompson..Petitioner,

v.

State of South Carolina..Respondent.

PETITION FOR WRIT OF CERTIORARI

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Other Counsel of Record:
South Carolina Attorney General's Office
Rembert Dennis Building
1000 Assembly Street
Columbia, S.C. 29201

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QUESTIONS PRESENTED

I. Whether the PCR court erred when it did not find trial counsel rendered ineffective assistance of counsel when trial counsel failed to introduce bank statements at trial that would have explained Petitioner's possession of a large amount of money at the time of the crime?

II. Whether the PCR court erred when it concluded that trial counsel did not render ineffective assistance of counsel when trial counsel failed to request a severance?

III. Whether PCR court erred when it did not find appellate counsel rendered ineffective assistance of counsel when it did not raise the issue of sufficiency of the evidence and when trial counsel made an appropriate directed verdict motion at the end of the State's case.

STATEMENT OF THE CASE

Petitioner was indicted by the Berkeley County Grand Jury for kidnapping (2011-Gs-08-1659), armed robbery (2011-GS-08-1570), and first degree burglary (2011-GS-08-1573). He was represented at trial by David Aylor. He was tried before the Honorable Kristi L. Harrington and a jury between November 7th and 11th, 2011. He was found guilty and sentenced to 15 years for each charge, to be served concurrently.

Petitioner then filed a timely notice of appeal. Petitioner was represented by Lanelle Durant of the South Carolina Office of Indigent Defense, Appellate Division. She filed a merits brief, and raised the following issue on appeal:

> Did the trial court judge err in refusing to suppress the identification evidence when the show-up identification procedure was unduly suggestive, inherently unreliable, and conducive to irreparable mistaken identification?

Petitioner then filed a Motion to Relieve Counsel and to Proceed *Pro Se*. He also filed a Writ of Mandamus. The South Carolina Court of Appeals dismissed these motions with prejudice. The Court of Appeals then affirmed Petitioner's conviction and sentence. *State v. Thompson,* Op. No. 2014-UP-136 (S.C. Ct. App. filed April 2, 2014).

Petitioner then filed an application for post-conviction relief on July 9, 2014. An amended application was filed February 11, 2015. The State filed its Return on September 4, 2015. An evidentiary hearing was held before the Honorable G. Thomas Cooper on December 9, 2016. Petitioner was represented by Lance Boozer. The State was represented by Ruston Neely. The Order of Dismissal was filed February 21, 2017.

This petition for writ of certiorari timely follows.

ARGUMENTS

I. The PCR court erred when it did not find trial counsel rendered ineffective assistance of counsel when trial counsel failed to introduce bank statements at trial that would have explained Petitioner's possession of a large sum of money at the time of the crime.

Relevant Facts

Petitioner's convictions arise out of events that occurred on August 6, 2010. That night, there was a home invasion of a group of Brazilians who were living in a high foot traffic area of Berkley County. App. 150. Officer Jason Charlton testified during the *Neil v. Biggers*[1] hearing that it is a low-economic area where a number of people walk and do not drive cars. App. 103-104. He testified that "it's not uncommon for people to run from the police in that area." App. 127. The victims did not spend much time around African-Americans and believed they share many similar physical features. App. 181, 202. Mr. Silva, one of the victims who made an identification of Petitioner as one of his assailants, acknowledged that he testified that all black men look alike to him. App. 321-22. One victim gave a statement to law enforcement that one of the suspects was wearing a blue shirt, but neither Petitioner nor his co-defendant were wearing blue shirts when they

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1 409 U.S. 188 (1972).

were detained by law enforcement. App. 189. The CAD report noted that the description was two black males wearing red and white shirts. App. 205.

