State of South Carolina
In the Supreme Court
On Writ of Certiorari to Horry County
Honorable William H. Seals Circuit Judge

Kieron K. Coleman

Petitioner

RECEIVED
OCT 15 2018
S.C. SUPREME COURT

State of South Carolina

Respondent

Appellate Case No: 2018-000598

Kieron K. Coleman Pro Se
Petition for Writ of Certiorari

[redacted]

Whether petitioner's conviction should be reversed because trial counsel's failure to request a mere presence instruction pursuant to [redacted] 324 S.C. 117, 477 S.E.2d 711 (1996) constitutes ineffective assistance of counsel under the Sixth Amendment.

[redacted]

On October 20, 2015 petitioner filed a PCR application App 453. On September 18, 2017, the Honorable William H. Seals held a hearing. App 514 Daniel A Selva II represented petitioner App 514 Johnny Ellis James jr represented the State App 514 on December 6, 2017 judge Seals denied petitioners allegation App 568, this Petition follows.

[redacted]

The standard of review in PCR cases depends on the specific issue before the court. A PCR court findings of fact will be upheld if there is evidence in the record to support them. [redacted] 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (Citing [redacted] 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) Questions of law are reviewed de novo, with no deference to trial courts.

[redacted]

Petitioner's conviction should be reversed because trial counsel's failure to request a mere presence instruction pursuant to [redacted] 324 S.C. 117, 477 SE2d 711 (1996). Constitutes ineffective assistance of counsel under the Sixth Amendment.

Trial Counsel failed to request a jury instruction for mere presence. The evidence and testimony at trial supported a charge of mere presence. The jurors could have acquitted Coleman based on a mere presence instruction from the judge and based on Coleman's testimony.

"The law to be charged is determined by the evidence presented at trial. Mere presence instructions are required when evidence supports the conclusion that the defendant was merely present at the scene where drugs were found and it was whether the defendant had a right to exercise dominion and control over them. [redacted], 324 S.C. 117, 477 SE.2d 711 (1996), Citing [redacted] 298 S.C. 362, 380 SE2d 834 (1989)

Coleman's testimony at trial was that he remained in the car upon arrival at the Marotte house which is the subject of the charged burglary. Coleman believed that he, Dudley, and Cowan were at the Marotte residence to collect on a debt from an associate of Cowan's. Coleman was unaware that Dudley had committed a burglary until they were apprehended and arrested by police. The jury was free to believe Coleman's testimony which supported a jury instruction of mere presence. The PCR court erred in finding neither deficient performance nor prejudice. App 573 The Court first erred for not holding counsel to the rule of law when there was plain and clear evidence that the petitioner met both prongs of mere presence and counsel's claim dose not meet [redacted] 466 U.S. 668 (1984) as justifiable for failing to request a mere presence charge. In the PCR Court ruling stated that "At the evidentiary hearing, Counsel expressed ambivalence about seeking an expanded instruction on mere presence" But the fact is there was no mere presence instruction made by the court until his charge or in his charge conference this decision could have only been made during the Courts charge of the Hand of one is the Hand of all instruction where the court Made a partial instruction on mere presence"... Mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting

App 573, In fact Counsel's exact words were I dont know how much further judge Hyman would expound on the mere presence charge that he gave, had we formally requested it App 522 12-14 Counsel failed to request a full mere presence charge even after hearing the incomplete instruction given by the court warrants ineffective assistance counsel [redacted] 264 S.C. 515, 521, 216, SE2d 182, 185 (1975) further South Carolina law dictates that jury instruction when analyzed must be considered in their entirety see [redacted] 355 S.C. 396 SE2d (2003) see [redacted] 393 S.C. 526, 549, 713, SE2d 591, 604 (2011) A jury charge is correct if when read as a whole charge. The charge adequately covers the law. ID A jury charge that is substantially correct and covers the charge dose not require reversal. Then Counsel said "mr Coleman's testimony, I didnt feel it was a mere presence case. App 522 14-15 But this is not true but in fact argues both prongs at trial. "merely being at the scene of the crime" This is a defense that my codefendant Lawyer Mr Mureddu was going to introduce in his opening Statement that his defendant was the victom of circumstances he was unaware of App 91 L-25/ 92 1-25. Then Mr Long decided to use it in his closing argument,

