

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Thomas A. Russo, Circuit Court Judge

ORIGINAL

BRANDON GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000557

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief 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

RECEIVED
NOV 14 2018
S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT.....2

 Reply Testimony4

 Closing Argument.....5

 Direct Appeal5

 PCR.....6

 Order of Dismissal8

ARGUMENT

 Defense counsel was ineffective for failing to call petitioner’s grandfather, Samuel Greene, to testify that he took the fishing gear out of petitioner’s car before the police impounded it, since the state stressed there was no evidence to support petitioner’s trial testimony that he intended to go fishing on the day of the fatal incident, and was not “looking for trouble,” particularly where the solicitor naturally stressed there was no evidence to corroborate petitioner’s testimony that he intended to go fishing that day9

CONCLUSION.....12

PETITION TO BE RELIEVED AS COUNSEL13

ISSUE PRESENTED

Was defense counsel ineffective for failing to call petitioner's grandfather, Samuel Greene, to testify that he took the fishing gear out of petitioner's car before the police impounded it, since the state stressed there was no evidence to support petitioner's trial testimony that he intended to go fishing on the day of the fatal incident, and was not "looking for trouble," particularly where the solicitor stressed there was no evidence to corroborate petitioner's testimony that he intended to go fishing that day?

STATEMENT

Petitioner was indicted at the December 15, 2009, term of the Hampton County Grand Jury for the offense of murder in the death of Dominick Badger. App. 544 – 545. On July 8, 2010, petitioner was also indicted by the Hampton County Grand Jury for ABIK for the injury to Anthony Antonio Badger. App. 542 – 543.

Petitioner's case was called to trial on September 4, 2012, before the Honorable R. Markley Dennis. Byron Gipson represented petitioner. Solicitor Randolph Murdaugh, III, and Tamika Legette prosecuted the case. App. 1.

Anthony Antonio Badger testified on October 2, 2009 he was at the decedent, Dominick Badger's house. App. 86, l. 11 – 87, l. 5. That afternoon, Badger, (the decedent), petitioner, and Dexter Bozeman "was in the yard." App. 87, l. 25 – 88, l. 3.

Anthony Badger claimed that at about 5:30 or 6 o'clock that afternoon, petitioner and Keith King got in an argument "and Brandon Greene told him that he would shoot him." Badger said he told petitioner "we're all family, please don't do that." "Keith King told Brandon Greene that he would hit him in the head with a block." App. 89, ll. 3-15.

Anthony also maintained that petitioner kept a gun inside his car. "He was toting the gun down in there." "He had his hand on it, but he never did pull it out." App. 89, ll. 16 – 22.

Later in the day, Anthony said petitioner told him: "Man, y'all don't need to go to no party. Y'all drunk already. So I told Brandon Greene then, I said: Man, look, I'm grown. I go where I want to go at. I started walking off. By the time -- by the time I started walking off, he called me a bitch. So when he called me a bitch, I turned around and I throw my hand up. And at the same time I throw my hand up, he started firing." Anthony said, "I just yelled out. . . .

and he shot me in my stomach, and I went and got me some help.” The decedent was present at the time. App. 93, l. 1 – 94, l. 16.

The jury would later find petitioner not guilty of A.B.I.K. for the shooting which involved Anthony Badger, above.

Petitioner conversely testified that on October 2, 2009, after work at 5 pm, he stopped and bought two half pints of brandy. He went to the home that he shared with his grandparents -- Samuel Greene included -- and loaded his fishing gear and a gun. The gun was loaded in case he encountered alligators or wild hogs while he was fishing. App. 296, l. 9 – 297, l. 7.

On his way to his fishing spot, petitioner stopped at Decedent Dominick Badger’s house. Petitioner had previously talked with Dominick about getting a chain for his son’s four-wheeler. Dominick told petitioner he did not have a chain for the four-wheeler. App. 297, l. 19 – 298, l. 9.

Petitioner eventually did not go fishing as planned, but instead stayed in the yard at Dominick’s house talking with the Decedent Dominick and Anthony Badger, Keith King and Dexter Bozeman. Petitioner shared his brandy with the other men. Anthony Badger became more aggressive as the day wore on, and petitioner testified that he pulled the gun from his waist and shot in Anthony’s direction. During this encounter, Dominick, the decedent, attacked petitioner and petitioner shot him. App. 301, l. 6 – 318, l. 24.

