

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

ERIC LAMONT OWENS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001075

JOHNSON PETITION FOR WRIT OF CERTIORARI

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SC SUPREME COURT

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Did trial counsel render ineffective assistance by failing to request a mistrial when the brother of the deceased wore a shirt emblazoned with a picture of the deceased in full view of the jury because the shirt disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented?

STATEMENT

Petitioner and Shaina Wallace¹ were dating in November 2013. App. 115, ll. 14-24. On November 11, 2013, Wallace, Petitioner, Stanley “Man” Jones, and others were drinking and playing cards at the home of Blaine Seay. App. 119, l. 22 – App. 120, l. 5; App. 138, ll. 7-15; App. 167, ll. 7-18; App. 168, ll. 7-11; App. 183, ll. 9-24. Petitioner and Jones went outside and started arguing. App. 120, ll. 6-8; App. 122, ll. 14-15; App. 184, ll. 8-9. Jones struck Petitioner in the face, and Petitioner fell to the ground. App. 120, ll. 9-10; App. 122, ll. 15-16; App. 122, l. 25 – App. 123, l. 1; App. 185, ll. 3-5. When Petitioner got up, Petitioner was angry and the two men continued to argue. App. 120, ll. 17-20; App. 123, ll. 2-3; App. 172, ll. 17-21; App. 185, ll. 6-7; App. 185, ll. 16-17. Wallace convinced Petitioner to leave with her. App. 120, ll. 21-24; App. 122, ll. 18-19.

Wallace claimed that while she and Petitioner were in the car, Petitioner asked her to take him to his home so that he could get his gun. App. 123, ll. 7-11. Initially, Wallace refused, but she eventually took him home where he got a gun. App. 123, ll. 11-15. Petitioner retrieved a “long gun” from his home. App. 124, ll. 3-5. Wallace and Petitioner returned to the party, but Jones was gone. App. 123, ll. 16-17; App. 169, ll. 6-12. Petitioner was still angry with Jones. App. 132, ll. 16-20; App. 145, l. 23 – App. 146, l. 1; App. 173, ll. 8-25.

The following day, Petitioner borrowed Wallace’s car while she was at work. App. 127, ll. 2-10; App. 158, l. 22 – App. 159, l. 1; App. 164, ll. 3-8. However, when it was time for Petitioner to pick her up from work, Wallace learned her sister would get her because Petitioner claimed her car was not working properly. App. 128, l. 1-18.

¹ At the time of trial, Shaina Wallace was charged with obstruction of justice and accessory after the fact for her conduct related to the death of Jones. App. 138, l. 24 – App. 139, l. 11.

Petitioner picked up his friend, Derrick White, in the morning. App. 192, ll. 11-13; App. 193, ll. 10-15.² According to White, Petitioner said that Jones “stole him,” which was slang for a sucker punch. App. 194, ll. 6-16. Petitioner also told White that he planned to “[g]et his round back,” which was slang for going to fight back. App. 194, ll. 18-21. White thought Petitioner and Jones were going to fight. App. 195, ll. 15-16. White was driving while Petitioner was in the backseat. App. 195, ll. 17-24. White drove them to Jones’s house. App. 196, ll. 1-2. Jones walked outside to meet them. App. 196, l. 23. Jones then asked Petitioner if he were going to shoot him. App. 196, ll. 24-25; App. 197, ll. 5-8. Petitioner responded that he was. App. 196, l. 25; App. 197, ll. 9-12. Petitioner pulled out his gun and shot Jones. App. 197, ll. 13-21. After the shooting, Petitioner told White to drive away, and he did. App. 197, l. 25 – App. 198, l. 10.

Later that day, Wallace saw Petitioner with White. App. 129, ll. 2-12. Wallace claimed that when she questioned Petitioner about Jones’s death, he denied any involvement at first. App. 130, ll. 6-10. However, he eventually admitted to her that he killed Jones. App. 130, ll. 9-12.

The pathologist explained that Jones had been shot once in his left chest. App. 227, ll. 17-18; App. 232, ll. 2-5. The bullet exited through his right back. Tr. 227, ll. 18-19. Based upon the measurements of the wounds, the pathologist opined that Jones was shot with a slug. App. 231, ll. 4-12; App. 235, l. 2 – App. 236, l. 15; App. 238, ll. 2-8.

On June 12, 2014, a Spartanburg County grand jury indicted Petitioner for murder and possession of a weapon during a violent crime (2014-GS-42-2236). App. 437-438. The state,

² At the time of trial, Derrick White had pled guilty to accessory after the fact for his participation in Stanley Jones’s murder, but he had not been sentenced. App. 204, ll. 2-9; App. 207, ll. 4-5.

represented by Able Gray and Chris Bain, called the case to trial on April 20-22, 2015, before the Honorable Roger L. Couch and a jury. App. 1. Roger Poole represented Petitioner. App. 1.

