

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Williamsburg County

Honorable D. Craig Brown, Circuit Court Judge

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JASON THOMAS BOSTON,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

APPELLATE CASE NO 2017-002179

PETITION FOR WRIT OF CERTIORARI

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 I. Trial counsel erred in not allowing the presentation of alibi testimony at trial as a strategy in order to save the last argument to the jury at closing because such a strategy constituted deficient legal representation as the homeowner in the case never identified petitioner as the robber neither before trial nor at trial, and the remaining noncredible eyewitnesses gave glaring and obvious inconsistent accounts of the robbery at trial, all of which meant that had petitioner’s alibi defense been presented, then a reasonable probability existed that the outcome of his trial would have ended differently.....3

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ISSUES PRESENTED

I. Trial counsel erred in not allowing the presentation of alibi testimony at trial as a strategy in order to save the last argument to the jury at closing because such a strategy constituted deficient legal representation as the homeowner in the case never identified petitioner as the robber neither before trial nor at trial, and the remaining noncredible eyewitnesses gave glaring and obvious inconsistent accounts of the robbery at trial, all of which meant that had petitioner's alibi defense been presented, then a reasonable probability existed that the outcome of his trial would have ended differently.

II. Trial counsel erred in failing to object to the solicitor's erroneous closing remark suggesting that petitioner's motive for robbing an individual who was Hispanic was due to the belief that he would escape prosecution because many Hispanic persons fail to report crimes based on the fear of deportation as a consequence.

STATEMENT

Petitioner Jason Thomas Boston was convicted of armed robbery per jury trial held during the April 2015 term of the Williamsburg County General Sessions Court before Judge Clifton B. Newman and was sentenced to imprisonment for a period of eleven years. M. Amanda Shuler represented petitioner at trial, and Assistant Solicitor Kimberly V. Barr appeared on behalf of the state. App. 1-269. Petitioner appealed, but his appeal was dismissed on December 7, 2016, by the South Carolina Court of Appeals. See State v. Boston, Op. No. 2016-UP-503 (S.C. Ct. App. filed December 7, 2016). Katherine H. Hudgins, Esquire, of the South Carolina Office of Appellate Defense, represented petitioner on direct appeal.

On January 30, 2017, petitioner filed a PCR application with the Williamsburg County Office of the Clerk of Court. App. 271-277. The respondent filed a return dated June 22, 2017, requesting that a hearing be held in response to petitioner's PCR action. App. 278-282.

A PCR hearing was convened on July 24, 2017, at the Williamsburg County General Sessions Court before Judge D. Craig Brown. App. 284-344. Petitioner was present at the hearing and represented by Lance S. Boozer, and Assistant Attorney General Julie H. Coleman appeared on behalf of the state. On August 15, 2017, Judge Brown signed an Order of Dismissal denying and dismissing petitioner's allegations of ineffective assistance of counsel in the case. App. 346-357.

Petitioner appealed Judge Brown's Order of Dismissal. This petition follows.

QUESTION I

Trial counsel erred in not allowing the presentation of alibi testimony at trial as a strategy in order to save the last argument to the jury at closing because such a strategy constituted deficient legal representation as the homeowner in the case never identified petitioner as the robber neither before trial nor at trial, and the remaining noncredible eyewitnesses gave glaring and obvious inconsistent accounts of the robbery at trial, all of which meant that had petitioner's alibi defense been presented, then a reasonable probability exists that the outcome of his trial would have ended differently.

At trial, Luciano Garcia testified that on March 14, 2014, Latoya Hickson drove her vehicle (Expedition) up to his house, and that immediately thereafter a black male, who was also in the vehicle, jumped out, "pulled a gun on [him]," and took his wallet and cell phone. Garcia could not and did not identify petitioner as the perpetrator who robbed him prior to trial or at trial. App. 98, l. 5 – App. 110, l. 22.

Latoya Hickson testified at trial and explained that she drove up to Garcia's home around dusk on the date in question, and that she saw petitioner, who was with her in the vehicle, exit and point a gun at Garcia. App. 119, l. 14 – App. 139, l. 4.

