

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Thomas A. Russo, Circuit Court Judge

ORIGINAL

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AUG 01 2018

S.C. SUPREME COURT

BENJAMIN J. JACKSON

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000881

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and erroneously advised Petitioner not to testify because of his prior record, where Petitioner relied on this erroneous advice when he chose not to testify, and where there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified as to his innocence?

STATEMENT OF THE CASE

Hazel Dunning cleaned St. Stephen Evangelical Church every week. On May 19, 2010, she was cleaning the church with her adult son. App. 138, l. 15 – 140, l. 8. At the time, a new sanctuary was being built at the church so numerous construction workers were also present. App. 140, l. 9 – 141, l. 14. When she arrived around 9:30 am that morning, Dunning parked her Ford Expedition at the rear of the church. App. 141, l. 22 – 142, l. 15.

As she was cleaning the kitchen area alone, someone approached her from behind and asked for her keys. She initially thought one of the construction workers needed to move her car. However, when she turned around, she was facing the barrel of a gun. The individual holding the gun demanded her “f’ing keys” and threatened to “blow [her] head off.” App. 144, ll. 8-25. Dunning “knew the voice” and claimed the person “was not anyone there at the church.” App. 145, ll. 1-4. She described the firearm as “a long barrel gun.” App. 145, ll. 5-8. Dunning ultimately handed the man, who continuously pointed the gun at her head, her keys and cell phone. Before fleeing, the man made Dunning lay on the floor. App. 145, l. 9 – 146, l. 5.

Dunning was only able to provide a very general description of the perpetrator. She claimed he was a black male, approximately five feet eleven inches to six feet two inches tall and one hundred fifty to one hundred eighty pounds. App. 134, ll. 11-15. She said he was wearing a white shirt and dark colored pants. App. 146, ll. 6-11. He also may have been wearing “a cap on his head.” App. 146, ll. 10-11. Dunning claimed she did not look the man directly in the face due to the presence of the gun. App. 146, ll. 6-9.

Dunning’s son, who was upstairs during the encounter, heard yelling and eventually saw Dunning’s car “spin off.” App. 147, ll. 5-10. One of the construction workers called 911. Law enforcement arrived shortly thereafter. App. 147, ll. 5-18. Dunning’s car was returned to her about

two weeks later, but it had been wrecked, and her personal items were missing from the car. App. 147, l. 25 – 149, l. 4.

Around midnight on May 28, 2010, Investigator Rick Ollic of the Berkeley County Sheriff's Department, who was involved in the investigation of the armed robbery, saw a vehicle matching the description of Dunning's stolen Expedition at a red light in Moncks Corner. App. 184, l. 1 – 187, l. 16. He followed the car and called for backup. App. 187, ll. 17 – 189, l. 25. After backup arrived, Investigator Ollic initiated his blue lights and attempted to stop the car. While the driver initially pulled over, once Ollic approached the car, it sped off. App. 190, l. 9 – 193, l. 1. Numerous officers chased the vehicle until it eventually wrecked. The driver ran into the woods and was not apprehended that morning. App. 193, l. 2 – 196, l. 3; App. 198, ll. 11-13. However, a wallet with credit cards and a picture identification card was found in the car. App. 196, l. 6 – 197, l. 4. Based on the VIN number, the vehicle was determined to belong to Ms. Dunning. App. 198, ll. 7-10.

The name on the identification card and other cards found in the wallet was Benjamin Jackson (Petitioner). An address was also present. On June 1, 2010, law enforcement obtained a search warrant for Petitioner's residence. App. 241, ll. 19-24. When the warrant was executed the next day, various items belonging to Ms. Dunning were found in and around the home. App. 198, l. 14 – 200, l. 13; App. 244, l. 6 – 250, l. 3; App. 264, l. 4 – 266, 20. Petitioner was arrested following the search. App. 242, l. 19 – 243, l. 9.

Shortly after his arrest, Petitioner gave an oral statement to law enforcement admitting "he did it" and "he was sorry." App. 263, ll. 7-20. The following day, Petitioner gave a written statement apologizing to Dunning and stating he was just "after the vehicle." App. 275, l. 18 – 278, l. 2.