Petitioner testified the police were waiting for him that night when he got home, and he was taken into custody. His fishing gear was still in his car. Petitioner later learned that petitioner’s grandfather, Samuel Greene, took the fishing gear out of his car before the police impounded the vehicle. App. 320, l. 8 – 341, l. 14.

The solicitor, on cross-examination, concentrated on petitioner’s defense that he was going fishing that day and did not want any trouble. “And apparently at some point he decided

not to go fishing but to sit there and drink liquor.” Petitioner replied, “I stayed a little longer than my stay was planned.” App. 324, l. 17 – 325, l. 15. Petitioner admitted to the solicitor that when it became nighttime, “No, I didn’t go fishing then.” App. 325, ll. 16-18.

At the close of the cross-examination, the solicitor asked petitioner if he was sure he had fishing tackle in his car when he returned to his grandparents’ house where he was arrested. Petitioner said he was positive the fishing gear was in the car. App. 341, ll. 1-13.

On redirect testimony, petitioner testified, “I later found out that when my car was still in the yard that night, my grandfather took my things out of the car, because the officers said they were going to take the vehicle to impound it.” App. 341, l. 19 – 344, l. 20.

Petitioner’s grandfather, Samuel Greene, had not been called as a witness at that point during the trial to testify that petitioner indeed had fishing gear in his car when he returned home that evening, and that Samuel removed the fishing gear before the police impounded the car.

As will be seen, at PCR, Samuel Greene was asked, “Is there an explanation why when the police got there there was no fishing gear in the car?” App. 496, ll. 10-12. Samuel explained that the car was rented to him and he let petitioner drive it. The police were going to confiscate the car so Samuel took the stuff out of the vehicle, including the fishing gear. Mr. Greene told petitioner’s trial attorney about taking the fishing gear out of the car which would have corroborated that petitioner was truthfully testifying at trial. App. 495, l. 14 – 497, l. 11.

Reply Testimony

At trial, the state called two witnesses in reply. Both witnesses, police officers, testified that when the police took custody of the car no one took anything out of the car. There was no fishing gear in the car. App. 344, l. 22 – 347, l. 10; App. 351, l. 19 – 352, l. 6.

After the reply witnesses from the state, defense counsel Gipson said he wanted to call witnesses, which would have included Samuel Greene, to contradict what the officers just testified about regarding the fishing gear. The judge told defense counsel he could have called anyone he wanted and that he was not allowing surrebuttal testimony. App. 353, ll. 5-17. Thus, the jury never heard Samuel Greene's explanation for why fishing gear was not in the car when the police impounded it, where appellant's defense depended on the credibility of his testimony that he planned to go fishing that day, he was not looking for any trouble, and that the Badgers were the cause of the shooting after the men drank that day.

Closing Argument

In his closing argument to the jury, solicitor Murdaugh focused on the lack of fishing tackle in the car -- not so subtly asserting petitioner was lying about what he intended to do that day. "Well, bless God, he's going fishing, and Mr. Foreman and ladies and gentlemen of the jury, he's going fishing with no fishing tackle in the car. You heard Chauncey Solomon, where ever he is . . . They [the police] impounded it. They took it to the impound yard at the sheriff's department, and then they did an inventory search, and no fishing tackle was in it." App. 384, l. 25 – 385, l. 16.

The solicitor stressed that while petitioner claimed his grandfather got the fishing gear out of the car, that no evidence showed that there was any fishing gear in the car. App. 385, ll. 12-16. Judge Dennis sentenced petitioner to forty years imprisonment. App. 430, ll. 13-18.

Direct Appeal

On appeal, this Court can take judicial notice of the fact appellate counsel Kathrine Hudgins raised the following issue before the Court of Appeals in an Anders brief:

Did the trial judge err in refusing to allow Appellant to introduce surrebuttal testimony to rebut the State's reply witnesses who testified that at the time of Appellant's arrest the Hampton County Sheriff's Department impounded the car Appellant was driving and nobody removed fishing tackle from the car, as testified to by Appellant?

