

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

BOBBY A. GILBERT,

V.

STATE OF SOUTH CAROLINA,

ORIGINAL
RECEIVED
PETITIONER
JUN 04 2018
S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2017-001981

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT3

CONCLUSION.....6

PETITION TO BE RELIEVED AS COUNSEL7

ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective in failing to request a jury instruction on the lesser included offense of voluntary manslaughter?

STATEMENT

In July of 2008, the Darlington County Grand Jury indicted Petitioner, Bobby Gilbert, for murder, larceny and armed robbery, indictments #08-GS-16-1031, 1032, 1039. On April 27, 2009, Petitioner proceeded to jury trial before the Honorable Howard P. King. W.S. “Trey” Watts, III represented Petitioner at trial. Kernard E. Redmond and Patti McKenzie prosecuted the case. The jury found Petitioner guilty as charged. Judge King sentenced petitioner to life in prison for murder, thirty (30) years consecutive for armed robbery and ten (10) years concurrent for larceny. A timely notice of intent to appeal was filed and the direct appeal perfected with a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals denied counsel’s request to be relieved as counsel and ordered briefing on whether the trial judge erred in granting the State’s Batson motion. The matter was argued before Judges Short, Thomas and Pieper on June 11, 2013. On June 26, 2013, the Court of Appeals affirmed the convictions and sentences. State v. Gilbert, Op. No. 2013-UP-283 (S.C. Ct. App. filed June 26, 2013). A petition for rehearing was filed and then denied on August 22, 2013. A petition for writ of certiorari was filed with the South Carolina Supreme Court and denied on July 23, 2015.

On September 3, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 5, 2016. Petitioner filed an amended application on June 7, 2017. The State filed an amended return and partial motion to dismiss on June 16, 2017. On July 18, 2017, an evidentiary hearing was held before the Honorable Roger E. Henderson. In a written order signed September 8, 2017, Judge Henderson denied relief and dismissed the application. A timely notice of intent to appeal was served on September 25, 2017. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective in failing to request a jury instruction on the lesser included offense of voluntary manslaughter.

During the trial, prior to the jury charge, the judge questioned Petitioner about a decision not to request instructions to the jury on the lesser included offenses of voluntary manslaughter and strong-armed robbery. (App. p. 529, line 14 – p. 530, lines 1-8). The judge did not advise Petitioner about the sentencing range for a conviction for voluntary manslaughter. Petitioner testified at the PCR hearing that prior to trial the State offered to allow a guilty plea to voluntary manslaughter for a thirty (30) year sentence. (App. p. 602, lines 13-18).

In the PCR application Petitioner alleged that trial counsel was ineffective in failing to request certain jury instructions. (App. p. 568). During the PCR hearing Petitioner testified that when the trial judge questioned him about instructing the jury on the lesser included offenses, he did not understand that a conviction for voluntary manslaughter carried a sentencing range between two (2) and thirty (30) years. (App. p. 604, line 18 – p. 605, 606, 607, lines 1-17). Petitioner testified that if he had known that he could receive a sentence of less than thirty (30) years for voluntary manslaughter, he would have requested an instruction on the lesser included offense. (App. p. 607, lines 8-17).

Trial counsel testified at the PCR hearing and claimed that he advised Petitioner about the sentencing ranges for the lesser included offenses. (App. p. 625, line 23 – p. 626 – 629, line 1). Counsel testified, “My opinion was to request the lesser included.” (App. p. 629, line 1). In the order of dismissal the PCR judge wrote:

The Court finds that applicant has failed to demonstrate any deficiency on the part of Counsel in determining whether to seek particular jury instructions. In light of Applicant’s previously discussed, baseless

allegation that Counsel failed to investigate or explain anything, when it is apparent from the trial transcript and testimony that Counsel substantially investigated the matter, the Court finds Counsel's testimony credible and Applicant's testimony not credible. The Court gives no weight to Applicant's claim that he did not understand lesser-included offenses at the time of trial, but accepts Counsel's testimony that he explained and advocated for inclusion of the lesser-included offenses. Applicant clearly and unequivocally informed the trial court that he freely and voluntarily made the decision to not seek instruction on lesser-included offenses. Aside from the lesser included offenses, Applicant offers no specific jury instruction that Counsel should have sought. For all of these reasons, Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

(App. p. 643). The PCR judge erred.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

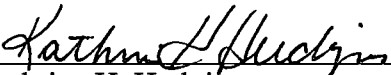
“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). “To warrant the court eliminating the charge of manslaughter, there must be *no evidence whatsoever tending to reduce the crime from murder to manslaughter*. If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was

committed, the defendant is entitled to such charge.” Id. (citation omitted). “Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge *must* be given.” Id. at 597, 698 S.E.2d at 608.

In the present case the judge did not rule that the evidence failed to support a charge on the lesser included offense of voluntary manslaughter. Instead, the judge questioned Petitioner to determine if his decision not to seek the lesser included offenses was made freely and voluntarily. This decision was a legal decision that should have been made by trial counsel, in consultation with Petitioner. Trial counsel testified that he believed the lesser included offenses should have been requested. Trial counsel was ineffective in failing to request the lesser included offense of voluntary manslaughter. There is a reasonable probability that, if counsel had requested a jury instruction on the lesser included offense of voluntary manslaughter, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

BOBBY A. GILBERT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

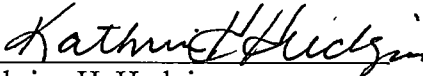
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bobby A. Gilbert states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Roger E. Henderson, which was held on July 18, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Bobby A. Gilbert.

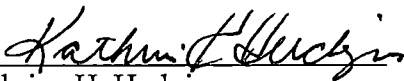
Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of June, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."


Kathrine H. Hudgins
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

This 4th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

BOBBY A. GILBERT,

PETITIONER

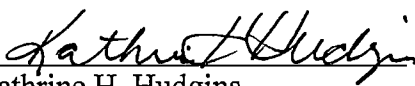
V.

STATE OF SOUTH CAROLINA,

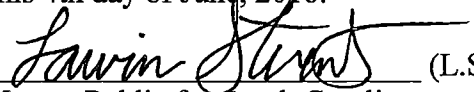
RESPONDENT

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 Johnny Ellis James, Jr., 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 Bobby A. Gilbert, #219284, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of June, 2018.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.