Sharhonda Burgess was also a passenger riding along with petitioner in Hickson's vehicle on the date in question and witnessed the events that transpired after they stopped at Garcia's home. Burgess testified at trial. Burgess stated that she saw petitioner exit and take Garcia's wallet and phone while holding a gun. App. 61-76.

During the PCR hearing held in the case, petitioner testified that he was at his mother's house from 6:00 pm to 11:30 pm on March 14, 2014, and that he asked counsel to present his

mother as an alibi witness at his trial in support of his alibi defense in the case, but that trial counsel refused to do so via the strategy that by doing so the defense would lose the last argument to the jury at the close of the case App. 294, l. 14 – App. 296, l. 25; App. 302, lines 7-23; App. 277, l. 18-23; App. 298, l. 1-7; App. 298, l. 19-22; App. 300, l. 23-25.

Petitioner's mother, Mary Pressley, testified during the PCR hearing and stated that she was set to be called as a witness at trial and ready to inform the jury that petitioner was at her house working around the house from 6:00 p.m. to 11:00 p.m. on the date in question, but that trial counsel decided not to call her as a witness. App. 304-308; App. 310-311.

Trial counsel testified at the PCR hearing and explained that it was her understanding from petitioner's mother that petitioner left her house at around 8:00 p.m. to 8:45 p.m. on the date in question and that she was concerned about how the "gap" in time would affect the credibility of an alibi defense, and that she thought her strategy of securing the last argument would have been more beneficial in gaining an acquittal because Garcia never could identify petitioner as the perpetrator and because of the inconsistencies in Hickson's and Burgess' testimony and recollection of the robbery. App. 323-324; App. 319; App. 326; App. 337; App. 239, l. 21-24.

The PCR judge ruled that trial counsel articulated a valid strategy (i.e. gaining the last argument) in choosing not to present an alibi defense that did not appear to be airtight. App. 352-354.

The robbery occurred before 8:30 p.m. because the 911 call was received at 8:30 p.m. App. 167, l. 6-20. Therefore, there was "no gap" that was significant in time that would have precluded the submission of an alibi defense contrary to counsel's belief as to what time petitioner left his mother's house, because 8:30 pm to 8:45 p.m. would have been outside

parameters; and furthermore, petitioner's mother's trial testimony (according to her PCR testimony) would have been that petitioner departed from her house around 11:00 p.m. on that night. Compare Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), where the Court held that trial counsel was ineffective at a burglary and rape trial in failing to present an alibi witness who would have testified that he saw the defendant leave a lounge fifteen minutes prior to the conclusion of the time of the rape. Clearly, petitioner's alibi defense was plausible despite the concern of the minutes count and it should have been presented to the jury as a defense at trial. Additionally, the fact that Garcia could not positively identify petitioner as the gunman and/or perpetrator and the fact that there were inconsistencies in Hickson's and Burgess' stories meant that all of this combined with the alibi defense would have strengthened petitioner's defense to the extent that it would have been worth losing the last argument at closing. Compare also, Grier v. State, 299 S.C. 321, 384 S.E.2d 722 (1989), where the Court held that counsel was ineffective in failing to call alibi witnesses for trial where the state's theory was that the defendant entered and robbed a convenience store and 3 a.m. because the defendant testified that he was home by 1 am on that morning, and also because his older brother would have testified that he saw the defendant sleeping in his room after 1 a.m., and his nephew would have testified that he was on the porch at 1 a.m. and saw the defendant arrive home at that time, and his younger brother would have testified that he helped the defendant inside the house after he came home as all of this collectively would have provided crucial proof in support of his alibi defense.

A defendant has a right to present witnesses in his defense. Faretta v. California, 422 U.S. 806 (1975). Thus, counsel's trial strategy to save the last argument by foregoing a valid alibi defense constituted deficient representation in violation of petitioner's Sixth Amendment right to competent legal representation at trial because the prejudicial value of the loss of the presentation

of an actual defense (alibi) was greater, as such a defense that might have yielded an acquittal, in comparison to using the last argument to the jury to gain an acquittal. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). Moreover, but for counsel's error, a reasonable probability existed that the outcome of the trial would have been different if the alibi evidence had presented at trial. Trial counsel erred in denying petitioner the opportunity to present alibi witnesses in his defense at trial.