The Court of Appeals dismissed petitioner's appeal pursuant to Anders v. California, 386 U.S. 738 (2014), thereby finding no merit to the abuse of discretion in refusing surrebuttal testimony argument.

PCR

Petitioner filed an application for post-conviction relief on March 4, 2015. App. 432 – 446. Petitioner, several times, in that application, wrote that his attorney was ineffective for failing to call a witness, his grandfather, to corroborate his testimony about the fishing gear, and rebut arguments that he was not telling the truth. App. 435; App. 439.

The state filed a return to this application dated October 28, 2015. App. 447 – 452.

An evidentiary hearing was convened on October 9, 2017, before the Honorable Thomas A. Russo. James Falk represented petitioner and Ruston Neely was the assistant attorney general. App. 453 – 454.

Petitioner testified that his grandfather was prepared to testify that he took the fishing tackle out of the car petitioner was using that day. As seen, when his grandfather, Samuel Greene, was not called as a witness in his defense, the judge refused to allow the grandfather to testify after the state's reply witnesses, who focused on the lack of fishing gear in the car. The judge would not allow surrebuttal testimony. App. 476, l. 23 – 478, l. 11.

Petitioner confirmed that defense counsel "spoke with my grandfather about it." App. 478, ll. 4-6. Petitioner's grandfather, Samuel Greene, confirmed in his testimony at the PCR

hearing that he had spoken to trial counsel about his available testimony that he took the fishing tackle out of petitioner's car before the police impounded it. App. 496, l. 1 – 497, l. 4.

Defense counsel Gipson confirmed that petitioner told him on the day of the fatal shooting that he intended to go fishing. However, after the men started enjoying each other's company, petitioner decided not to go fishing. App. 501, l. 4 – 502, l. 1.

Defense counsel Gipson said he did not call Samuel Greene as a witness because petitioner could testify about the fishing tackle being removed from the car, "and he did." App. 502, ll. 7-13. Gipson said he thought the solicitor would try to "bait Mr. Greene, Mr. Samuel Greene, his grandfather, into getting into a position where there could be some character things brought in." Gipson claimed he thought the grandfather somehow might open the door to prior bad acts involving petitioner then coming into evidence. App. 502, l. 2 – 504, l. 1. Gipson concluded, "Now, would I have loved surrebuttal to bring in Mr. Greene to speak on that specific matter, sure I would have loved to do that, but Judge Dennis said it was -- he was not going to allow it, so that was the ruling of the court." App. 504, ll. 2-6.

Gipson also said after the state's reply witnesses about the no fishing tackle being in the car testimony that he considered Samuel Greene's testimony more important than ever, and that was why he asked for surrebuttal testimony. App. 510, l. 16 – 511, l. 8.

In arguing that petitioner should be granted a new trial based on ineffective assistance of counsel, PCR counsel Falk said Samuel Greene "could have put that fire out [about whether fishing gear was in the car] if he had been called." "I think that Mr. Gipson should have called Mr. -- he knew about Mr. Greene Senior, his grandfather, he had conversations with him. And had he called him to the stand we believe that there is a reasonable possibility that the jury would have reached a different verdict." App. 517, l. 12 – 518, l. 4.

Order of Dismissal

In the Order of Dismissal dated November 7, 2017, the judge wrote that defense counsel was not deficient for failing to call Samuel Greene as a witness. The order stated that defense counsel “testified the surrebuttal witness was also a liability to applicant’s case.” The order concluded petitioner failed to prove that if Samuel Greene had testified that there was a reasonable probability the result of the trial would have been different. App. 535 – 536.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

ARGUMENT

Defense counsel was ineffective for failing to call petitioner's grandfather, Samuel Greene, to testify that he took the fishing gear out of petitioner's car before the police impounded it, since the state stressed there was no evidence to support petitioner's trial testimony that he intended to go fishing on the day of the fatal incident, and was not "looking for trouble," particularly where the solicitor naturally stressed there was no evidence to corroborate petitioner's testimony that he intended to go fishing that day.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court found defense counsel was ineffective for failing to call witnesses to corroborate the petitioner's trial testimony. In Lounds, the complaining witness, Garrett, testified that petitioner came to his warehouse and inquired about for a job. Garrett said petitioner then displayed a gun, took a small sum of his money, and forced him to drive to Garrett's parents' house for more money. Petitioner allegedly jumped out of the truck and ran away before they arrived at the home of Garrett's parents.

