

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

—————
Certiorari to Horry County

Roger E. Henderson, Circuit Court Judge
—————

DAYTON CARANDO FRINKS, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001778
—————

PETITION FOR WRIT OF CERTIORARI
—————

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED

APR 30 2018

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

Trial counsel erred in failing to request a jury charge on the
lesser offense of second degree burglary.3

CONCLUSION7

ISSUE PRESENTED

Trial counsel erred in failing to request a jury charge on the lesser offense of second degree burglary.

STATEMENT

Petitioner Dayton C. Frinks Jr., was found guilty of first degree burglary¹ during the May 2013 term of the Horry County General Sessions Court before Judge Edward B. Cottingham. App. 1-184. James Galmore represented petitioner at trial, and Assistant Solicitor Candace Livesay appeared on behalf of the state. Judge Cottingham sentenced petitioner to imprisonment for a period of fifteen years. Petitioner appealed, but the case was dismissed on March 18, 2015, by the South Carolina Court of Appeals. Assistant Appellate Defender Susan B. Hackett, of the Office of Appellate Defense, represented petitioner on direct appeal.

On June 22, 2015, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 186-192. The respondent filed a return that was served on December 6, 2016, (App. 197) requesting that a PCR hearing be filed in the case. App. 193-196.

A PCR hearing was convened on May 23, 2017, at the Horry County Courthouse before Judge Roger E. Henderson. App. 198-227. Petitioner was present at the hearing and represented by James K. Falk, and Assistant Attorney General Valerie G. Giovanoli appeared on behalf of the state. On August 7, 2017, Judge Henderson issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of counsel. App. 229-237.

Petitioner appealed Judge Henderson's Order. This brief follows.

¹ Petitioner was indicted for kidnapping and first-degree burglary, but the jury found him not guilty on the kidnapping charge. App.175, lines 14-18.

ARGUMENT

Trial counsel erred in failing to request a jury charge on the lesser offense of second degree burglary.

At trial, Elias Michaels testified that on November 12, 2012, he and his wife returned home after dinner and that he backed his vehicle into the garage of his home in Long, South Carolina, while his wife went inside the house through another entrance. Michaels explained that after he parked his vehicle in the garage, he felt “somebody” tap him on the shoulder. Michaels stated that this “somebody” held a gun, and wore a hoodie and a semi-Halloween mask, and that there were two other people standing in the garage at the rear of his vehicle. Michaels reported that all three men were black males. Michaels stated that he kept moving close enough to the door from the garage leading to the inside of the house until he was able to open the door and then slam it shut and lock the door. App. 18, l. 5 – App. 24, l. 6; App. 63, lines 13-18.

After police arrived on the scene, Michaels noted that a screen from one of his windows at the back of his house was torn and that the outer portion of the glass behind it had been broken. App. 24, l. 15 – App. 27, l. 1. The inference was that entry had been gained via the broken screen and window, but any alleged activity might have been interrupted when his wife went into the house. App. 28, l. 3 – App. 32, l. 3. Michaels testified at trial that he identified petitioner as the perpetrator to his neighbor as they sat at a bond hearing before trial, but that he did not inform the police of his identification. App. 40, l. 21 – App. 41, l. 24. Then, at trial, unbeknownst to anyone that an identification would be made in the case, Michaels made a positive identification pointing to the man (petitioner) sitting at the defense table as the perpetrator. App. 43, l. 7-14.

Originally, the only evidence to be offered at trial was the fingerprint evidence gathered from the broken window in question that positively matched petitioner's prints as summarized by print examiner John R. Cauder. App. 93, l. 21 – App. 98, l. 4; App. 53, l. 13 – App. 55, l. 23.

In this case, there was no pretrial evidence of an identification of the perpetrator that existed. No authorities were aware of Michaels' identification of petitioner as the perpetrator prior to trial at the bond hearing because he did not divulge this information to police. App. 212, l. 4 – App. 213, l. 25. Therefore, the case went to trial with the only evidence being presented in the case against petitioner was his fingerprint match on a broken glass outside a cut screen at Michaels' house. App. 216, l. 18-23; App. 206, l. 6 – App. 207, l. 8. Quite naturally, defense counsel was prepared to challenge the evidence based on the sufficiency of the evidence (fingerprint match only) **until** Michaels made his in-court identification at trial, which was revealed on cross-examination through questions raised by defense counsel. App. 208, l. 22 – p. 21, l. 7. At that juncture, however, the dynamics of the case changed as the state then had two pieces of evidence against petitioner.