QUESTION II

Trial counsel erred in failing to object to the solicitor's erroneous closing remark suggesting that petitioner's motive for robbing an individual who was Hispanic was due to the belief that he would escape prosecution because many Hispanic persons fail to report crimes based on the fear of deportation as a consequence.

During closing argument, the solicitor made the following remarks:

[Victim Garcia] an easy target. And folks, I'll just be candid, a lot of people like the defendant believe that people like the victims are easy marks because the victim can't speak English. People come to the conclusion, and you know, he's Hispanic or he's from Mexico and probably here illegally, they're not gonna call the police, they're not going to call the police because, you know, they're afraid they'll get deported so they're an easy mark. And surely if he called the police, the police aren't, you know, they're not going to be worried about trying to investigate that or bring charges. And certainly, you know, heaven forbid that police investigate it and they report it. Well, I mean, they're not gonna be around when it comes to trial time. And surely, surely the State is not gonna go through the expense of getting an interpreter and having all these people come up here and try this case. Tr. 193, lines 9- p. 194, l. 4.

During the PCR hearing, trial counsel stated she "probably could have [objected]" to this argument and moved for a mistrial in effect because the solicitor improperly presented a motive for robbery, i.e., based on an assumption not found in the record that he (petitioner) would escape

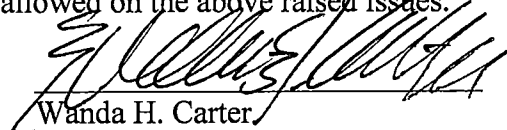
prosecution because Hispanics are fearful of calling police and facing deportation as a consequence. App. 331, l. 19 – App. 335, l. 10.

The PCR judge ruled that the solicitor's comments were not objectionable and that counsel was not deficient in failing to object to the same, and no prejudice from the failure to object. App. 354-355.

The solicitor's comments suggesting petitioner's motive was to take advantage of a Hispanic by choosing to rob a Hispanic because they were easy prey were improper and impermissible remarks. The reasons being that the state does not have to prove motive in a case, and there was no evidence in the record to support said remarks from the case, and the state cannot attack a defendant's character in a case. See, State v. Takis, 204 S.C. 149, 28 S.E.2d 679 (1944) (state need not prove motive); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981) (closing arguments should not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn from therein); and Rule 404(a), SCRE. Note that petitioner did not testify at trial. The solicitor's comments in question were objectionable. Counsel's error in failing to object to the same constituted deficient legal representation at trial, and but for counsel's error the outcome of the trial might have been different had the trial judge ruled in favor of the petitioner based on an objection, or the outcome of the appeal might have been different had this issue been preserved for appellate review. Counsel's error in this regard violated the Sixth Amendment. See Strickland v. Washington, *supra*. The solicitor's outright assertion of petitioner's alleged ill motive was not supported by the evidence in the record and the same was prejudicial as well in that this was an attack against petitioner's character, all of which infected the trial with such unfairness (see State v. Beatty, 813 S.E.2d 502 (2018) as to make his resulting conviction a denial of due process.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner would request that the Petitioner's petition be granted and full briefing allowed on the above raised issues.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2018.

STATE OF SOUTH CAROLINA
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Honorable D. Craig Brown, Circuit Court Judge

JASON THOMAS BOSTON,

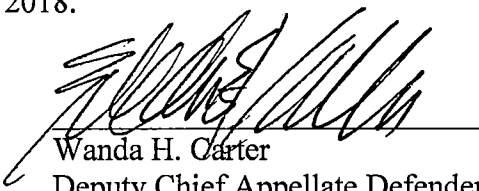
PETITIONER

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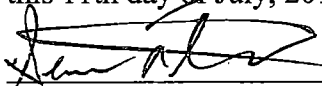
CERTIFICATE OF SERVICE

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 Julie Coleman, 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 Jason Thomas Boston, #360656, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 11th day of July, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 11th day of July, 2018.



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