Mr long at Closing "I hate to borrow other people's words, but i think it some what prophetic when Mr mureddu come to you and stood here and made his opening statement" And what was his point that he wanted buried in your mind for you to think about throughout this trial. Some times you get involved with some people that will get you in trouble, "that you didnt otherwise intend or plan, that you otherwise wouldnt have done. App 407 10-17 The second part of the PCR court judgement was that "The court finds that the record clearly indicates that the court did so instruct the jury." Applicant consequently cannot show any prejudice and, accordingly, his request for relief as to this allegation is Denied. App 573 The standards of ineffective assistance counsel focus is whether or not counsel's performance was deficient the courts instruction dose not elevate counsel from his failure especially when the courts instruction was in error "mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting. App 573 Mere presence is generally applicable in "two circumstances" The standard on which must be met IS whether a person is guilty of a crime by virtue of accomplice liability, Or that the defendants mere presence near the contraband dose not establish guilt.

[redacted] 393 S.C. 526, 549, 713, SE2d 591, 604 (2011) A jury charge is correct if when read as a whole charge, the charge adequately covers the law. ID A jury charge that is substantially correct and covers the charge dose not require reversal. This would be true if the jury heard the second part of the mere presence charge along with "mediate possession: Possession of a thing through someone else, such as an agent. In every instance of mediate possession there is a direct possessor (the principal) This is what i argued also in my testimony that i was handed the contraband through the car window from someone else. The prejudice comes from witness testimony either testifying that i was the one with the contraband "jewelry" or the one near it throughout trial "App 156-23-25 App 157-01 App 183-18-24 App 230-8-16 App 300-14-20 App 319-26-23 App 416-14-18 App 418-7-8 The PCR court erred in holding petitioner could not prove deficient performance and prejudice under Strickland and this should reverse the partial instruction by the court should not been considered a cure to the prejudice obtained by the failure of hearing the second part of mere presence which would have allowed the jury to know not to infer guilt from being near contraband was fatal to the defense from the juries ignorance of the law.

Without the mere presence request where there was factual grounds to argue and the partial instruction by the Court that my right to fair trial was violated and that there is not only grounds to revers but also vacate my sentence.

Thank you from
the Coleman Family

My humble respects goes to the victoms of this case

[redacted]

[redacted] In The Supreme Court

[redacted] Certiorari to Horry County

[redacted] Honorable William H. Seals Circuit Judge

[redacted] Keiron L. Coleman

[redacted] Petitioner

[redacted]

[redacted] State of South Carolina

[redacted] Respondent

[redacted] Appellate Case No: 2018-000083

[redacted] Keiron L. Coleman - Pro Se

[redacted] Petition for writ of certiorari

Issue Presented

Whether Petitioners Conviction should be reversed because trial Counsel failed to request a charge on Res gestae instruction and Stat v Lyle 125 S.C. 406 415-16, 118 SE 803, 807 (1923) balancing test as required in State v Brian L Spears Appellate case No# 2010-162287) Constitutes ineffective assistance of Counsel under the sixth Amendment.

Statement

On October 20, 2015 Petitioner filed a PCR application App 453, on September 18, 2017, the Honorable William H. Seals held a hearing, App 514 Daniel A Selwa II represented petitioner App514 Johnny Ellis James jr represented the State App 514 on December 6, 2017 Judge Seals denied petitioner's allegation App 568, this Petition follow's.

Standard of Review

The Standard of review in PCR cases depends on the specific issue before the Court. A PCR Court findings of fact will be upheld if there is evidence in the record to support them Sellner v State 416 S.C. 606, 610, 787 SE2d 525, 527 (2016) (Citing Jordan v State 406 S.C. 443, 448, 752 SE2d 538, 540 (2013) Questions of law are reviewed de novo, with no deference to trial courts.

[redacted]

Counsel was ineffective in inquring what actions were the state speaking about that they would be addressing in the res gestae is deficient performance and unreasonable Strickland v washington 446 US 668 (1984) once the state said they would not be addressing the pending Charges App. 16-3 Counsel never inquired about the res gestae evidence and its contents is ineffective assistance Counsel. And his failure to request the 911 recording Confirming Ms Ross allegation that she made the allegation before she wrote her statement after the officer returned helping her with her report is ineffective assistance counsel and the fact the 911 recording was not there but testified to as a fact without objection and request for evidence is ineffective assistance counsel under Jencks v US 353 US 657, 1 ED 2d 1103 S.C.t 1007 (1957) we hold that the Criminal action must be dismissed when the government, On the ground of privilege elect's not to Comply with an order to produce. for the accused inspection and for admission in evidence "relevant statement's" or reports in its possession of government witnesses "touching the subject matter of their testimony at the trial. "The government must either produce their witnesses written reports and oral statement's for inspection by the defense or dismiss the Charges. Recordings are in the motion of discovery in Brady and are required as well.

