

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 03 2018

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2017-002494

Jaquwn Brewer #347482,..... Petitioner,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

Tommy A. Thomas, Esq.
Attorney for Petitioner
7588 Woodrow Street
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

Christian Saville Esq.
Office of the Attorney General
Attorney for Respondent
P.O. Box 11549
Columbia, SC 29211-1549

INDEX

TABLE OF CASES	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
ARGUMENT	10
CONCLUSION	14

TABLE OF CASES

Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967)

Gill v. State, 346 S.C. 209, 552 S.E. 2d 26 (2001)

Jackson v. Deno, 378 U.S. 368 (1964)

Johnson v. State, 325 S.C. 182, 480 S.E. 2d 733 (1997)

State v. Brewer, 411 S.C. 401, 768 S.E. 2d 656 (2015)

State v. Garner, 389 S.C. 61, 697 SE 2d 615 (Court of Appeals 2010)

State v. Jennings, 394 S.C. 473, 478, 716 S.E. 2d 91, 93 (2011)

State v. Martin, 292 S.C. 437, 357 SE 2d 21 (1987)

State v. Rivera 402 S.C. 225, 741 SE 2d 694 (2013)

State v. Stokes, 381 S.C. 390, 673 SE 2d 434 (2009)

United States Constitution Amendment V; S..C. Constitution Article I §12,

QUESTION PRESENTED

Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was unaware that trial counsel intended to concede that he shot the Victim Donald Parker?

Did the Lower court err in not granting Post Conviction Relief on the basis that trial counsel failed to argue and preserve for Appeal that the video statement was inadmissible and a violation of the confrontational clause?

Did the Lower Court err in not granting Post Conviction Relief on the basis that Appellate Counsel was ineffective for failure to raise the issue of Burden Shifting?

STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Court of General Sessions. Appellant was indicted during the June 2009 term of the Beaufort County Grand Jury for one count of assault and battery with intent to kill (ABWIK), one count of possession of a weapon during the commission of a violent crime and one count of murder (2009-GS-07-1279,-1296,-1293). Appellant proceeded to jury trial and was found guilty as indicted. Jared S. Newman, Esquire, represented Appellant. On August 26, 2011, the Honorable William H. Seals, Jr. sentenced him to a term of imprisonment of twenty years for ABWIK, five years for Possession of a weapon during the commission of a violent crime and life without parole for murder. The sentences were ordered to be run concurrently.

A timely notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals sent a certified question to the South Carolina Supreme Court. The South Carolina Supreme Court affirmed in part; reversed in part, and remanded. State v. Brewer, 411 S.C. 401, 768 S.E. 2d 656 (2015). The Remittitur was issued on March 5, 2015.

An evidentiary hearing on Appellant's PCR Application was convened on February 13, 2017, at the Beaufort County Courthouse. The Appellant was represented by James K. Falk, Esq. Ruston W. Neely, Esq. represented the Respondent. An Order of Dismissal was signed by The Honorable R. Scott Sprouse on October 30, 2017. A timely Notice of Appeal was filed.

STATEMENT OF FACTS

The Petitioner, Jaquwn Brewer was indicted for three charges one count of assault and battery with intent to kill (ABWIK), one count of possession of a weapon during the commission of a violent crime and one count of murder. (2009-GS-07-1279,-1296,-1293) The Petitioner was tried by Jury on August 22, 2011 – August 26, 2011. The Honorable William Henry Seals, Jr. presiding. The Jury returned guilty verdicts on all three counts. At the Jury Trial, the Judge admitted portions of an audio recording from an interrogation of the Petitioner which contained statements of unidentified declarants. The Petitioner's trial attorney objected to the admission of this evidence.

An Application for Post Conviction Relief was filed August 10, 2015. The Application alleged ineffective assistance of trial counsel as well as ineffective assistance of Appellate Counsel. A Post Conviction Relief hearing was held February 13, 2017 before the Honorable R. Scott Sprouse. The Petitioner was represented by James K. Falk, Esq. The State was represented by Ruston Neely, Esq.

Prior to filing a Post Conviction Relief, the Petitioner filed a Direct Appeal. The Direct Appeal concerned the admission of Brewer's unredacted audio tape interrogation by the Police. The Court found that the admission of the interrogation was in error. However, they affirmed Brewer's conviction for Assault and Battery with Intent to Kill and Possession of a Weapon during the Commission of a Violent Crime, as the error was harmless with respect to the charges. The Court did reverse the Murder conviction and remanded for a new trial. The Court notes, that despite learning from many witnesses that there were at least two shooters in the club parking lot that night, investigators pursued the Petitioner as the only suspect.