When the trial began, the judge gave the jury some preliminary instructions. App. 69, l. 12 – App. 86, l. 9. Thereafter, the state delivered its opening statement followed by the defendant’s opening statement. App. 86, l. 16 – App. 91, l. 18. After the judge handled some other preliminary matters, defense counsel requested to speak with the judge at the bench. App. 93, ll. 19-20. After the bench conference, the judge instructed a man to stand. App. 93, l. 23. Through the colloquy, it was revealed the man was Mark Douglas Jones, the brother of the deceased. App. 94, ll. 5-9. The brother was wearing a t-shirt with a picture on the front of the deceased. App. 94, ll. 11-15. The judge informed the brother that he would not permit him to wear the t-shirt into the courtroom. App. 94, ll. 16-17. The judge determined the shirt “could be used as an effort to try to influence the jury.” App. 94, ll. 17-18. Judge Couch explained that if the brother wished to remain in the courtroom, he would need to cover the t-shirt with another shirt or change shirts. App. 94, ll. 19-20. The brother indicated he wanted to remain in the courtroom without changing shirts, but he seemed to acquiesce to the judge’s instruction. App. 94, l. 23 – App. 95, l. 8. Thereafter, the judge told the brother that he could wear the shirt outside “as long as the jury doesn’t see it.” App. 95, ll. 18-20.

The state’s case against Petitioner relied solely upon the credibility of its witnesses. App. 86, l. 25 – App. 87, l. 5; App. 90, l. 2-4. Those witnesses, Wallace, Seay, and White, gave multiple inconsistent statements to law enforcement. App. 116, l. 13 – App. 118, l. 13; App. 140, l. 4 – App. 145, l. 10; App. 148, ll. 18-25; App. 169, l. 14 – App. 170, l. 22; App. 179, l. 10; App. 199, l. 10 – App. 201, l. 8; App. 205, l. 23 – App. 206, l. 20; App. 257, ll. 12-13; App. 257, l. 25; App. 260, ll. 23-24; App. 266, ll. 4-9; App. 268, l. 20 – App. 269, l. 2. In fact, two of those

witnesses did not provide incriminating information against Petitioner until the police charged the witnesses with crimes associated with Jones's death and their cooperation was necessary in order to reduce their exposure to criminal charges. App. 90, ll. 5-7; App. 90, l. 19 – App. 91, l. 12; App. 138, l. 24 – App. 140, l. 3; App. 203, l. 25 – App. 204, l. 9; App. 206, l. 25 – App. 207, l. 15.

The jury found Petitioner guilty as charged. App. 296, ll. 8-21. Judge Couch sentenced Petitioner to five years imprisonment for the weapon and to thirty-five years imprisonment for murder. App. 301, l. 17 – App. 302, l. 3; App. 439-440. He ordered the sentences to be served concurrently. App. 301, l. 17 – App. 302, l. 3; App. 439-440.

Petitioner filed a notice of appeal, which was perfected by David Alexander by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 304-316. On appeal, Petitioner challenged the trial judge's refusal to charge the jury with the lesser-included offense of voluntary manslaughter. App. 304-316. On January 25, 2017, the Court of Appeals dismissed the appeal. Ap. 317-318; State v. Owens, 2017-UP-055 (S.C. Ct. App. Filed Jan. 25, 2017). Remittitur was sent on February 10, 2017. App. 319.

Petitioner filed an application for post-conviction relief (PCR) on April 28, 2017. App. 320-326. The matter proceeded to an evidentiary hearing on January 31, 2018, before the Honorable Grace Gilchrist Knie. App. 333. Valerie Giovanoli represented Petitioner, and Susannah C. Ross represented Petitioner. App. 333.

During the hearing, Petitioner explained that trial counsel should have objected to the deceased's brother wearing a t-shirt with a picture of the deceased on it at the trial. App. 348, l. 22 – App. 349, l. 2. According to Petitioner, the brother was wearing the inflammatory t-shirt during the jury voir dire and selection process. App. 349, ll. 3-14. The t-shirt prejudiced the jury

against him because the brother was sitting in full view of the jury. App. 349, ll. 15-16; App. 363, ll. 7-23.

According to trial counsel, he requested to approach the bench regarding the brother's t-shirt. App. 391, ll. 13-25. Trial counsel explained there was a conversation at the bench regarding the t-shirt, and, then, the judge engaged the brother in a colloquy about the shirt. App. 391, ll. 13-25. The trial judge resolved the matter by having the brother change his shirt or cover it up. App. 392, l. 2.

