

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Diane Schafer Goodstein, Circuit Court Judge

DESHAWN LEE POWELL,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002099

PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in not finding trial counsel ineffective for failing to focus on the murder weapon as a defense when Petitioner’s DNA was not found on knife; knife was found on Petitioner’s front porch at the front door by law enforcement although the officers claimed they did not see it initially; and for not calling Petitioner Powell’s brother to testify that he did not see the knife when he entered the home before the officers.8

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to focus on the murder weapon as a defense when Petitioner's DNA was not found on knife; knife was found on Petitioner's front porch at the front door by law enforcement although the officers claimed they did not see it initially; and for not calling Petitioner Powell's brother to testify that he did not see the knife when he entered the home before the officers?

STATEMENT

On November 3, 2010, at approximately 5:00 AM, Niki Bryant entered Arthur Riley's house on Jameson Street for a date with him. When she knocked on the door, the door partially opened and she saw Riley on the floor and the house in disarray. According to Bryant, she got scared and ran to find someone to call the police. App. 50, line 1 – App. 51, line 21.

The Orangeburg County Sheriff's Department officers responded to Jameson Street and found Riley lying in the doorway in a pool of blood. App. 26, line 1 – App. 27, line 20. Crime scene investigator Lieutenant Gerald Carter testified that Riley was found face up, unclothed in his living room. App. 137, lines 2-8. Upon examining Riley at autopsy, the forensic pathologist, Dr. Janice Ross, testified that the cause of death was exsanguination due to stab wounds. App. 251, line 20-25; App. 260, lines 9-16.

Lieutenant James Shumpert with the Orangeburg County Sheriff's Office responded to the call at Riley's house on Jameson. App. 183, line 16- App. 188, line 1. When he talked with Niki Bryant, she provided the names of Petitioner Powell and D-Shop. App. 188, line 2 – App. 190, line 25.

Lieutenant Shumpert learned from Niki that Powell lived next door to her. The Lieutenant then went to Powell's house. He knocked and then entered the front door. He talked with Powell's mother and brother who were in the home. They did not find Powell. When Lieutenant Shumpert left through the front door, he saw a small knife on the porch that he had not noticed when he entered the house. The knife had a red stain on it which the Lieutenant thought might be blood. The knife was collected after it was photographed. App. 191, line 1 – App. 197, line 18.

Petitioner Powell was then arrested and charged with murder. App. 197, line 22 – App. 202, line 9. In February of 2011, the Orangeburg County Grand Jury indicted Powell for murder,

indictment #2011-GS-38-0015. On May 15, 2012, Powell proceeded to jury trial before the Honorable Edgar W. Dickson and a jury. Peggy Hinds and Douglas Mellard represented Powell at trial. Donald Sorenson and Harrison Bell prosecuted the case.

At trial, Niki Bryant testified that Riley's house was a crack house where people smoked crack, sold crack, drank and tricked. App. 41, lines 18-25. When Bryant went to Riley's house to get crack around midnight on November 3, 2010, he asked her to stay but she left with Slick and Ebony to turn a trick. Red and Todd were still at Riley's house when Niki left. App. 44, line 2 - App. 47, line 18. Niki returned later and then found Riley's body. App. 50, line 1 - App. 51, line 21.

Ronnette "Red" Stevenson testified that on the evening of November 2, 2010, and early morning of November 3, 2010, she was at Riley's house "drinking, getting high, playing cards" and chatting with Todd and Monkey Doo. Riley later asked them to leave his house because he was expecting company. App. 93, line 11 - App. 94, line 19. According to Red, when she and Todd left Riley's house, they saw Darrell Jones, "D-Shop" and Petitioner Powell, "New York" walking toward Riley's house. App. 95, lines 3 - 24.

Red testified that she turned around and saw D-Shop and asked him what's going on. According to Red, D-Shop said that "he was like man, he in there beating, beating Mr.--." App. 96, lines 23-25. Red testified, "... and I was like that's F'ed up, go stop him, and he say he did try, but they kicked him out." App. 98, lines 3-5.