Argument

Petitioner's conviction should be reversed because trial counsel's failure to request a balancing test, on the Res gestae testimony being introduced by the state. Citing Fletcher, 379 S.C. at 23, 664 SE2d at 483 If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing Id Even if the prior bad act is clear and convincing and falls within exception it must be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice to the defendant Id (Citing rule 403, SCRE) Constitutes ineffective assistance Counsel under the Sixth Amendment and right to fair trial under the Fourteenth Amendment

Trial Counsel failed to request a balancing test of MS Nancy sue Ross Res gestae testimony prior to hearing the state's plan to introduce it at trial "Well, Lyle goes to prior bad acts and the state may not attempt that. But if the state does, the state would have to comply with the Lyle exceptions. You understand that common plan, scheme, design, things of that nature App 15-15-19 "your Honor, we do not plan to bring in any of the other charged burglaries. There are certain actions on the day that this occurred before immediately before and immediately after the burglary. "In fact", Those probably res gestae really the only thing we would go into. App 15-20-25

When ever res geotae or prior bad acts testimony is going to be introduced the court in State v Spears Appellate case NO 2010-162287 found such error was not harmless and case was remanded.

Evidence of other crimes or bad acts is not admissible to show criminal propensity to committ the crime charged or to demonstrate the bad character of the accused, Rule 404(b) The Fletcher Court held that it was improper to admit the neighbor's testimony regarding these prior bad act's where theres was no evidence, let alone clear and convincing evidence, as to which Caretaker perpetrated the prior bad act's. Petitioner was accused of being a prowler at the Ross house then during testimony retracked the prowling allegation "Okay so you may not have used the word prowl" App 113-25 or sneak, but you were concerned enough to call the police. App 114-1-2 "yes App App 114-7 "Since there's no audio and there's a quiet moment here, is it normal procedure in a stop like that, to call for backup? App 118-18-20 "when there's a prowler complaint in a call like that, yes. And on traffic stops, we generally try to have more than one person there. App 168-21-23

[redacted]

And this wasnt really traffic. This was a stop for suspicion is that correct App 168-24-25 "Correct. Correct. App 169-1 "It was never established that a crime took place at ms Ross home when ms Ross was asked about our conduct "I dont want to put words in your mouth, I promise you. But how was their body posture when they were walking to the front door? were they walking as anybody else would in a mall, or were they crouching and creeping what were they doing? App 106-14-18 "They were walking as you would normally expect. App 106-19 "So it didnt appear from their outward appearance that they were trying to hide anything is that correct? App 106-20-22 "I suppose you could say that, right. App 106-23 At trial MS Ross testified that i tried to open her back sliding door this was suppose to be recorded on her all call" And then i heard the door try to be opened. And I was very "frightened" at that point so on "911" I said, you need to get here now, theyre trying to get in my house. App 96-3-6 The issue with this is the State failed to give us a copy of the 911 call to see if this is what she said when she made the call or if this was added to her testimony after the officer came back to do the second part of her interview. "All right. And were you in the process of writing your written statement with him at the time when he went to chase, or was this given by you at a later date? App 104-13-16

"I was in the process of writing it. App 104-17 "And do you remember where it was when how far you had gotten with it when you said, wait, that's the car? App 104-18-20 " I cant remember that. App 104-21 Without the recording confirming that I tried to open her back sliding door which counsel failed to argue Brady by it's rule that the state had violated Brady by not giving us a copy of the 911 call to be analyzed for its truthfulness it would have confirmed if she did say I tried to open her door or if this was added to her voluntary statement and testimony to further strengthen their case considering after all the time the lead investigator had after the fact to go back and have her finish her report that gives the police the advantage to add or remove from her testimony has to be considered prejudicial and without the 911 recording to confront her allegation violates the Confrontation Clause of the Fifth Amendment right to confront my accuser's in the Court of law. They needed a reason to support there probable cause and other then her testimony of me trying to open her sliding door which theres no testimony by officer Rick Tibbott or any one mention to check the slider door for finger prints MS Ross never testified to seeing me wearing gloves we never made it off the property to disgard of any gloves or were gloves ever found on me or the car or the property itself but they never checked to further confirm her story.