In an interview at the Beaufort County Sheriff's Office, Brewer waived his Miranda rights and agreed to speak with investigators. The recording of this interview, including the interrogators' hearsay-laden questions and comments, was played for the jury. The investigators informed Brewer that many witnesses observed him shoot both victims, which was true only with respect to the shooting of Parker inside the Club. Brewer denied involvement in either shooting, and approximately twenty minutes into the interview, Brewer told investigators that he wanted to end the interrogation. Yet the interrogation continued. The investigators employed various tactics to extend the interrogation, including bringing Brewers' mother into the room and repeatedly telling Brewer that he should "prove himself innocent" by turning in his handgun, all of which was audiotaped and played to the jury, over Brewer's objection. (App. p. 830)

The Court found that, early on, Brewer stated multiple times he was "ready to go." Brewer reminded the officers that they said he could stop the questioning at any time. When Brewer continued to ask that the interrogation stop, an investigator answered, "No." Brewer finally stated, "Man, I don't wanna talk no more." The investigator responded that if Brewer were innocent, he could prove his innocence by producing his gun. The investigators demanding Brewer prove his innocence continued unabated, even after Brewer repeatedly said, "I can't say no more."

Brewer moved, on the basis of hearsay, to have the investigators' statements redacted from the audiotaped recording of his interrogation. The trial court denied Brewer's request. Brewer was convicted on all charges.

The Argument and issue presented on Appeal by counsel for the Petitioner was “Did the Circuit Court improperly admit hearsay statements contained on an audio recording of an interrogation interview, identifying Appellant as the perpetrator?”

In the analysis of the issue presented, the Court points out that the improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice, State v. Jennings, 394 S.C. 473, 478, 716 S.E. 2d 91, 93 (2011) and State v. Garner, 389 S.C. 61, 697 SE 2d 615 (Court of Appeals 2010). The court goes further to note that error is deemed harmless when it could not have reasonably affected the result of a trial and an Appellate Court will not set aside a conviction for such insubstantial errors and that whether an error is harmless, depends on the circumstances of the particular case. The Court concludes that review of the evidence shows that the error was harmless with the first shooting inside the club, but not harmless concerning the second shooting in the parking lot outside of the club. The Court therefore concludes that the error in admitting the interrogation statement was harmless beyond a reasonable doubt as it relates to the Assault and Battery with Intent to Kill and the Weapon’s charge. The Court goes further to state that the evidence regarding the second shooting “stands in stark contrast”. Where there was only circumstantial evidence against the Petitioner for the Murder. That there were two potential shooters in the parking lot. (App. p. 719)

There are two dissenting opinions; Justice Pleconis as well as Justice Beatty. Justice Pleconis in his dissent would affirm both of the Petitioner’s convictions. His dissent is interesting to note that he states the vast majority of eight objectionable statements relate to what is referred to as the first shooting and only a portion of the eight passage specifically relate to the second shooting. Lastly, he makes the statement

that the Petitioner seeks reversal solely on the basis of the Trial Court's refusal to strike these eight statements from evidence. (App. p. 728) The Petitioner notes here that the issue raised on Appeal was solely the issue of hearsay.

Justice Beatty raises the issue that the Jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent. In Justice Beatty's view, this created a due process structural defect. Structural defects are not subject to a harmless error analysis regardless of the evidence presented and accordingly, he would have reversed all of Brewer's convictions and remanded for a new trial. (App. p. 729)

In the Petitioner's Application for Post-Conviction Relief, he alleges two grounds.

1. Ineffective assistance of Trial Attorney
2. Ineffective assistance of Appellate Attorney. (App. p. 757)

In an addendum, attached to that document, the Applicant goes further to more specifically state in part:

1. That Trial Counsel was ineffective for conceding guilty on Applicant's behalf without his consent; and
2. That Appellate Counsel was ineffective for failure to raise the burden shifting issue, which was preserved for Appeal and a 5th Amendment violation. (App. p. 761)

Trial Counsel stated at the Post Conviction Relief hearing that a number of witnesses actually saw the Petitioner fire inside of the club and there were two photographs of the Petitioner with a pistol in his waistband. (App. p. 804, lines 1-6) Also that the DJ testified that he actually witnessed the Petitioner fire the gun (App. p.

804, lines 6-8) Trial Counsel testified that as trial strategy, that he wanted to argue that it was not an Assault with Intent to Kill, that it was a lesser offense, High and Aggravated Nature. That he did concede to the Jury that the Petitioner did shoot inside the club, but there was no intent to kill. He stated that he thought that this was the only way to maintain credibility with the Jury and that a shooting in the leg is an Assault and Battery of a High and Aggravated Nature. (App. p. 804, lines 9-25) Trial Counsel does concede that he should have discussed this issue with his client. (App. p. 806, lines 1-5)

Appellate Counsel testified that the issue that he raised on Appeal was a hearsay problem with statements that were included on the audio recording. (App. 812, lines 21-23) Appellate Counsel further states that he raised this issue as a hearsay issue. He did not raise it as a confrontational clause issue. (App. p. 813, lines 3-5) He states that he did not think that this issue was explicitly argued in the Lower Court.