A Berkeley County Grand Jury indicted Petitioner on October 20, 2010 for second degree burglary, grand larceny, kidnapping, armed robbery, possession of a firearm during the commission of a violent crime, and failure to stop for a blue light. App. 520-531. His case was called to trial on March 8, 2012 before the Honorable J.C. Nicholson, Jr., and a jury. App. 1. Assistant Solicitors Brian Alfaro and Ariel Pittman represented the state, and Patricia Kennedy represented Petitioner. The jury ultimately found Petitioner guilty as indicted. App 397, l. 16 – 399, l. 1. He was sentenced to thirty years for armed robbery, thirty years for kidnapping, fifteen years for second degree burglary, five years possession of a firearm during the commission of a violent crime, three years for failure to stop for a blue light, and ten years suspended upon the service of five years probation for grand larceny. All sentences were ordered to be served concurrently. App. 406, l. 24 – 407, l. 24.

The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Jackson, 2015-UP-389 (S.C. Ct. App. filed July 29, 2015). App. 441-442.

On August 1, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 443-450. The state filed a return to this application dated July 6, 2017. App. 451-458. An evidentiary hearing was held on February 26, 2018 before the Honorable Thomas A. Russo. App. 459. Assistant Attorney General Rasheeda Cleveland represented the state, and Rodney Davis represented Petitioner. App. 459.

Petitioner testified at the evidentiary hearing that before trial, his counsel never discussed with him his right to testify or whether or not he should testify in his defense. App. 470, l. 25 – 471, l. 11. Moreover, counsel never offered or attempted to prepare him to testify by reviewing with him the types of questions he may be asked. App. 471, ll. 12-19. She also never talked to him at all before trial about his prior record and whether he could be impeached with his prior record if he

chose to testify. App. 471, ll. 20-23. It was not until the third day of trial when trial counsel for the first time brought up his right to testify. Counsel told Petitioner it “[w]ouldn’t be a good idea to testify” because of his “background record.” App. 471, l. 24 – 472, l. 13. Based on counsel’s advice, Petitioner told the trial judge he would not testify. App. 473, ll. 8-21.

If it had not been for counsel’s advice, Petitioner would have testified in his own defense at trial. He would have explained to the jury that he was only guilty of possession of a stolen vehicle and failure to stop for a blue light. He would have admitted he paid a “guy named Johnny” twenty-five hundred dollars to get a vehicle for him, that he ultimately knew it was stolen, and that he fled when law enforcement attempted to pull him over. However, he was completely unaware of the extent of the actions Johnny took to get the car. Petitioner vehemently denied going to the church and confronting Ms. Dunning. App. 475, l. 1 – 477, l. 23; App. 483, ll. 15-23.

Patricia Kennedy, Petitioner’s trial counsel, admitted she advised Petitioner not to testify. She asserted, “The issue for Mr. Jackson [Petitioner] . . . in terms of him testifying was the statement that he gave. . . [H]e didn’t have much of a criminal history. The thing that hurt him was a prior conviction for burglary. But I knew in terms of him testifying given the statement, the written statement he had given, the deputy solicitor would really have a field day with that.” App. 492, l. 19 – 493, l. 5. Kennedy acknowledged she was experienced with phrasing a prior conviction merely as a felony before the jury rather than impeaching a defendant, such as Petitioner, with the specific prior conviction to avoid any prejudice concerning the nature of the conviction. App. 493, l. 21 – 494, l. 8. She also admitted she failed to review with Petitioner his potential testimony before trial or run through mock questions and answers to help prepare Petitioner to testify. App. 494, ll. 9-15.