After the hearing, the state filed a memorandum of law. App. 409-417. Judge Knie denied Petitioner relief by a written order dated June 1, 2018. App. 418-436. Regarding Petitioner's allegation that trial counsel was ineffective for failing to move for a mistrial because the deceased's brother was present in the courtroom wearing a shirt with the deceased's face on it, Judge Knie found trial counsel was not deficient and Petitioner did not suffer prejudice. App. 428. Judge Knie recounted the circumstances surrounding the trial judge addressing the brother regarding his t-shirt. App. 428. Thereafter, Judge Knie "note[d] that this occurred in the very beginning of the trial, when the jury had not even heard any evidence and knew very little about the evidence, and even less about who [the brother] was or what [the deceased] looked like." App. 428. Judge Knie found no deficiency or prejudice because "[t]he matter was in fact addressed by the trial judge prior to the start of the trial" and the brother "was required to leave the courtroom and was not permitted to be in the courtroom wearing a shirt bearing the image of the [deceased]." App. 428.

On June 6, 2018, Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel rendered ineffective assistance by failing to request a mistrial when the brother of the deceased wore a shirt emblazoned with a picture of the deceased in full view of the jury because the shirt disrupted the trial and improperly influenced the jury to decide the case on emotion instead of the evidence presented.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686.

To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688.

Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. Specifically, on the prejudice prong, the question to ask is “whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt.” Id. (emphasis added). The United States Supreme Court

specifically ruled that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Moreover, the Court held that:

The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel’s performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.

Id. at 695.

“The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution.” State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). “[T]he very heart of a ‘fair trial’ embodies a disciplined courtroom wherein an accused’s fate is determined solely through the exercise of calm and informed judgment.” Id. at 303, 295 S.E.2d at 631.

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)). While a mistrial should be granted only when “absolutely necessary” and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident “is so grievous that the prejudicial effect can be removed in no other way.” Id. Another way of describing when a mistrial must be granted is when there is “manifest necessity.” State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930).

“The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.” State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

This Court held a mistrial was in order where “spectators filled the courtroom seats to capacity and even stood against the walls,” there were several outbursts of laughter from the spectators requiring an admonition from the judge, a juror reported that one spectator glared at her with “obvious disgust,” and the jurors overheard a spectator making opinionated remarks. Stewart, 278 S.C. at 301-302, 295 S.E.2d at 629-630. This Court held it was error for the trial judge to deny the motion for a mistrial “without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice.” Id. at 302, 295 S.E.2d at 630. Further, this Court held the judge’s reliance on his instructions to the jury to disregard improper spectator conduct was insufficient to assure Stewart received a fair trial. Id. at 304, 295 S.E.2d at 631.

In another case involving disorder in the court, this Court held a defendant was entitled to a new trial where there was “no doubt that the action on part of the audience and crowd in the courtroom during part of the trial was so irregular and improper and was allowed to go unchecked by the officials that the defendant did not get what he was entitled to, a fair, impartial, and legal, trial.” State v. Gens, 107 S.C. 448, 93 S.E. 139, 140 (1917). In this transporting liquor case, several ladies held large posters condemning liquor traffic before the jury during part of the trial. The ladies sat directly in front of the jury and to the left of the judge. Id. at 448, 93 S.E. 139. This Court held:

The action of the women was highly improper, in that it was an attempt to impede justice, however innocent on their part, and deny to the defendant a fair and impartial trial, guaranteed to him by the law of the land, an attempt to influence a sworn jury to arrive at a verdict improperly, and to be influenced by outside influence, trying the case by manufactured outside public opinion, and not by the facts of the case as developed in evidence and the law of the trial judge.

Id. Despite the jurors indicating they were not influenced in any manner by the posters, this Court held the trial judge should have set aside the verdict. Id.

On the other hand, in State v. Hughes, 336 S.C. 585, 596-597, 521 S.E.2d 500, 506 (1999), this Court found a trial judge did not abuse his discretion in denying a motion for a mistrial where the deceased's mother "loudly exited the courtroom" followed by her sister during the cross-examination of a medical expert. The trial judge noted that the mother's conduct "could be interpreted as a 'negative comment' on the defense evidence," the disruption was short and "the jury already knew how she felt since she had testified as a victim impact witness" in the capital sentencing proceedings. Id. This Court found the jury "likely understood her outburst as an expression of [her] grief," about which she had already testified. Id.

Similarly, in State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct. App. 1996), the Court of Appeals held that the displays of emotion – audible crying by spectators – in the courtroom during the alleged victim's testimony did not require a mistrial. When defense counsel moved for a mistrial, the trial judge stated "he did not believe that any displays of emotion so far would have tainted the jury." To ensure additional emotional outbursts would not prejudice the jury, the judge cleared the courtroom and instructed the jury that the courtroom had been cleared due to the display of emotion by observers. Id. Further, the judge implored the jurors that they were not to draw any inferences from this fact as neither side had done anything improper and reminded the jurors that they were to base their verdict on the testimony and evidence presented, not on emotion. Id.