Appellate Counsel states that in regard to the burden shifting argument, he didn't raise it. His concern was it was a statement made on a piece of evidence that was introduced into Court and not by a participant such as the Prosecutor's Office. (App. p. 813, lines 17-25) Appellate Counsel notes that the burden shifting was discussed over, over and over at the Trial. (App. p. 814, line 25, p. 815, line 1) Appellate Counsel concedes that the burden shifting was an issue and should have been raised. But he did not raise it for strategic reasons and it was just an error on his part. (App. p. 815, lines 14-18)

Appellate Counsel admits that in a footnote to the Supreme Court's Order it clearly implies that the impropriety of the continuing of the investigation is not an issue

that is before the Court (App. p. 720) and it highlights an issue that needed to be explored. (App. p. 818, lines 13-19)

Appellate Counsel also acknowledges that he did not raise the confrontational clause issue because it was not preserved. That a confrontational clause violation is a 6th Amendment violation. (App. p 822, lines 21-24) Appellate Counsel states that had it been preserved as a confrontational clause issue he would have raised that issue before the Supreme Court. (App. p. 825, lines 2-5)

On November 5, 2017, the Court issued an Order of Dismissal. The Petitioner's allegations as set forth in the Order are:

1. Ineffective Assistance of Counsels failure to object to the interview tape on 5th Amendment grounds.
2. Ineffective Assistance of Appellate Counsel's failure to brief the burden shifting issue.

FAILURE TO OBJECT ON 5TH AMENDMENT GROUNDS

The Court, in its Order, states that Counsel properly objected to the introduction of Petitioner's statement in a Jackson v. Deno hearing on four separate grounds.

1. Continuation of the interview after Petitioner requested that the interview stop.
2. The Mother of Petitioner was brought into the interview room to reopen the interview.
3. The hearsay testimony used by the interviewing officers; and
4. Law Enforcements insistence that Petitioner prove his innocents with burden shifting (App. p. 835)

The Order of Dismissal finds that these issues were preserved and reviewed by the South Carolina Supreme Court.

FAILURE TO BRIEF THE BURDEN SHIFTING ISSUE

The Court finds in regards to Ineffective Assistance of Appellate Counsel, that Trial Counsel objected to the audio tape on the basis that Law Enforcement statements were burden shifting and that this ground was not briefed by Appellate Counsel. That Appellate Counsel was not deficient for failing to raise a different issue. The Court goes further to note “where the Court agreed with Appellate Counsel and found in their favor. Appellate Counsel’s argument was successful. There can be no stronger argument than a winning argument.” (App. p. 833) Accordingly, the Court found that the Petitioner failed to prove that Appellate Counsel’s briefing decisions were deficient.

ARGUMENT

Did the Lower Court err in not granting Post Conviction Relief on the basis that Appellate Counsel was ineffective for failure to raise the issue of Burden Shifting?

Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was unaware that trial counsel intended to concede that he shot the Victim Donald Parker?

Did the Lower court err in not granting Post Conviction Relief on the basis that trial counsel failed to argue and preserve for Appeal that the video statement was inadmissible and a violation of the confrontational clause?

Counsel for the Petitioner is going to argue the ineffective assistance of Appellate Counsel issue first.

The Petitioner would assert that the Court’s finding that Appellate Counsel was not deficient for failing for raise a different issue, is clearly in error. The Court seems to

equate a win on the issue of hearsay, as a nullification of the need of any other arguments regarding this matter. The Court's statement that there can be no stronger argument than a winning argument completely ignores the Supreme Court's Order. Justice Beatty in his dissent clearly points out the PCR Court's error in its decision. Justice Beatty writes that a due process structural defect existed in this trial and that structural defects are not subject to a harmless error analysis regardless of the evidence presented. He cites State v. Rivera 402 S.C. 225, 741 SE 2d 694 (2013) The Supreme Court affirmed in part, reversed in part and remanded. The reversal and ordering of a new trial on the murder charge left standing a twenty (20) year sentence on the Assault and Battery with Intent to Kill charge.

The Supreme Court found that a harmless error evaluation was required as a result of Appellate Counsel's issue of a hearsay violation. The Supreme Court broke the incident down into two sections. A shooting inside of the club and a shooting outside of the club. The Court found these to be two very different scenarios and found that the Statements made in relation to the inside of the club was harmless error. The Petitioner would assert that had Appellate Counsel argued the issue of burden shifting then as pointed out by Justice Beatty, the prejudice analysis would not have been required and the Court would not have conducted its harmless error analysis regarding the inside shooting. Therefore, had Appellate Counsel argued the Burden Shifting issue, the Court would have been inclined to have reversed all of his convictions and ordered a new trial on all three convictions rather than just the Murder charge.

