ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

DARRYL L. DRAYTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000329

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance when he failed to move for a mistrial when Juror 59 saw one state's witness, the decedent's fiancé, Bartley, pay money to another state's witness, Edwards, after Edwards provided crucial testimony against Petitioner?

STATEMENT

Petitioner was indicted for murder during the December 2010 term of the Charleston County Grand Jury. App. 997 – 998. On October 1 – 5, 2012, Petitioner's trial was held in front of the Honorable J.C. Nicholson, Jr, and a jury. App. 1. Jennifer K. Shealy and Timothy Finch represented the state. Id. D. Ashley Pennington and Michael Cooper represented Petitioner. Id.

Petitioner was found guilty as indicted. App. 901, ll. 19 – 23. Judge Nicholson sentenced Petitioner to life in prison. App. 911, ll. 8 – 11.

Petitioner's conviction was affirmed by the Court of Appeals. App. 985; State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015). However, the South Carolina Supreme Court granted certiorari. Id. This Court vacated the Court of Appeals decision in regards to Appellant's expectation of privacy in his historic cell site information, but affirmed Petitioner's convictions. Id.; State v. Drayton, 415 S.C. 43, 780 S.E.2d 902 (2015).

Petitioner filed a timely application for post-conviction relief on May 3, 2016. App. 914 – 923. Petitioner's post-conviction relief application alleged trial counsel was ineffective for failure to move for a mistral when a juror saw misconduct between two of the state's witnesses Bartley and Edwards. Id. The state made its Return on May 15, 2017. App. 925 – 930.

Petitioner's post-conviction relief hearing was held on December 12, 2017, in front of the Honorable Michael G. Nettles. App. 932. Chris Murphy represented Petitioner. Id. Justin Hunter represented the state. Id.

On June 23, 2018, Judge Nettles issued an order of dismissal denying Petitioner's post-conviction relief claims. App. 984 – 996. This Petition for Writ of Certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance when he failed to move for a mistrial when Juror 59 saw one state's witness, the decedent's fiancé, Bartley, pay money to another state's witness, Edwards, after Edwards provided crucial testimony against Petitioner.

Relevant Facts

During Petitioner's trial, the jury foreman informed the court that Juror 59 saw the decedent's fiancé, Bartley, who was also a witness at trial, give money to another state's witness, Edwards, during a lunch break. App. 672, ll. 1 - 11.

Bartley testified earlier in the trial that he and the decedent, Alexis Lukaitis, knew each other for many years before they became engaged. App. 302, l. 16 – 305, l. 1. Bartley testified that the decedent would take prescription medication, without a prescription, from a man named "D," whom Bartley identified as Petitioner. App. 307, ll. 1 – 9. Bartley stated that on the night the decedent died she was with "D" driving to Charleston to buy prescription medication. App. 311, l. 16 – 312, l. 22.

Edwards testified that Petitioner came to his house the day after Petitioner allegedly drove to Charleston with the decedent. App. 371, ll. 8 – 24. Edwards testified that Petitioner asked for a ride to the hospital to get medical attention for a cut on his hand. Id. Edwards claimed Petitioner said he sustained the injury when he got in a fight, the night prior, "with three guys from Beaufort"[1]. App. 374, ll. 7 – 11.

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[1] Later in the trial, medical personnel and the pawn shop owner testified that Petitioner told them different causes for how he cut his hand. App. 415, l. 24 – 416, l. 14; App. 424, ll. 4 – 18; App. 432, ll. 12 – 16.

According to Edwards, after the trip to the hospital, Petitioner directed Edwards to drive to a nearby pawn shop because he had a class ring he wanted to sell[2]. App. 376, ll. 19 – 22. Edwards testified that they stayed in a hotel in Hardeeville for the next two days and that Petitioner asked Edwards to drive him to Florida, which Edwards refused. App. 378, ll. 2 – 16; App. 379, ll. 5 – 18; App. 379, l. 25 – 380, l. 2.

Edwards testified that he drove himself to the doctor after the second night at the hotel because he was not feeling well. App. 381, ll. 5 – 8. While at the hospital he claimed he saw a news report of the decedent's murder. App. 381, ll. 16 – 20.

When Edwards returned home, he claimed he found, "trash on the porch... somebody didn't put the trash in the trash can..." and when Edwards looked into the trash can, "there was a bunch of items in there which I couldn't hardly really see. So I took a few items out - -." App. 382, ll. 1 – 7. Edwards testified that the items he took out of the trash can, "was a bunch of bloody stuff." App. 382, ll. 23 – 24. Edwards then called 911 and, when a police officer arrived, he showed the officer the bloody trash he found on his porch. App. 384, l. 14 – 385, l. 2.

