

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

JAMES EDDIE BAILEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000601

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to request a spoliation instruction in a timely manner and as a result waiving any objection to the trial judge's failure to instruct the jury on spoliation?

STATEMENT

In October of 2013, the Greenville County Grand Jury indicted Petitioner, James Eddie Bailey, for armed robbery, kidnapping, possession of a weapon during the commission of a violent crime and resisting arrest, indictment #2013-GS-23-9292. On October 8, 2014, Petitioner proceeded to jury trial before the Honorable Steven H. John. Symmes Culbertson represented Petitioner at trial. Allen Fretwell prosecuted the case. The jury found Petitioner guilty as charged. Judge John sentenced Petitioner to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was filed and the direct appeal perfected. On June 8, 2016, the South Carolina Court of Appeals affirmed the conviction. State v. Bailey, Op. No. 2016-UP-278 (S.C.Ct.App. filed June 8, 2016).

On May 22, 2017, Peittioner filed an application for post-conviction relief [PCR]. The State filed a return on September 1, 2017. An evidentiary hearing was held on December 15, 2017, before the Honorable Robin B. Stilwell. Rodney W. Richey represented Petitioner at the hearing. DeShawn H. Mitchell represented the State. In a written order signed March 21, 2018, Judge Stilwell denied relief and dismissed the application. A timely notice of intent to appeal was served on April 2, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to request a spoliation instruction in a timely manner and as a result waiving any objection to the trial judge's failure to instruct the jury on spoliation.

The jury found Petitioner guilty of charges involving the robbery of a Dollar General Store. During the robbery a cashier called 911 and Deputy Nathaniel Emily with the Greenville County Sheriff's Department quickly arrived at the store. The deputy saw Petitioner as he was running away and chased Petitioner on foot. (App. pp. 149-153). The deputy's dashboard camera recorded the approach to the store and continued to record after he parked and chased Petitioner. (App. pp. 160-161). The video from the dashboard camera was introduced in evidence without objection. (App. p. 161, lines 23-25). Deputy Giovanni, also with the Greenville County Sheriff's Department, joined in the chase. Deputy Giovanni's dashboard camera also recorded his approach to the store. Deputy Giovanni, however, claimed that he failed to preserve the video from his dashboard camera because he determined that the video lacked "evidentiary value." (App. p. 180, line 17 – p. 181, lines 1-13). At trial Deputy Giovanni admitted that he tased Petitioner prior to arresting him in connection with the Dollar General robbery. (App. pp. 183-185).

Trial counsel requested an instruction on spoliation the day after the judge had instructed the jury on the law and the jury had begun deliberations. (App. p. 289, lines 1-21). Trial counsel argued:

Your Honor, as is often the case, unfortunately, during the course of a trial things may find their way past my thought process. Specifically, in this case there was testimony regarding an additional in-car video that was not presented in evidence. The issue – and I'll mispronounce this I'm sure – but I call it spoliation came up. I did not raise that at the time of your requested jury charges. Maybe I should have. But, quite honestly, I did not have that thought

in my head at that time. On reflection I now believe that that is an issue that should have been raised. And although I did not request it at the time you asked for jury charges, I'm requesting it now.

(App. p. 289, lines 8-21). The judge denied the request to give the jury a spoliation-of-evidence charge, finding there was no evidence to support the charge. (App. p. 293, lines 18-21). The judge stated, "Now, would the best, absolute, hundred percent best, course of business have been to have made a copy of that and turned it over to the state, yes. No question about that. But there's no bad faith. There's zero evidence of it. So you look at the other part of it that the evidence possessed some kind of exculpatory value apparent on its face before the evidence was destroyed. And there is zero evidence of that." (App. p. 292, line 22 – p. 293).

On direct appeal Petitioner argued that the trial judge erred in denying Petitioner's request to instruct the jury on spoliation of evidence. (App. p. 314). In affirming the conviction the South Carolina Court of Appeals wrote:

Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Nesbitt, 411 S.C. 194, 199, 768 S.E.2d 67, 70 (2015) ("In criminal cases, the appellate court sits to review errors of law only." (quoting State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011))); State v. Lemire, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))); Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial [court] shall reasonably direct."); Rule 20(b), SCRCrimP ("[T]he parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. . . . Failure to object in accordance with this rule shall constitute a waiver of objection.").

(App. pp. 338-339).

In the PCR application Petitioner asserted, among other allegations, that trial counsel was ineffective for failing to request a jury instruction. (App. p. 343). In the order of dismissal the PCR judge found that trial counsel was not ineffective because a spoliation charge was not proper. The PCR judge wrote, “Notwithstanding, this Court finds as the trial court did a spoliation charge was not proper. In its ruling the trial court ruled ‘in this particular case, clearly, there’s no evidence in this case, certainly none produced by the defendant and none that’s been set forth in this trial, that the state destroyed evidence in bad faith. There’s just no evidence, zero evidence, of that in this case.’” (App. p. 388). The PCR judge erred. Trial counsel was ineffective for failing to timely request a jury instruction on the spoliation of evidence.

Rule 20 of the South Carolina Rules of Criminal Procedure provides:

- (a) **Time for Request.** All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon.
- (b) **Objections to Charge.** Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection.

Trial counsel’s request for a jury instruction on the spoliation or destruction of evidence was not timely and as a result, any objection was waived for appellate review.

Appellant was entitled to an instruction on the State’s destruction of evidence. While the State does not have an absolute duty to safeguard potentially useful evidence that might vindicate a defendant, Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001), pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing

notions of fundamental fairness. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81, L.Ed. 413 (1984). This standard requires criminal defendants be afforded a meaningful opportunity to present a complete defense. Id. “Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.” Trombetta, 467 U.S. at 488, 104 S.Ct. 2528. To establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. Cheeseboro, 346 S.C. at 538, 552 S.E.2d at 307. Under the facts of this case it would be impossible to demonstrate that the video possessed exculpatory value when the video was erased before being viewed by anyone other than the officer who tased Petitioner and his supervisor. (App. pp. 200-201).


A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable

probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was ineffective in failing to timely request a jury instruction. There is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different. The challenge on appeal would have been limited to the merits and would not have concerned waiver of the objection. Petitioner is entitled to post-conviction relief.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

STATE OF SOUTH CAROLINA

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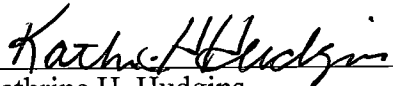
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Eddie Bailey states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Robin B. Stilwell, which was held on December 15, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 James Eddie Bailey.

Respectfully Submitted,

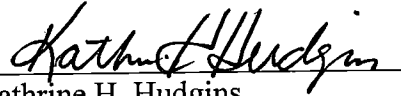


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of November, 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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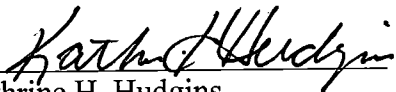
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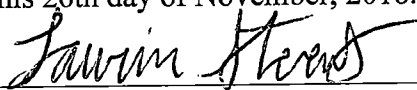
CERTIFICATE OF SERVICE

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 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 Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on James Eddie Bailey, #114196, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of November, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.