ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Beaufort County

Honorable Diane Schafer Goodstein, Circuit Court Judge

ANDRE GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000002

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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

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ISSUES PRESENTED

Whether the PCR Court erred in denying Petitioner relief, where deficiency was found following trial counsel's failure to object to a question by law enforcement to Petitioner asking why a non-testifying codefendant indicated that Petitioner committed the crimes for which both men were charged?

Whether the PCR Court erred in denying Petitioner relief, where counsel failed to object to phone calls allegedly placed to a complaining witness, where the State alleged witness intimidation, where the calls were not linked to Petitioner, and where the PCR Court analyzed the issue under a hearsay lens rather than an ineffective assistance of counsel claim?

STATEMENT

Petitioner was indicted by a Beaufort County grand jury on or about December 15, 2011 for kidnapping, armed robbery, carjacking, and unlawful carrying of a pistol. App. 384 – 391. The State called his case to trial on April 23, 2012 before the Honorable J. Derham Cole and a jury. App. 1. Patrick Hall and Jeffrey Stephens appeared on behalf of the State, and Donald Colongeli represented Petitioner during the three-day trial. The jury found Petitioner not guilty on the armed robbery and unlawful carrying of a pistol charges and guilty of carjacking and kidnapping. App. 281 ll. 6 – 17.

Judge Cole sentenced Petitioner to thirty years on the kidnapping charge, suspended upon the service of twelve years and probation for five years. App. 285 ll. 10 – 21. On the carjacking charge, Petitioner was sentenced to twelve years, concurrent. App. 285 l. 22 – App. 286 l. 12.

Trial counsel made several post-trial motions the day after trial, all of which were denied. App. 288 – 302. Petitioner's direct appeal was dismissed following a brief filed pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Petitioner filed an application for post-conviction relief on or about February 17, 2014. App. 304 – 312. It contained multiple allegations of ineffective assistance of counsel, including claims that counsel failed to object when the State played a CD containing audio of an interview between Andre Massey and Petitioner and that counsel failed to object to the introduction of calls to a complaining witness wherein the State was alleging witness intimidation. App. 311. The State made its Return on or about September 8, 2014. App. 313 – 316.

An evidentiary hearing took place on June 5, 2017 before the Honorable Diane S. Goodstein. App. 318. Tristan Shaffer represented Petitioner, and Ruston Neely appeared on behalf of the State. Trial counsel testified at the hearing.

An Order of Dismissal was issued on or about November 21, 2017. App. 371 – 383. The PCR Court denied relief on five allegations raised by Petitioner, including counsel's failure to object to the State playing the CD containing an objectionable question suggesting that Petitioner's codefendant told law enforcement Petitioner had committed the crimes in question. Although the PCR Court found trial counsel was deficient in this regard, the Court found that Petitioner failed to prove prejudice. App. 377 – 380.

This appeal follows.

ARGUMENT

I. The PCR Court erred in denying Petitioner relief, where deficiency was found following trial counsel's failure to object to a question by law enforcement to Petitioner asking why a non-testifying codefendant indicated that Petitioner committed the crimes for which both men were charged.

A redacted version of the interview between law enforcement and Petitioner was played before the jury in Petitioner's trial. App. 198 ll. 8 – 12; Applicant's Exhibit 1 (CD of Andrew Green Interview). The interview is an unrefined conversation between Petitioner and Andre Massey, an employee of the Port Royal Police Department. Id.; App. 181 ll. 6 – 16. While the CD was being played, trial counsel interrupted and voiced an objection to the mention of Petitioner's background. App. 198 l. 19 – App. 202 l. 18. However, counsel failed to object to a question posed by Massey to Petitioner asking why codefendant Brandon Parker would have said Petitioner was with him and "the one who done these things, if he hadn't done it."

The facts giving rise to Petitioner's arrest allegedly took place on June 9, 2011. App. 111 l. 5 – App. 125 l. 14. Dennis Boskey rode with Parker to some apartments so Boskey could collect twenty dollars that someone owed him. Id. Boskey testified that a man got into the back of the car and rode with them. Id. Boskey claimed the man placed a gun against the back of his head and requested that he empty his pockets. Id. Boskey indicated that he was directed to get into the trunk of the car, which he did. Id.