Petitioner's trial continued and, during a recess, Juror 59 saw Bartley give Edwards money outside of the courthouse, within view of two security cameras. App. 672, ll. 3 – 14; App. 679, ll. 10 – 25; App. 695, ll. 4 – 6. Juror 59 informed the jury's foreman of the incident. App. 680, ll. 7 – 10. The foreman brought the incident to the attention of the court. App. 685, ll. 1 – 23.

Only Juror 59 and the foreman knew of the misconduct by Bartley. App. 672, ll. 4 – 13. None of the other jurors were informed of the incident. App. 682, ll. 3 – 8; App. 683, ll. 14 – 17.

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[2] The pawn shop owner testified during Petitioner's trial to the characteristics of the ring that Petitioner allegedly sold at his store, and Mr. Bartley testified that the ring in question belonged to the decedent. App. 428, l. 6 – 430, l. 17; App. 305, ll. 2 – 15.

Judge Nicholson called Bartley to testify outside the presence of the jury. App. 675, l. 8 – 677, l. 23. Bartley claimed that he paid Edwards, after Edwards coincidentally provided crucial testimony against Petitioner, some money to eat lunch that day. App. 676, ll. 14 – 21. Bartley also testified that he and Edwards had never met before. App. 676, l. 24 – 677, l. 3.

The trial judge told the attorneys during an in-chambers conference that his initial thought was to declare a mistrial sua sponte. App. 672, ll. 16 – 17. Defense counsel stated that he and Petitioner decided against moving for a mistrial. App. 691, ll. 1 – 12. Even though Juror 59, was "straight and aboveboard with everything," he was dismissed. App. 693, ll. 23 – 24; App. 696, ll. 20 – 21; App. 699, ll. 2 – 22. The foreman was allowed to remain on the jury[3].

After the jury reentered the courtroom, Judge Nicholson explained that Juror 59 was removed from the jury through no fault of his own but withheld the details of why Juror 59 was dismissed. App. 707, ll. 11 – 19.

The trial court allowed defense counsel to recall Bartley to the stand for questioning in front of the jury about the payment he made to Edwards. App. 808, l. 14. Bartley claimed that he paid Edwards twenty dollars to eat lunch. App. 809, l. 6 – 810, l. 19.

During closing arguments, defense counsel reiterated the impropriety involved with the payment from Bartley to Edwards and questioned Edwards' integrity as a witness. App. 852, l. 22 – 854, l. 22. Petitioner's trial concluded, and he was found guilty as indicted. App. 901, ll. 19 – 23.

Pennington testified at the PCR hearing that his decision to not move for a mistrial was a valid trial strategy. App. 955, l. 17 – 957, l 4. Pennington did not want to move for a mistrial because it would have given the state time to test DNA found at the crime scene. App. 969, l. 21

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[3] The foreman told the court that knowledge of the incident would not affect his decision making and all parties agreed he should stay on the jury. App. 684 – 686; App. 701, ll. 2 – 6.

– 970, l. 12. He wanted to imply Edwards was more culpable than the state made him seem. App. 955, l. 17 – 957, l 4. Pennington also stated that he wanted the jury to be shocked and to infer that Edwards and Bartley were hiding something. Id.

At Petitioner's PCR hearing, Petitioner testified that he wanted defense counsel to move for a mistrial. App. 969, l. 16 – 970, l. 12. Petitioner testified that the DNA that had already been tested was inconclusive. Id.; App. 650, l. 23 – 651, l. 5. Petitioner argued that providing more time to test the DNA evidence would have benefited his case and that he, "did want the DNA tested." App. 970, ll. 13 – 15.

The PCR court found that defense counsel did not provide ineffective assistance when he failed to move for a mistrial after Juror 59 saw a state's witness payoff another state's witness because it was a valid trail strategy. App. 990. The PCR court held that Petitioner failed to prove he was prejudiced by defense counsel's failure to move for a mistrial. Id. That was an error and that error prejudiced Petitioner.

Discussion

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for

PCR 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." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 692).

In the present case, Petitioner argued that his counsel was ineffective for failure to move for a mistrial. To present a reasonable probability that the result of trial would have been different but for trial counsel's errors, Petitioner must show that the error undermined the confidence in the outcome of his trial. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998); *see also* Johnson v. State, 325 S.C. 182, 480 S.E.2d 773 (1997).

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. *See* Strickland, 466 U.S. at 687-88. Specifically, trial counsel failure to move for a mistrial when a juror witnessed one state's witness paying another right outside the courthouse constituted ineffective assistance. App. 695, ll. 4 – 6; s*ee* Simmons, supra; *see also* Freeman v. Class, 95 F.3d 639, 644 (8th Cir. 1996); Martin v. Grosshans, 424 F.3d 588, 592 (7th Cir. 2005).

