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MAY 16 2018

S.C. SUPREME COURT

Elder Prescott Leach
#197673
Lieber Corr. Inst. Edisto B-52
P.O. Box 205
Ridgeville, SC 29472-0205
May 8, 2018

Hon. Daniel E. Shearouse,
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Elder Prescott Leach v. State of South Carolina
Case No. 2017-001972.

Dear Mr. Shearouse,

Enclosed for filing with your office, please find my Prose Response to Johnson Petition For A Writ of Certiorari in the above-referenced case and Certificate of Service.

Thank you for your assistance in this matter.

Respectfully Submitted,
x Elder Leach
Elder Prescott Leach

Enclosure
File

cc: Mr. Justin J. Hunter, Esq.
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Elder Prescott Leach #197673
Lieber Conv. Inst. Edisto B-52
P.O. Box 205
Ridgeville, SC 29472-0205
May, 2018

Mr. Justin J. Hunter, Esq.
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Elder Prescott Leach v. State of South Carolina
Case No. 2017-001972

Mr. Hunter,

Enclosed please copy of my Pro se Response to Johnson
Petition for a Writ of Certiorari, in the above referenced
case.

Sincerely,
x Elder Leach
Elder Prescott Leach

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

ELDER PRESCOTT LEACH

PETITIONER,

V.

STATE OF SOUTH CAROLINA

RESPONDENT,

APPELLATE CASE NO 2017-001972

PRO SE RESPONSE TO JOHNSON
PETITIONER FOR WRIT OF CERTIORARI

Elder Leach

Elder Prescott Leach
#197673
Lieber Conv. Inst. E-B-52
P.O. Box 205
Ridgeville, SC 29472-0205
Pro se Petitioner

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ISSUES

1. Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to properly challenge prior convictions, resulting in life without parole ("LWOP") sentence?
2. Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to show by a preponderance of the evidence that the conviction was defective.
3. Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the sufficiency of indictment and to the indictment being materially amended at the close of the trial?

STATEMENT

On March 20, 2014, the York County Grand Jury indicted Petitioner Elder Leach for two counts of trafficking in crack cocaine. App. 477-482. On February 27, 2014, the State filed notice of intent to seek a sentence of life without the possibility of parole.

On May 12, 2014, Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. App. 1. Michael L. Brown and Sean Cronin represented Appellant. Assistant Solicitors Matthew Shelton and Leslie Robinson represented the State.

The jury found Appellant guilty as charged. App. 311, l. 1-14. The State allegedly served the Petitioner with Notice of the State's intention to seek life without parole "under the three strikes recidivism statute" according to S.C. Code Ann. § 17-25-45. App. 313, l. 16-24. The trial court sentenced Petitioner to two concurrent terms of life imprisonment with the possibility of parole. App. 316, l. 21-25. Petitioner's convictions and sentence were affirmed. App. 338.

Petitioner filed his application for post-conviction relief on September 16, 2016. App. 340. It contained allegations of ineffective assistance of counsel, including claims against both trial and appellate counsel, and claims of prosecutorial misconduct. App. 345. In total, Petitioner's application contained approximately forty-three different claims. App. 347-App. 349.

The State made its Return on or about December 22, 2016, App. 350. An evidentiary hearing was held on

August 1, 2017, before the Honorable R. Lawton McIntosh. App. 356. Leah Moody represented Petitioner, and Justin Hunter appeared on behalf of the State. Petitioner, trial counsel, appellate counsel testified without objection, by telephone, and the assistant solicitor testified at the hearing.

By order filed September 15, 2017, Judge McIntosh denied Petitioner relief. App. 447. The Order of Dismissal indicated that Petitioner had failed to prove deficient conduct and prejudice for all his claims.

ARGUMENT

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

1. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to properly challenge prior convictions, resulting in a life without parole ("LWOP") sentence.

At the PCR hearing, Petitioner testified that his trial counsel was ineffective for failing to challenge his prior convictions on the ground that it was not a violent offense under Section 17-25-45 of the South Carolina Code of Laws when the prior offenses were alleged to have been committed. R. 361-363.

Here, there was no evidence in the record concerning Petitioner's prior convictions of distribution of crack cocaine and distribution within the proximity of a park (Indictment 1992-GS-46-4099 and trafficking in crack cocaine 10-28 grams and a proximity charge stemming from the same incident, Indictments 2005-GS-46-0694 and 0695. The only evidence concerning the convictions were a form indictment, which gave no details of the facts or circumstances concerning the trafficking and proximity charges.