Having been dispatched to the home invasion call, Officer Charlton saw three suspects about a quarter of mile from where the robbery occurred. One was carrying a laptop, and law enforcement had received word that a laptop was missing. When he stopped to speak to them, one suspect fled. App. 72. Petitioner had the laptop in his hands. He and a co-defendant, Clarence Fishburne, were detained, but no weapons were found. App. 74. Back at the victim's apartment, one of the occupants gave law enforcement a cell phone that one of the assailants had dropped. Law enforcement traced it to Fishburne. App. 81-82. Cell phones taken from Fishburne's pocket belonged to the victims. App. 82-83. Those phones, however, were not taken into evidence. App. 98.

The victims said that money was taken, $100 bills, $2 bills, "a Brazilian tradition." Law enforcement, however, did not recover those denominations from the suspects. App. 100. The victims claimed the following was stolen: three $100 bills, five $50 bills, a few $20 bills, a$1 bill and two $2 dollar pills. Petitioner had the following on him: Six $50 bills, six $20 bills, and two $1 bills. Mr. Silva indicated that a Blackberry had been taken, but law enforcement did not recover a Blackberry from either Petitioner or his co-defendant. App. 101. The victims never confirmed that the laptop that was in Petitioner's possession was the one that was stolen from them. App. 128, 324. Mr. Silva testified that the assailants stole around $600 from him. App. 317. Petitioner was subsequently convicted of these crimes.

At the post-conviction relief evidentiary hearing, Petitioner explained to the court that, on the day he was arrested for these events, he had withdrawn a substantial amount of money from

the bank to pay off his car loan. App. 879. He introduced into evidence bank receipts showing these withdrawals. App. 844-845.

The PCR court rejected the claim and held:

> Applicant claimed he withdrew the money that was found by law enforcement in his pocket from the bank. Applicant wanted to introduce the bank statement to show that the money in his pocket was not taken in the burglary. Trial counsel testified he did not believe the bank statement was of much evidentiary value. Trial counsel testified that his cross-examination of the victims led to the discovery that the denomination and amount of money the victims' claimed was taken in the burglary was not the same as the amount and denominations found on Applicant. Applicant and his codefendant were found with the victim's laptop and cell phones, which further lessened the value of the bank statement. Trial counsel decided not to introduce the bank statement because he believed the value of last argument was greater than the evidence which was redundant... This Court finds that Applicant has failed to satisfy his burden that trial counsel was deficient in not introducing the bank statement.

App. 932.

For reasons discussed below, the PCR court's order misstates the factual record and also commits errors of law.

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) the performance of counsel was deficient, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Rhodes v. State*, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* When a defendant's conviction is challenged, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting *Strickland v. Washington*, 466 U.S. at 696).

This Court has recognized that when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). The validity of counsel's strategy is reviewed under "an objective standard of reasonableness." *Ingle*, 348 S.C. at 470, 560 S.E.2d at 402.

The PCR court's order is factually inaccurate, and legally erroneous, and respectfully this Court should grant Petitioner's petition for writ of certiorari. First, the order claims that Applicant and his co-defendant were found with the victim's laptop and cell phones which "further lessened the value of the bank statement." In fact, the record shows that the victims never identified the laptop in Petitioner's possession as the one stolen from the victims. That point was testified to on two different occasions during the trial as indicated above. But also, the victim's cell phones were found in Petitioner's co-defendant's pocket. There was no evidence presented to show that Petitioner knew anything about the phones.

The order also improperly credits trial counsel's "strategy" that the introduction of the bank statements was not necessary since trial counsel had already had the victim's concede that the money found in Petitioner's pocket did not correspond to the denominations they claim were stolen. The Court found that the bank statements then would be "redundant." Respectfully, it would not have been "redundant;" it would have provided additional evidence that Petitioner was not involved in the home invasion. Surely any rational juror would have wondered why a young man, out late at night, would have had such a large amount of cash on him. The introduction of the bank statements would have informed the jury that it was because Petitioner had withdrawn that amount of money **that very day**.