Clearly Appellate Counsel was ineffective.

Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was unaware that trial counsel intended to concede that he shot the Victim Donald Parker?

The Petitioner would assert that he had the right to make the decision as to whether or not an admission to shooting could be made by his attorney in front of the Jury. Generally under the United States and the South Carolina Constitutions' a Defendant has a right to remain silent and to not testify during his trial. To make this right meaningful, our Courts have held that it is impermissible for the State to comment directly or indirectly on the Defendant's failure to testify at trial. United States Constitution Amendment V; S.C. Constitution Article I §12, Gill v. State, 346 S.C. 209, 552 S.E. 2d 26 (2001), Johnson v. State, 325 S.C. 182, 480 S.E. 2d 733 (1997).

The Petitioner would argue that this admission by counsel was an encroachment on his right to remain silent. This information only could have been used after discussion with Petitioner and his consent. Therefore, counsel's use of this information, even as trial strategy without the permission of the Petitioner was in violation of his constitutional rights and as such trial counsel was ineffective.

Did the Lower court err in not granting Post Conviction Relief on the basis that trial counsel failed to argue and preserve for Appeal that the video statement was inadmissible and a violation of the confrontational clause?

Appellate counsel also acknowledges that he didn't raise the confrontational clause issue because it was not preserved and that if there is a confrontational clause violation it means that there is a 6th Amendment violation. (App. p. 822, lines 21-24)

Appellate Counsel also states that had it been preserved, that the confrontational clause issue he would have raised that issue before the Court (App. 825, lines 2-5)

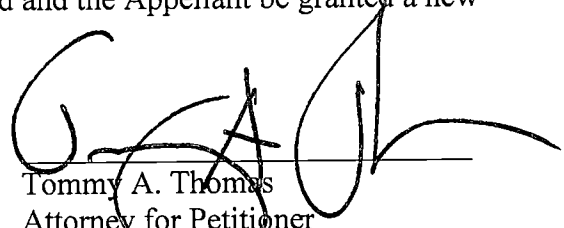
Trial Counsel failed to argue that the video statement was inadmissible based upon the confrontational clause. The Confrontational clause guarantees that in all criminal prosecutions the accused shall have the right to be confronted with the witnesses against him. That this right to confront and cross examine witnesses is essential to a fair trial that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial State v. Martin, 292 S.C. 437, 357 SE 2d 21 (1987) State v. Stokes, 381 S.C. 390, 673 SE 2d 434 (2009). Trial Counsel states that he vehemently objected on a number of grounds to the use of the audio interrogation because the only thing that you hear the Petitioner saying on the tape is, I didn't do it, I didn't shoot anybody, I didn't do it. (App. p 796, lines 17-25, p. 797, line 1.) Counsel further states that he moved under Miranda and under Edwards a number of times arguing that the Petitioner said, "I don't want to talk" "I want to quit" and the detective basically tells him that he can't. (App. p. 797, lines 7-10) Trial Counsel further states that the Detectives were leaning hard on Petitioner saying "look dude, 1, he says "we got all these witnesses that saw you do it". That wasn't true and that was heard by the Jury. Counsel notes that the other thing that was heard by the Jury constantly though out the tape is "just give up the gun, just come on Jaquwn give us the gun" "if you give us the gun dude, you can prove you are innocent." (App. p. 797, lines 11-20)

The Petitioner would argue that this information regarding the witnesses who could testify that he did it went to the Jury without the ability of the Petitioner through his counsel to cross examine any of these individuals. That is clearly in violation of the United State's Constitution, 6th Amendment right.

The Petitioner would assert that Trial Counsel was ineffective for not having objected on these grounds and that as such this issue was not preserved for a Direct Appeal.

CONCLUSION

That the Lower Court's decision be reversed and the Appellant be granted a new trial.

A handwritten signature in black ink, appearing to read 'T. A. Thomas', is written over a horizontal line. The signature is stylized and cursive.

Tommy A. Thomas
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

December 3, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 03 2018

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

S.C. SUPREME COURT

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2017-002494

Jaquwn Brewer #347482,..... Petitioner,

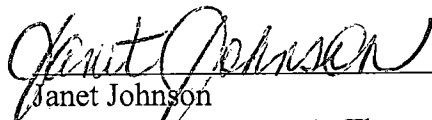
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Janet Johnson, assistant to Tommy A. Thomas, Attorney for the Petitioner, hereby certify that I hand delivered a copy of the Appendix and Petition for Writ of Certiorari, to:

Christian Saville, Esq.
The Office of the Attorney General's
1000 Assembly Street
Columbia, SC 29211-1549



Janet Johnson
Secretary to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

December 3, 2018