Todd Wise said he was at Art Riley's house with Red on the evening of November 2, 2010, and early morning of November 3, 2010. Riley asked them to leave his house because Niki and Riley had a date. App. 111, line 21 - App. 113, line 14. Wise testified that after he and Red left Riley's house, they saw Petitioner Powell and D-Shop coming toward Riley's house. App. 113, line

15 – App. 115, line 3. According to Wise, as he and Red were headed down the dirt road, an argument ensued between Appellant, D-Shop and Riley. Wise and Red continued down the dirt road. As they walked back up the dirt road, they saw D-Shop. D-Shop said, “New York is beating Art or trying to kill him at some point.” App. 115, line 6 - App. 117, line 3.

D-Shop testified that earlier in the evening of November 2, 2010, he and Powell were at Shorty’s Club. The two left the Club between 2:00 and 2:30 AM and got a ride from somebody who dropped them off near Riley’s house. App. 66, line 9 – App. 67, line 25. According to D-Shop, Riley allowed him in the house but not Petitioner Powell. App. 69, lines 7-11. After D-Shop learned there were no girls at Riley’s house, he started to leave. However, Riley and Petitioner were arguing about why Petitioner Powell could not come inside. App. 69, lines 12-23. The argument escalated and D-shop testified that he was unsuccessful in breaking up the argument so he left. App. 69, line 24 – App. 70, line 25.

As he was leaving, D-Shop saw Red and Todd. Petitioner Powell and Riley were still arguing on the porch. Todd told D-Shop to go and get Petitioner because the fight was still escalating. App. 70, line 22 – App.72, line 20. According to D-Shop he once again tried to break up the fight but was again unsuccessful. (Tr. p. 72, line 20 – p. 73, 74, lines 1-6). D-Shop then walked off and went home, according to his testimony. App. 72, line 20 - App. 74, line 14. D-Shop testified that he never saw a knife or any weapon. App. 74, line 7 – 10.

Amanda Webb testified as the DNA case worker with the State Law Enforcement Division (SLED). App. 305, ll. 17 – App. 306, ll. 6. She testified that the DNA profile developed from the knife handle matched the DNA of the victim, Arthur Riley. App. 317, lines 7 – 25. On cross-examination, Ms. Webb confirmed that Petitioner Powell’s DNA profile was not found on any of the items she tested. App. 327, line 6-12.

The jury found Powell guilty of the lesser included offense of voluntary manslaughter. App. 428, line 1 – 14. Judge Dickson sentenced Powell to thirty (30) years in prison. App. 443, line 6 – 13.

A timely notice of intent to appeal was served and filed. The appeal was perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967) by the Division of Appellate Defense. The Court of Appeals dismissed Petitioner Powell's appeal on July 1, 2015. State v. Powell, Op. No. 2015-UP-379 (Ct. App. filed July 1, 2015).

On August 24, 2015, Petitioner Powell filed an application for post-conviction relief (PCR). App. 445. The state filed a return on December 10, 2015. App. 457. An evidentiary hearing was held on October 27, 2016 before the Honorable Diane S. Goodstein. App. 465. Petitioner Powell was represented by Jonathan Waller, and the state was represented by Ruston Neely. App. 465.

At the PCR hearing, Petitioner Powell testified that he provided DNA for testing but no DNA was found at the crime scene that matched his DNA. App. 474, ll. 1 – 14. He believed that his trial attorney did not prove proper representation for him when she overlooked the knife which would have shown his innocence. Powell said that was “a mistake that she shouldn't have overlooked.” Powell testified that his brother would have testified but “she pushed him away.” he said that was not right. App. 482, ll. 18 – App. 483, ll. 6.

On cross-examination, Powell stated that a “main problem” was that trial counsel did not present his brother's testimony. App. 488, ll. 3 – 15. He told his trial attorney that he was not at the crime scene and that he was innocent. App. 490, ll. 18 – App. 491, ll. 6.

Petitioner Powell's brother, Maurice Tucker, testified at the PCR hearing for Powell. Tucker said that he was already at the house where his mother and Powell lived the morning when law enforcement came seeking Powell. Tucker testified that he went through the front door when he

arrived at the home. He did not see the knife. Powell's trial attorney talked with Tucker and asked if he saw the knife. He told her that he did not. Tucker said that he was subpoenaed to testify but Powell's trial counsel told him that he was no longer needed. App. 496, ll. 14 – App. 498, ll. 17.