Trial counsel appears to not have even recognized how important this evidence was to his client's case, nor did he seem to understand the actual evidence the State had against his client. At the evidentiary hearing, counsel testified to the following:

> And one other thing I definitely want to make clear to you all. This whole issue with the currency, not the part about it being Brazilian currency, because that it completely made up, but this about the money difference, if you back and look in the transcript, you will see where I actually questioned and found out the exact amounts of money that the person who had missing money from, and the denominations in the money that Mr. Thompson had were completely separate, in different amounts. So the two did not even correlate.
>
> So not only was that a secondary issue anyway, because the items that were in his hands, in his actual possession that were stolen from the home, were corroborated to be from the home.
>
> But this whole currency thing about me not putting in this bank statement, that wasn't something that was even at all controversial, because they testified the amounts and the currency that was found, that the guy had lost. He said, it was stolen from him, compared to the money, whatever amount it was. This amount difference is obviously a rabbit trail as well.
>
> The amount didn't have anything to do with it either. "What had to do with it is what currency, basically, like, was it twenties, was it tens, was it fives, ones, whatever The two amounts didn't equal out, the amount in the actual total, nor did the actual denominations match up. So that was not even an issue at trial at all. I don't know where that came from either.
>
> Q: So it's your testimony that the cross-examination that you, and I guess not co-counsel, but co-defendant's counsel, cross-examined the officer on, made the bank statement's evidentiary value lessened?
>
> A: It was completely irrelevant. It wasn't part of their closing statement. They weren't trying to correlate-- that wasn't even something that was an accusation when he said the different-- they didn't need to prove that this money was or wasn't taken from this one individual, because they had two of the three defendants, one that was never called, so really just two, with actually items from the home that no one could argue against . . .
>
> My client, as well as the co-defendant, had possessions from the home that were in their possession when they were arrested. That was very relevant. This money issue was not an issue.

THE COURT: Physical objects?

THE WITNESS: Correct.

BY MR. NEELY:

Q: What were those physical objects?

A: A laptop, and I can't really recall, maybe two laptops and a cell phone.

App. 904-908.

Trial counsel also testified he did not know if Petitioner showed it to him because he "wasn't interested in it." App. 908. Importantly, and contrary to the order of dismissal, trial counsel denied that he considered the loss of closing argument in his assessment of whether to use the evidence or not. App. 907-908.

But also, and contrary to trial counsel's testimony, the State did use the amount of money Petitioner had in his pocket as part of its argument to the jury that Petitioner was guilty of this crime:

> Defendant Thompson had a lot of money on him when he was caught. And maybe some of those denominations didn't meet up exactly with what the victim thought that he had. But it was just a guess of what he may have had in his wallet.
>
> He knew he had about $600. He knew he had about $600 because it was his daughter's third birthday party the next day and he had to buy party favors and food, and that was taken from him.
>
> A lot of it was found in Defendant Thompson's pocket. Was all $600 found? No. But you also heard why that was because Officer Charlton told you why that was. Usually when three people commit a crime, three people are going to split the loot. And that's what happened here.

App. 578.

The State clearly used the large amount of money Petitioner had on him as proof that he was guilty of this crime. Trial counsel simply did not comprehend how valuable this evidence would have been had it been presented to the jury. This was hardly a case of overwhelming guilt, and trial counsel's performance was substandard and prejudicial.

The PCR court's order does not accurately reflect the facts presented at trial or at the evidentiary hearing, and it additionally commits legal error by finding that trial counsel decision not to use a piece of evidence did not render his performance ineffective. Respectfully, this Court should grant the petition for writ of certiorari and allow additional briefing on this claim.

II. The PCR court erred when it concluded that trial counsel did not render ineffective assistance of counsel when he failed to request a severance.

As Petitioner explained to the Court during the PCR hearing, Petitioner's co-defendant had just recently been released from prison. App. 866. During Petitioner's sentencing, the judge noted that she was troubled by the fact that Petitioner was out at 11:30pm with a man who was 12 years older than Petitioner was, and who had a criminal record. App. 867

In its order of dismissal, the PCR court denied this claim, finding that Petitioner was unable to name a specific trial right that was compromised by his joint trial or how a joint trial would prevent the jury from making a reliable judgment. App. 928-29. The court found that Petitioner's only assertion was that the jury was biased by his co-defendant's record, which implicated his own guilt. Since the codefendant's record was not introduced at trial, the court found that the record did not bias the jury against Petitioner. App. 929.