In Petitioner's underlying trial, DNA evidence was found at the crime scene. App. 650, l. 23 – 651, l. 5. At the PCR hearing, Petitioner testified that trial counsel told him the reason he did not move for a mistrial was because it would, "give the state time to test the DNA that was not tested to the lab." App. 969, l. 21 – 970, l. 12. However, Petitioner wanted the DNA tested. App. 970, ll. 13 – 15. "I feel - - the DNA was crucial in my case… they collected this evidence hoping that this would incriminate me, but… when they tested the DNA, it was an unidentified male." App. 969, l. 21 – 970, l. 12.

Trial counsel testified at the PCR hearing as well. He stated his strategy going into trial was to try to, "throw a monkey wrench in the case," because the defense was, "up against it, in

terms of strong circumstantial evidence." App. 955, l. 17 – 957, l. 4. Specifically, on the issue of not moving for a mistrial, defense counsel opined, "[I]t was fortuitous from my point of view...I frankly hoped that the jury would be so shocked by the conduct [of Bartley and Edwards] that the jury would buy into my theory that there was a rush to judge... and that [Edwards] had things to hide, and that the [Bartley] was sort of complicit in this." Id.

In Simmons, supra, the South Carolina Supreme Court found that Simmons' trial counsel was ineffective for failing to move for a mistrial. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). Simmons was convicted of burglary and two counts of assault and battery of a high and aggravated nature (ABHAN). Simmons, at 335, 503 S.E.2d at 165. During the trial, defense counsel failed to object and move for a mistrial when the solicitor improperly injected parole eligibility in his arguments to the jury. Id. at 336, 503 S.E.2d at 166.

The PCR judge in Simmons found that the solicitor's statement was harmless because "there was enough evidence in the record to convict the [petitioner], thereby providing a reasonable probability that the jury verdict would not have been different absent the solicitor's statements." Id. at 337, 503 S.E.2d at 166. Moreover, the PCR court found that the trial judge adequately cured any prejudice created by the solicitor's statement regarding a life sentence not being a full natural life by explaining to the jury that the trial judge was responsible for sentencing. Id.

This Court in Simmons found that defense counsel's failure to object constituted ineffective assistance regardless of the "overwhelming" evidence against Simmons and the "cure" the trial judge attempted. Id.; Id. at 340, 503 S.E.2d at 167. "[T]he trial judge's instructions to the jury did not correct the solicitor's misstatements concerning the consequences of the burglary conviction. The trial judge informed the jury that the sentencing responsibility

was exclusively his... No explanation of the sentencing consequences for a verdict of guilty and for a verdict of guilty with a recommendation of mercy were provided to the jury." Id. at 339, 503 S.E.2d at 167. Therefore, because the "cure" did not clear the jury's misconception regarding the sentencing consequences of a "life sentence," trial counsel's failure to move for a mistrial constituted ineffective assistance.

The overwhelming evidence presented against Simmons did not prevent trial counsel's insufficient performance from prejudicing Petitioner because, "the issue is whether the solicitor's improper argument prevented the jury from fairly considering the guilty with a recommendation of mercy verdict, *the overwhelming evidence of [Simmons'] guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument.*" Id. at 340, 503 S.E.2d at 167. (emphasis added) Thus, this Court overturned the PCR court's denial of relief because the solicitor's comments were unfairly prejudicial, the judge's jury instruction did not cure the error, and defense counsel provided ineffective assistance when he failed to object and move for a mistrial. Id. at 341, 503 S.E.2d at 168.

Here, the removal of Juror 59 did not cure the error because, as in Simmons, the "cure" did not eliminate the reasonable probability that the result of the trial would have been different had trial counsel moved for a mistrial. The removal of Juror 59 did not cure the taint from the improper payment that Juror 59 witnessed because the foreman knew what transpired and remained on the jury. Thus, Bartley's misconduct was improperly allowed to become part of the trial.

Defense counsel claimed his failure to move for a mistrial was a valid trial strategy aimed at painting Bartley and Edwards in a deceitful light in front of the jury. App. 956, l. 20 – 957, l.

3. However, that was an error because the taint from the improper payment was not cured by the court's removal of one of the jurors who knew about it. Here as in Simmons, an improper incident occurred, through no fault of Petitioner's, that risked undermining the proper function of the trial and the "cure" for the impropriety did not adequately remedy the problem.

Judge Nicholson's initial thought was to grant a mistrial sua sponte. App. 672, ll. 16 – 17. Had defense counsel accepted Judge Nicholson's initial idea or moved for a mistrial himself, "there is a reasonable probability that, ... the result of the proceeding would have been different." Strickland, 466 U.S. at 692. Therefore, trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2018.

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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 in the above referenced case has 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 Petition for Writ of Certiorari and a copy of the Appendix have been served on Darryl L. Drayton, #238403, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of August, 2018.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028