Boskey pulled the release latch while in the trunk of his car and jumped out. App. 115 l. 22 – App. 118 l. 11. A 911 call was made, and law enforcement arrived. Id. Boskey looked at a series of photographs and identified a man listed as Andre Green. App. 118 l. 16 – App. 121 l.

13. However, Boskey was unable to identify Andrew Green at trial. App. 118 l. 25 – App. 119 l. 3; App. 148 ll. 16 – 17.

The day after Petitioner was sentenced, trial counsel made multiple post-trial motions and spoke at length regarding one of the objections he should have made at trial. App. 290 – 302. Regarding the interview with Petitioner and the mention of Parker suggesting that Petitioner was the one who robbed Boskey, Petitioner remarked:

> I, unfortunately, failed to address or object spontaneously with some discussion Sergeant Massey had with Andre Green dealing with statements purportedly made by Brandon Parker. I was not admonished by the Court, but I had been informed by the Court earlier that day, based on these redactions that [the prosecutor] went out of his way to make the night before, that I should take time at lunch to sit down and address that particular tape, and I fully admitted to the Court after I failed to do so.

App. 291 l. 21 – App. 292 l. 5. Counsel explicitly remarked on the subject of this appeal:

> It was right after that objection and motion for a mistrial that a snippet, which even [the prosecutor] would agree to was maybe 1.5 seconds of a comment made by Detective Sergeant Massey about this Brandon Parker comment where it, specifically, if we hear or later read the transcript, said or question Mr. Green saying why would Brandon Parker, who was charged with the exact same charges, say that you were the one with him and did these things to, what would his motive be to lie. *I failed to jump up and object to that.*

App. 293 ll. 7 – 17 (emphasis added). He further suggested that the trial court "would agree that was an error" and indicated that the objection he should have made would have been based on meritorious grounds and possibly sustained. App. 293 ll. 18 – 23.

Counsel later indicated that the tapes, which were redacted, were full of prejudicial comments. App. 294 ll. 10 – 22. He even went as far as to say "[b]ut for my failure to spontaneously object to the testimony of Mr. Massey regarding the co-defendant, I believed that what has transpired in the last 24 hours very well could have been different." Id. Later during the hearing, counsel again admitted to making a mistake. App. 301 ll. 3 – 11. He posited that in

order to save the State money and time, a new trial should be granted. App. 301 ll. 12 – 25. The trial court denied the motion for a new trial. App. 302 ll. 21 – 22.

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Counsel admitted that he had not listened to the tape before it was played before the jury. App. 342 ll. 1 – 4; App. 345 ll. 11 – 13. PCR counsel expounded upon the PCR court's remark that "at no point did I hear Mr. Green agree with what the officers were saying, at any point" by noting that "at no point was there a confession where he actually said he did it." App. 338 ll. 11 – 25.

PCR counsel made a cogent argument regarding deficiency which the PCR court appeared to entertain when it asked specifically about prejudice. App. 347 l. 1 – App. 352 l. 3. Notably, PCR counsel pointed out that the complainant did not identify Petitioner at trial. Additionally, the jury returned a not guilty verdict on two out of the four charges. Rather than judging simply the credibility of Boskey, the State was able to bolster his testimony with Parker, a man who Boskey placed in the car at the time of the robbery.

The PCR court exhibited concern that trial counsel was unable to cross-examine the codefendant, only the law enforcement officer. App. 356 l. 22 – App. 358 l. 14. Prejudice manifested itself in Petitioner's case when this remark reinforced the credibility of Boskey. This was a comment by a law enforcement official representing that Petitioner's codefendant advised the police that Petitioner was the one who robbed Boskey. Without such a remark, the jury would only have had Boskey's testimony, sans bolstering. Based upon the two not guilty verdicts and the lack of identification at trial, there exists a reasonable probability that but for the deficiency in the form of counsel's failure to object, the jury may have found him innocent of additional charges as well.