In another case involving an emotional outburst, this Court held no mistrial was required where the deceased's sister had a minor outburst while testifying when asked to identify the defendant. State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996). This Court held the emotional outburst was ameliorated by the trial judge dismissing the jury and calling a recess as soon as the

outburst occurred to give the witness an opportunity to calm down. Id. at 93, 470 S.E.2d at 105. Further, this Court was persuaded that the outburst had little effect on the jury because it occurred at the beginning of the trial and was “very limited in time and in scope.” Id. As in Hughes, this Court surmised that the sister’s outburst was an expression of grief and the jury likely understood that. Id. While finding the curative measures here sufficient, this Court warned that some cases involving a witness’s or spectator’s outburst “may carry such great potential for prejudice that the trial judge should give, or offer to give, a curative instruction.” Id. at 93, 470 S.E.2d at 106.

The Court of Appeals addressed a matter similar to the one in the case *sub judice*. Dial, 405 S.C. at 257-259, 746 S.E.2d at 500-501. In the homicide by child abuse case, the child’s mother approached the witness stand with a heart-shaped urn containing the child’s ashes when she was called to testify. Id. at 257, 746 S.E.2d at 500. According to the Court of Appeals, the trial judge “immediately prevented [mother] from advancing any further and asked the jury to leave the courtroom.” Id. While the jury was out, Dial requested a mistrial based on the extremely prejudicial nature of the urn in eyesight of the jury. Id. The trial judge refused the request, noting mother approached the witness stand in a “very low-grade manner.” Id. Additionally, the trial judge did not believe any of the jury members saw the urn or knew it was an urn. Id. Based upon the trial judge’s measurements, the urn was slightly less than three inches in width and about two-and-a-half inches in length. Id. “The trial court denied Dial’s motion given the small size of the item, the manner in which [mother] approached the witness stand, and the fact that the trial court had the best view of the item and still did not know it was an urn.” Id. Nevertheless, the trial judge issued a curative instruction. Id. at 258, 746 S.E.2d at 501.


Thus, the Court of Appeals held “any alleged error prejudice was cured by the curative instruction.” Id. According to the Court, Dial could not establish that any juror saw the item or that

the item was recognizable as the child's urn if a juror did see it. Id. The curative instruction "ensured the jurors knew they were to base any decision on the facts presented at trial, not on emotional response or improper conduct." Id. at 258-259, 746 S.E.2d at 501.

Trial counsel's failure to move for a mistrial based upon the brother's shirt was deficient performance prejudicial to Petitioner. Brother's shirt depicted the deceased and was worn in clear view of the jurors. This symbolic clothing was inherently prejudicial and prevented Petitioner from receiving a fair trial. See Meghan E. Lind, Hearts on Their Sleeves: Symbolic Displays of Emotion By Spectators in Criminal Trials, 98 J. of Crim. L. & Criminology 1147, 1152 (Spring 2008). Brother intended to appeal to the jurors' emotions. Trial counsel failed to even request the judge question the jurors regarding whether they saw the shirt. Further, trial counsel failed to even request the judge issue a curative instruction to ensure the jurors knew not to consider the brother's shirt. The state had no physical or forensic evidence against Petitioner. Instead, the state relied solely upon witnesses who repeatedly lied and were ultimately charged with criminal conduct in connection with the deceased's death. This was not a case of overwhelming evidence of guilt. Instead, this was a case built upon falsehoods and individuals shifting blame to avoid or diminish their own criminal culpability. The jurors were encouraged to find Petitioner guilty based upon the brother's appeal to their emotions through his t-shirt bearing the image of the deceased.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find trial counsel rendered constitutionally deficient performance prejudicial to Petitioner, and order a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

ERIC LAMONT OWENS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Lamont Owens states:


1. She is an 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 Grace Gilchrist Knie, which was held on January 31, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Eric Lamont Owens.

Respectfully Submitted,


Susan B. Hackett
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."



Susan B. Hackett
Appellate Defender

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ATTORNEY FOR PETITIONER

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STATE OF SOUTH CAROLINA

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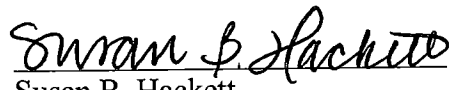
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STATE OF SOUTH CAROLINA,

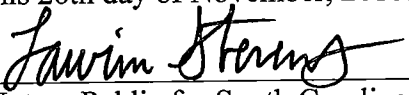
RESPONDENT

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 Jordan Cox, 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 Eric Lamont Owens, #252967, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of November, 2018.


Susan B. Hackett
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.