Trial counsel testified at the PCR hearing that no drugs were found in the victim's house but several witnesses said that it was a drug house. App. 501, ll. 1 – 25. Counsel said there was no evidence of drug use by Petitioner Powell. App. 501, ll. 21 -25. Counsel testified that there was no DNA, and no fingerprints connected to Powell. Counsel indicated that there was "absolutely nothing" linking Powell to the murder other than the fight he had with the victim earlier. App. 502, ll. 1 – App. 504, ll. 10.

Trial counsel stated the brother, Mr. Tucker, was not a strong witness as he could not tell her anything "other than when he got there, he didn't see him." She did not think Tucker sounded strong enough to help his brother. App. 504, ll. 10 – 15. She did not believe the testimony was stronger than having the final closing argument. App. 542.

The PCR judge issued an order on January 9, 2017 denying Powell's PCR application and dismissing it with prejudice. App. 528 – App. 534. PCR counsel filed a motion pursuant to Rule 59 (e), SCRCPC to amend the judge's order to address each of the claims. App. 535 – App. 536. On September 8, 2017, the PCR judge filed an amended order of dismissal addressing each of the claims raised by Petitioner Powell. The judge again denied Powell's PCR application and dismissed it with prejudice. App. 537 – App. 545.

In her order, the judge found that the substance of the testimony concerning not seeing the knife was already in evidence from law enforcement. Therefore Tucker's testimony would have added no new evidence. App. 541. The judge wrote that trial counsel made reasonable efforts to investigate the circumstances of the murder. The judge found that Petitioner Powell failed to show

how he was prejudiced by trial counsel's actions. App. 542. PCR counsel filed a notice of appeal.

This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to focus on the murder weapon as a defense when Petitioner's DNA was not found on knife; knife was found on Petitioner's front porch at the front door by law enforcement although the officers did not see it initially; and for not calling Petitioner Powell's brother to testify that he did not see the knife when he entered the home before the officers.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Trial counsel is ineffective if his failure to

present evidence alters the probable outcome of the trial. Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994).

Trial counsel was ineffective for not developing the knife as a defense for Powell. His DNA was not on the knife and no fingerprints. His brother's testimony would have supported the theory that law enforcement planted the knife on Powell's porch. His testimony would have helped create reasonable doubt of Powell's guilt.

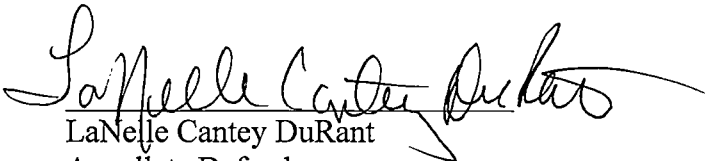
In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that to satisfy the prejudice prong of an ineffective assistance of counsel claim, an applicant must demonstrate there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. The court also held that the PCR court should also consider the strength of the state's case in light of all of the evidence presented as well as considering the impact of trial counsel's error.

The Supreme Court then found in Smalls that for the evidence to be overwhelming such that it precludes a finding or prejudice with regard to an ineffective assistance of counsel claim, the evidence must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of a "reasonable probability the factfinder would have had a reasonable doubt" cannot possibly be met.

There was nothing totally conclusive presented of Petitioner's guilt. There was no DNA, no fingerprints, no eyewitnesses. The only evidence was the word of a witness who saw the fight but who then left during the fight.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences reversed, and the case remanded for a new trial.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2018.

STATE OF SOUTH CAROLINA
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DESHAWN LEE POWELL,

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V.

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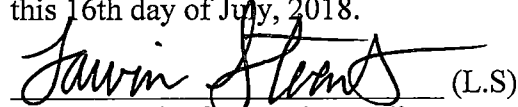
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix and a copy of the Supplemental Appendix in the above referenced case has been served upon Christian Saville, 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 and a copy of the Supplemental Appendix have been served on Deshawn Lee Powell, #350880, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of July, 2018.


LaNelle Cantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 16th day of July, 2018.

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