Petitioner conversely testified that Garrett purchased crack cocaine from him in the past, and he owed petitioner money. Petitioner went to Garrett's place of business, and he asked for the drug money Garrett owed him. Petitioner said he did not have a gun, and he did not threaten Garrett. Garrett volunteered to go to some people's houses to obtain the money to pay petitioner. Garrett was driving the truck to look to find these people, and Garrett stopped the truck and "took off running."

This Court in Lounds noted defense counsel said he did not believe the witnesses petitioner wanted him to call would have "added much to petitioner's defense." The Court found this was not objectively reasonable given the defense theory of the case. While defense counsel presented to the jury that petitioner and Garrett knew each other through drug dealing, this Court

noted that other witnesses were willing to testify to this fact, and this would have significantly added to the credibility of petitioner's case. Therefore, defense counsel was ineffective for not calling the witnesses.

Here, similarly, petitioner's defense was that he planned to go fishing, and he had no intent to engage in a fight or look for trouble with the decedent and the ABIK victim. Petitioner's defense was that he was not the aggressor, and he was not looking for trouble that day.

Petitioner testified that he had fishing tackle in his car, and he intended to go fishing that day. The solicitor focused strongly in his closing argument on the lack of any corroborating witnesses of this fact.

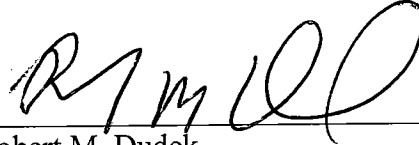
The testimony of petitioner's grandfather, Samuel Greene, was very important corroborating testimony in petitioner's case. Defense counsel was ineffective for failing to call Samuel Greene as a corroborating witness given the state's focus on the lack of fishing gear in the car petitioner was driving that day.

Defense counsel knew, or he should have known, that surrebuttal testimony was within the discretion of the trial judge, and disfavored by most trial judges. Defense counsel did not attempt to argue or change the trial judge's mind when the judge summarily ruled that he did not allow surrebuttal testimony. Cf. State v. Watson, 353 S.C 620, 579 S.E.2d 148 (2003). Further since the Court of Appeals dismissed an abuse of discretion argument pursuant to Anders in State v. Brandon Greene, 2014-UP-140 (filed April 2, 2014), this lends for support for the trial judge's ruling that defense counsel could have called Samuel Greene in petitioner's defense "just like any other witness."

Further, it was undisputed that Samuel Greene would have testified and corroborated petitioner's testimony that he, Greene, removed the fishing tackle from the automobile before the police impounded it. This was not a case where Greene vacillated about the exact nature of his testimony, and this is not a case where it could be argued that Greene's testimony would not have assisted the defense where the solicitor focused on the lack of corroborating testimony about petitioner's intent to go fishing on the day of the fatal shooting. Cf. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel's failure to call Samuel Greene as a witness during the defense case was deficient performance, and it prejudiced petitioner. See Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

By reason of the foregoing argument, the order of the post-conviction relief judge should be reversed, and this case remanded to the Hampton County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read 'R M D', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Thomas A. Russo, Circuit Court Judge

BRANDON GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

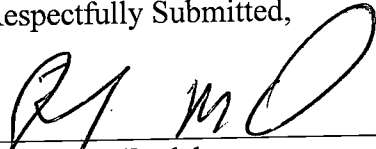
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Greene states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Thomas A. Russo, which was held on October 9, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He 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 him as counsel for Brandon Greene.

Respectfully Submitted,

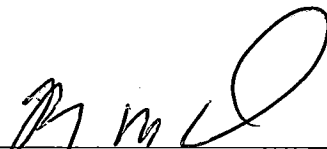


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



Robert M. Dudek
Chief 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

This 14th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Thomas A. Russo, Circuit Court Judge

BRANDON GREENE,

PETITIONER

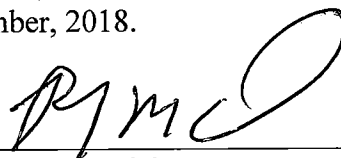
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 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 Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Brandon Greene, #289919, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of November, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

RECEIVED
NOV 14 2018
S.C. SUPREME COURT