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." *State v. Tucker*, 324 S.C. 155, 164, 478

S.E.2d 260, 265 (1996) (citing *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct. App. 1985). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *Id.* (citing *State v. Anderson,* 318 S.C. 395, 398, 458 S.E.2d 56, 57-58 (Ct. App. 1995).

Although it is common to have co-defendants tried together, this Court has always admonished the lower courts to act cautiously in allowing joint trials, and that a trial court judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him. *State v. Dennis*, 227 S.C. 275, 523 S.E.2d 173 (1999); *State v. Barnes*, 421 S.C. 47, 804 S.E.2d 301 (Ct. App. 2017).

Here the trial court judge did not properly consider the prejudicial effect of allowing a joint trial when Petitioner's co-defendant was so much older, and had a more significant criminal history than Petitioner. Respectfully, Petitioner asks this Court to grant his petition for writ of certiorari and allow additional briefing on this issue.

III. The PCR court erred when it did not find appellate counsel rendered ineffective assistance of counsel when it did not raise the issue of sufficiency of the evidence and when trial counsel made an appropriate directed verdict motion at the end of the State's case.

Appellate counsel rendered ineffective assistance of counsel when she failed to raise the issue of sufficiency of the evidence on direct appeal, and when the issue was properly preserved, and the evidence against Petitioner was woefully insufficient to support his conviction. The PCR court erred when it found otherwise.

In addressing this claim, the PCR court held:

> Appellate counsel's choice to focus on issues counsel believed had the best possibility of granting Applicant relief is not deficient. This Court finds that

> Applicant has failed to satisfy his burden to prove that appellate counsel was deficient. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

App. 933.

In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict. *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004). During trial, "[w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id.* at 593, 606 S.E.2d at 477-78 (citing *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). The trial court should "grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as '[s]uspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478.

The evidence adduced at trial was not compelling. The sole testimony tending to connect Petitioner to the crime was the identification made by the victims of the home invasion but, as discussed above, their identifications were highly problematic. The denominations of the money found on Petitioner did not correspond to what the victims alleged had been stolen. Also, the victims never identified the laptop in Petitioner's possession as having been the one stolen from them. The identification was a disfavored "show up" identification. Tr. 75-79. The victims suggested that one of the suspects may have changed shirts. Tr. 95.

In *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), the South Carolina Supreme Court found that where circumstantial evidence merely raises a "suspicion" that the accused is guilty, the State has failed to present "substantial circumstantial evidence." In *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2012), the Supreme Court reiterated that circumstantial evidence is

"substantial" when it "reasonably tend[s]" to prove the guilt of the accused, citing *State v. Lollis*, 343 S.C. 580, 585 (2001). A review of the evidence offered in these cases is instructive.

In *Bostick*, the State relied on four pieces of circumstantial evidence to convict the defendant of murder: 1) the victim's personal items were found in a burn pile in a nearby house that was owned by the defendant's mother; 2) a heavy petroleum product was used as an accelerant in the burn pile and the defendant's mother did not use accelerants; 3) gasoline was used as an accelerant to start a fire in the victim's home after she was struck by her assailant and gasoline was found on the defendant's shoes; and 4) blood was found on the defendant's jeans and an expert testified that, although she could not conclusively conclude that the blood belonged to the victim, there was a 99% chance that it did belong to the victim. In assessing this issue, the South Carolina Supreme Court found that, even when "[a]nalyzing the evidence presented by the State in the light most favorable to it," "the State's evidence...raised only a suspicion of guilt..." *Id.* at 141. The Court reversed Bostick's conviction.