At the PCR hearing trial, counsel testified that he did not request a lesser burglary charge because of the weapon involved and due to the fact that the events occurred in the nighttime. App. 216, l. 24 – App. 217, l. 10. Defense counsel's testimony regarding his strategy in not asking for the lesser burglary offense follows:

A.) ...it was either first-degree burglary, or the jury wasn't going to believe the in-court identification that had never been previously made. So that was the strategy, either the jury was going to believe the identification or not.

Q.) But if the jury didn't believe the identification but just believed the fingerprint, then you would have been entitled to probably....burglary third would you not.

A.) Yes. App 215, l. 23 – p. 216, l. 7.

Petitioner testified at the hearing and explained that his case looked favorable because the only evidence the state possessed was a fingerprint match, and that no one was aware of any pretrial identification made by the homeowner until said homeowner testified at trial during which time he submitted his in-court identification pointing him out to the jury as the perpetrator. App. 220, lines 5-8; App. 222, lines 4-13.

The PCR judge ruled that counsel was not ineffective in failing to request a charge on the lesser burglary offense because the case boiled down to whether the jury believed the identification or disbelieved the identification evidence, and that petitioner failed to show any prejudice based on the lack of a charge on the lesser burglary offense. App. 234.

Clearly, counsel's trial strategy was not sound or convincing. After counsel elicited testimony that yielded an identification of petitioner as the perpetrator, the state's case grew stronger and no longer hinged on a fingerprint match, but rather a fingerprint match coupled with an identification made in the case, which in turn meant that a burglary conviction became more likely than not to occur; and therefore, petitioner deserved the benefit of a lesser second degree burglary conviction option rather than stuck with a first degree burglary conviction only. The reason being that a jury can believe or disbelieve evidence in whole or in part, (see State v. Johnson, 236 S.C. 207, 113 S.E.2d 540 (1960), which is evidenced by the jury's acquittal on petitioner's kidnapping charge. Likewise, the jury might have chosen to ignore the weapon and nighttime aggravating circumstances of entering a dwelling sans consent under first degree burglary² and decided to convict on entry into a dwelling sans consent with an absence of

² (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

(1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime.

(a) is armed with a deadly weapon or explosive; or

concerns for the aggravating circumstances found under second degree burglary,³ or to dismiss the dwelling and building distinctions and convict on third degree burglary.⁴ Second degree burglary is a lesser offense of first degree burglary. State v. Goldenbaum, 294 S.C. 455, 365 S.E.2d 731 (2009). However, third degree burglary **cannot** be submitted to the jury when there is uncontroverted evidence that the structure entered was a dwelling. State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002), citing to State v. Bernsten, 295 S.C. 52, 367 S.E.2d 152 (1988). Second degree burglary applicable here, and at the very least petitioner should have been given the benefit of a doubt via a jury charge on the same. For instance, one could argue the implausibility of three grown men gaining entry through one bent screen and broken window.

Trial counsel erred in failing to request a jury charge on the offense of second degree burglary; and petitioner was prejudiced as a result because a reasonable likelihood exists that the outcome of petitioner's trial would have been different, i.e., a lesser sentence on a lesser offense, but for counsel's error, particularly in light of this jury's disposition to believe or disbelieve evidence in whole or in part via the jury's acquittal of petitioner on the kidnapping charge. Counsel's error violated petitioner's right to competent legal representation guaranteed under the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668 (1984).

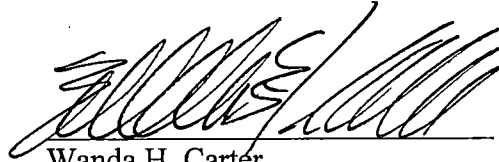
-
- (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument ; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
- (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
 - (3) the entering or remaining occurs in the nighttime

³ (A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein sans any aggravating circumstances.

⁴ (A) A person is guilty of burglary in the third degree if the person enters a building without consent and with intent to commit a crime therein.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition on the above-raised issue.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

DAYTON CARANDO FRINKS, JR.,

PETITIONER

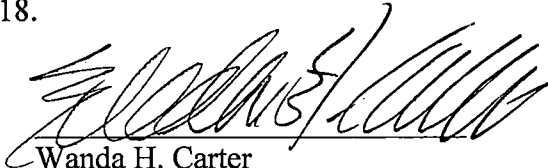
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

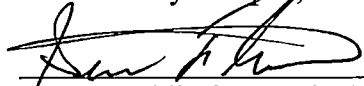
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Dayton Carando Frinks, #355560, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of April, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 30th day of April, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022