II. The PCR Court erred in denying Petitioner relief, where counsel failed to object to phone calls allegedly placed to a complaining witness, where the State alleged witness intimidation, where the calls were not linked to Petitioner, and where the PCR Court analyzed the issue under a hearsay lens rather than an ineffective assistance of counsel claim.

At trial, the State played a recorded interview between Boskey and Massey, part of which contained a discussion regarding threatening phone calls Boskey received. App. 134 l. 9 – 140 l. 16. Boskey testified that he was worried about the protection and safety of his family. App. 140 ll. 3 – 10. Counsel testified at the evidentiary hearing that he recalled allegations of telephone calls from Atlanta from unknown individuals. App. 328 ll. 7 – 21.

As pointed out by PCR counsel, the State suggested during closing argument that Boskey was intimidated into not identifying Petitioner. App. 226 l. 22 – App. 227 l. 1; App. 330 ll. 15 – 21. Trial counsel noted that Petitioner did not make the telephone calls, and it was "pure

speculation" that someone that may have known Petitioner would have made the calls to Boskey. App. 331 ll. 3 – 17.

To prove ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). Counsel in a criminal case must confine themselves to the record in addressing the jury. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats. State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct.App.1985). It would be a "prostitution of justice" to permit evidence that someone attempted to influence a witness by fear or fright without any evidence that connects the defendant with the tampering. State v. Rogers, 96 S.C. 350, 352, 80 S.E. 620, 621 (1914). Witness intimidation evidence may be admitted to show a consciousness of guilt if linked to a defendant. State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009). "Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility." Id.

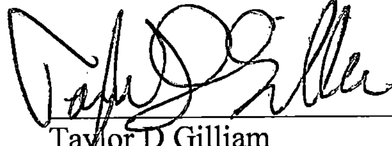
The findings of fact and conclusions of law in the Order of Dismissal rephrased Petitioner's ineffectiveness allegation and analyzed it solely under a hearsay standard. App. 376 – 377. The allegation raised in the PCR application and as discussed at the evidentiary hearing was not simply whether the testimony was hearsay, but whether the telephone calls could be linked to Petitioner. The PCR Court should not have analyzed whether the threats were offered to prove the truth of the matter asserted; this appeal revolves around whether trial counsel was deficient in failing to object because the phone calls were not linked to Petitioner.

Boskey testified about the telephone calls, and the State played the audio of his interview with Massey. App. 124 l. 6 – App. 125 l. 17; App. 134 l. 9 – App. 140 l. 10. Later during closing arguments the assistant solicitor rehashed some of those remarks. App. 228 ll. 4 – 19. However, because these telephone calls were not linked to Petitioner, counsel should have objected to prevent their introduction. See Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). Massey admitted that these telephone calls "could have been from anybody." App. 208 ll. 10 – 18. In fact, the State never obtained Boskey's telephone records in an attempt to determine who placed the calls. App. 153 l. 24 – App. 159 l. 15; App. 206 l. 11 – App. 208 l. 17.

There was no evidence that Petitioner intimidated the witness in the telephone calls. Accordingly, counsel was ineffective in failing to object to the introduction of the tape and Petitioner was prejudiced thereby.

CONCLUSION

Based upon the foregoing, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on these issues.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of October, 2018.

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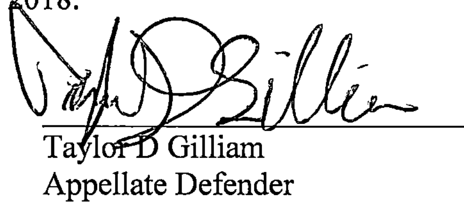
CERTIFICATE OF SERVICE

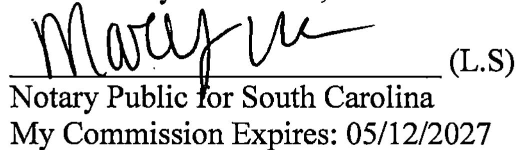
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Andre Green, #283773, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 10th day of October, 2018.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 10th day of October, 2018.


(L.S)

Notary Public for South Carolina
My Commission Expires: 05/12/2027