In *Odems*, the State relied on four pieces of circumstantial evidence to convict the defendant on charges of robbery, grand larceny, criminal conspiracy, and malicious injury: 1) the defendant was located in the getaway car shortly after the time of the robbery; 2) the items stolen from the victim's home were found in the car; 3) the defendant fled from law enforcement when pulled over; and 4) the defendant enlisted the help of an uninvolved person in his attempt to evade arrest. According to this Court, "[t]he circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-established directive that circumstantial evidence that is not substantial is insufficient to go to a jury." *Id.* Again, the Court the convictions based on insufficiency of the evidence.

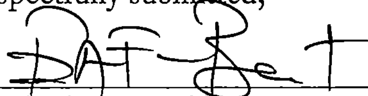
Appellate counsel rendered ineffective assistance of counsel when she failed to raise this issue that was properly preserved and meritorious. A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Where appellate counsel fails to raise a meritorious issue on appeal that constitutes reversible error, the appropriate relief is a new trial. *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 152 (1991). *See also Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001).

Respectfully, Petitioners asks this Court to grant his petition for writ of certiorari and allow additional briefing on this claim.

CONCLUSION

For these preceding reasons, Petitioner respectfully asks this Court to grant his petition for writ of certiorari, and allow additional briefing of these claims.

Respectfully submitted,



Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Ste. 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

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Case No. *2017-000547*

Douglas Thompson . . . . .Petitioner,

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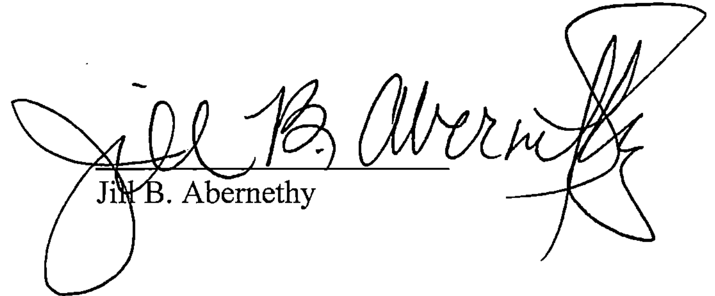
State of South Carolina. . . . . Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Petition for Writ of Certiorari and Appendix were served by first class United States mail, postage prepaid, this 26th day of March, 2018, upon the following:

Alan Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211



Jill B. Abernethy

BLUME FRANKLIN-BEST & YOUNG, LLC

ATTORNEYS AT LAW

900 Elmwood Avenue, Suite 200
COLUMBIA, SOUTH CAROLINA 29201
PHONE: (803) 765-1044
FAX: (803) 765-1143

JOHN H. BLUME
ELIZABETH FRANKLIN-BEST
LAURA W. YOUNG
KEIR M. WEYBLE *OF COUNSEL*
DAVID I. BRUCK *OF COUNSEL*

RECEIVED
MAR 26 2018
S.C. SUPREME COURT

March 26, 2018

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

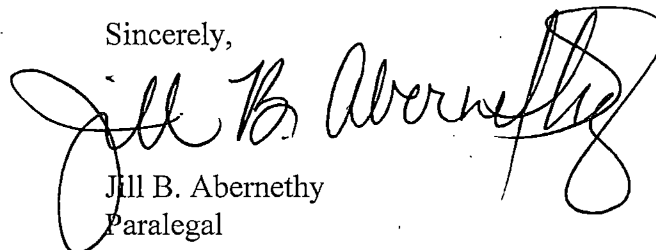
RE: *Douglas Thompson v. State of South Carolina*
Case No. 2017-000547

Dear Mr. Shearouse:

Please find enclosed for filing, with certificate of service, the original and six copies of the Petitioner's Petition for Writ of Certiorari and one unbound and one bound copy of the Appendix in regards to the above captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please feel free to contact this office.

Sincerely,



Jill B. Abernethy
Paralegal

Enclosure

cc: Alan Wilson, Esq.