To further add to the conflict of her testimony MS Ross testifies to getting help in her voluntary statement "Okay is there anything in that statement that you didnt tell this jury today? App 100-17-18 "I dont know if "we" mentioned the woman driving. App 100-19 we mentioned it argued would have questioned here in her testimony if she'd been coached and the legitimacy of her voluntary statement should have been in question also. Over all the prejudice of her Res gestae testimony was based on the propensity to commit the crime and how afraid she was throughout her testimony was skillfully put together to say without saying we came there to break in her house at first then state got bolder as the trial went on when the state during cross examination of me pitting me against the witness. "SO if she says she saw you jiggling the knob, shes lying. App 387-24-25 This was fatal to the defense the testimony of MS Ross and Mr DeBusk for a fact is propensity to commit the crime when you hear Mr DeBusk's closing argumint not only dose it suggest that App 409-1-25 App 410-1-7 App 412-12-17 " He says he never tried to get into MS Ross door MS Ross says, I saw the man" tall Man with the gray sweatshirt, trying to open my door and I said over the phone, hurry up, he's trying to get in. So he's got a history of lying and a reason to lie. There is no where in my Ross testimony She said she saw me counsel should have objected.

And second he pitted me against the witness a second time the first time the State disregarded his statement with no curative by the Court other then all right App 388-6 Only to pitt me against the witness a second time with no objection or Cure from the judge App 412-12-17 "who was it that went to the door and tried to open it at ms Ross house? Mr. Coleman ms Ross "saw him". App 414-8-10 The testimony of ms Ross would have failed State v Lyle Based on it's propensity to prove guilt mr DeBusk testimony suggest that our sole purpose was to committ a burglary at the ms Ross home went past Res-gestae. Once Counsel was alerted that res gestae testimony was going to be introduced "In fact, they're probably res geste really the only thing we would go into. App 15-24-25 This was indication enough to request a balancing test i believe Counsel failed to because the trial judge was the subject in State v Spears judge Carry B Hyman where in the case of State v spears It was decided in the Court of appeals Justice Pieper held that (1) Trial Court failed to Conduct requisite on the record balancing test with respect to prior bad act testimony (2) Such failure was not harmless (3) Remand to permit trial Court to conduct on the record balancing test was appropriate. Case remanded

In State v Martucci 380 S.C. 232: Even if prior bad act evidence is relevant under theory of res gestae prior to admission the trial judge should determine whether its probative value clearly out weighs any unfair prejudice. Even after notice that res gestae Evidence would be introduced neither the court or defense ask to hear the testimony before it was admitted i believe this was a conflict of interest on counsel the State needed that testimony to come in and Counsel did nothing to object to the res gestae Evidence neither was he asked about it by the State in PCR as far as Allegation #4- failure to object to testimony of Nancy Sue Ross. Applicant testified at the evidentiary hearing that counsel was ineffective by failing to object to the testimony of witness nancy sue ross on grounds that her report to law enforcement was racially motivated there is no evidence in the record before this Court to show any racial prejudice on the part of the witness it be relevant to her Competence to testify. Rule 601, SCRE) Every person is Competent to be a witness except as otherwise provided by statute or these rules) Accordingly, the Court finds no deficiency of counsel or prejudice therefrom and Applicants request for relief by way of this Allegation is Denied. This was not my allegation first my allegation was " To object to testimony in violation of rule 403. App27-5-25 / App28-1-25 App29-1-21

During the hearing the state never questioned Mr Long in regards to allegation #4 or did he deny my allegations in number four Counsel never put up any argument to the allegations when the state never examined him on the issue of pcr are or any of allegation #4 to render a verdict it is Counsel duty to answer the Claim accusing him in violation of Strickland v Washington in allegation #4 with no refuting from Counsel. The PR court failed to conduct proper findings of facts and Conclusion of Law to allegation #4 were there is no record of response to the allegation at the pcr hearing refuting the allegation by Counsel or dose the pcr court render its facts and conclusions on the proper allegation. I ask for the Some reason as will my other allegations that my sentence be reversed or Vacated.

Thank you from the
Coleman family

P.S. Respect to the victoms of this case.

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