Trial counsel was ineffective in failing to challenge Petitioner's prior convictions on the ground that they were not classified as "most serious offenses" for which a life sentence could have been imposed pursuant to §17-25-45. Trial counsel was further ineffective in failing to challenge Petitioner's prior convictions for trafficking and proximity offense where the two offenses stemmed from the same incident, which should have been considered as one offense, and, therefore one strike for serious offense, not two strikes. Trial counsel's failure to challenge Petitioner's prior conviction prejudiced Petitioner.

in that he was sentenced to a LWOP sentence with out the ability to challenge on appeal.

Petitioner's LWOP sentence should be reversed and remanded for resentencing.

2. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to show buy bust was defective.

Petitioner testified at the PCR hearing, that counsel was ineffective for allowing to videos of the incident to be redacted with gaps in the video and periods of silence, where the videos were not an accurate similarity occurrence. That the two videos run together depicts an occurrence not substantially similar to what actually occurred during the buy bust. The police officers lost sight of the C.I. for approximately six minutes. R. 365-366.

Trial counsel testified at the PCR hearing that they were two videos - may be a video and audio. That the video was not that good but the audio was good so the state and trial counsel "had to merge the two. That he thought not two actual video. There were two recordings. One had video, one did not. The one without video was easier to hear. The one with video was hard - was messed up. R. 409. Trial counsel testified that, in his opinion video evidence was overwhelming. R. 411.

Here, trial counsel was ineffective in agreeing

to redacting the video and audio recordings; and allowing the video and to be put together as one. Petitioner was prejudiced by counsel's failure to fight the video and audio as well as to motion to suppress all drug evidence where the C.I. stopped and fiddled around for five to ten minutes under the hood of his car. R.413.

Here, the switch had every reason to lie and set a man up - the Petitioner - to get out of serious charges.

Petitioner's conviction and LWOP sentence should be vacated, or in the alternative, reversed and remanded for a new trial.

3. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the sufficiency of the indictment and to the indictment being materially amended at the close of the trial

Trial counsel was ineffective for failing to object to the indictment which was materially amended at the close of Petitioner's trial where the original two-billed indictment charged Petitioner with a first-offense and allowed the solicitor to alter -materially the notice document, to third offense in violation of Petitioner's 5th Amendment Due Process rights as well as S.C. Const. Art. 2, § 11 and Art. V, § 22. "Due Process requires that a criminal defendant be properly served with a valid indictment."^①

Here, trial counsel failed to object to an invalid and materially amended indictment.

① State v. Smalls, 364 S.C. 343, 346, 613 S.E.2d 754 (2005).

Petitioner was tried and convicted and sentenced to a LWOP sentence because trial counsel was deficient in his failure to object to the indictment being amended from a first offense to a third offense without presentation to the Grand Jury. This, in violation of his constitutional right guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, § 11 and Art. V, § 22 of the S.C. Constitution

Petitioner's conviction and LWOP sentence should be vacated and remanded for resentencing or, in the alternative, remanded for a new trial.

CONCLUSION.

For the foregoing reasons, Petitioner requests that the Court grant the petition for a writ of certiorari to allow full briefing by an attorney experienced in these issues, reverse the charges against him and remand for a new trial, or, in the alternative, resentencing.

x Elder Leach
Elder Prescott Leach
Pro Se

This 8th day of May, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

ELDER PRESCOTT LEACH,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby declares under the penalty of perjury, §16-9-10(A)(2) of the South Carolina Code of Laws (1976) that a true copy of Pro se Response to Petition for a writ of Certiorari pursuant to Johnson v. State in the above referenced case was served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, Attorney General Office, Post Office Box 11549, Columbia, S.C. 29211, attorney for Respondent, this 8th day of May, 2018.

Elder Prescott Leach

Elder Prescott Leach #197673

Lieber Conv. Inst. E-B-52

P.O. Box 205

Ridgeville, S.C. 29472-0205

Pro se Petitioner

Elder P. Leach

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Ridgeway, S.C. 29472-0205

May 8th, 2018

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MAIL ROOM
LIEBER C.I.

Supreme Court of South

Hon: Daniel E. Shearouse

clerk of Court

P.O. Box 11330

Columbia, S.C. 29211