The PCR judge ultimately denied Petitioner relief. He found trial counsel gave “sound advice” concerning whether or not Petitioner should testify. App. 517. The judge emphasized that counsel’s advice was “not based so much on [Petitioner’s] prior record as it was on her concern for subjecting [her] client to cross-examination in regard to statements [Petitioner] made.” App. 517. The PCR judge further found, based on the on the record colloquy between Petitioner and the trial judge, that Petitioner knowingly, intelligently, and voluntarily waived his right to testify. App. 517-518.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and erroneously advised Petitioner not to testify because of his prior record, and where Petitioner was prejudiced because there is a reasonable probability the outcome of Petitioner’s trial would have been different if Petitioner had testified as to his innocence, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and erroneously advised Petitioner not to testify because of his prior record, where Petitioner relied on this erroneous advice when he chose not to testify, and where there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified as to his innocence.

Trial counsel wholly failed to prepare Petitioner to testify before trial. Her main concern with Petitioner testifying was subjecting him to cross examination in regard to the prior statements he gave to law enforcement. However, counsel never reviewed with Petitioner any of the potential questions the solicitor may have asked if he had chosen to testify. Such efforts would have prepared Petitioner to handle such questions on cross examination. Counsel also acknowledged Petitioner did not have much of a prior record and that he likely would have merely been impeached with a felony conviction as opposed to the specific nature of his prior conviction, namely burglary. These failures constitute deficient performance. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if he had testified as to his innocence regarding the charges related to the burglary and armed robbery at St. Stephen Evangelical Church.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334

S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

In Horton v. State, 306 S.C. 252, 253 411 S.E.2d 223, 224 (1991), the petitioner alleged ineffective assistance of counsel on grounds that his trial counsel gave erroneous advice on which Horton based his decision not to testify. Specifically, Horton argued his decision not to testify was based on trial counsel’s advice that he would be subject to cross examination on two prior convictions for assault and battery with intent to kill and possession of marijuana. Id. at 253-254, 411 S.E.2d at 224. This Court held trial counsel’s advice was erroneous since possession of marijuana did not constitute a crime of moral turpitude and Horton’s conviction for assault and battery with intent to kill was too remote having occurred more than fifteen years before trial. Id. at 254, 411 S.E.2d at 224. While noting Horton acknowledged the ultimate decision not to testify was his alone, the Court held Horton “met the second prong of the ineffective assistance test by a showing of prejudice by his reliance upon counsel’s erroneous

advice; and that, but for counsel's error, there is a reasonable probability the result would have been different." Id. at 255, 411 S.E.2d at 225. Consequently, the Court remanded for a new trial. Id.

Here, trial counsel erroneously advised Petitioner not to testify because he would be impeached with his prior convictions. However, Petitioner's only significant conviction was for burglary and counsel acknowledged Petitioner likely would have merely been impeached with a "felony" as opposed to the specific conviction itself. Moreover, counsel failed to prepare Petitioner to testify in any way before trial. She admitted she did not review with Petitioner the potential questions he may have been asked if he had chosen to testify. This constitutes deficient performance.

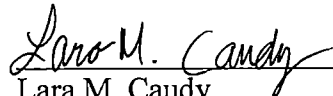
Petitioner was prejudiced by counsel's deficient performance because he relied on counsel's erroneous advice when he chose not to testify. Moreover, because of counsel's deficient performance, Petitioner was wholly unprepared to testify. The outcome of Petitioner's trial would have been different if he would have admitted to possessing the stolen vehicle and failing to stop for a blue light, but maintained his innocence as to the other charges. This admission would have gained Petitioner credibility before the jury. Accordingly, there is a reasonable probability the jury would have acquitted Petitioner of armed robbery, kidnapping, grand larceny, and second degree burglary if he had testified.

Because of counsel's deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2018.

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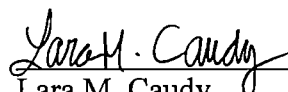
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin J. Jackson III states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on February 26, 2018 before the Honorable Thomas A. Russo. In her opinion, seeking certiorari from the order of dismissal is without merit.
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 Benjamin J. Jackson.

Respectfully Submitted,



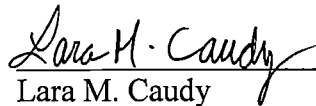
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 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."



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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 have been served upon Megan Harrigan Jameson, 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 upon Benjamin J. Jackson III, #338036, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 1st day of August, 2018.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of August, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.