

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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S.C. SUPREME COURT

JIMMY LEE SESSIONS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

APPELLANT

APPELLATE CASE NO 2018-000117

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATE'S QUESTIONS PRESENTED

I. Did the lower court err in finding trial counsel ineffective for failing to challenge a jury charge where Counsel properly and timely objected, and where said charge was an accurate statement of law, made up a small portion of an otherwise accurate set of jury instructions, was preceded by numerous reminders that the defendants did not have to prove anything, and did not result in any discernible confusion on the part of the jury?

II. Did the lower court err in finding appellate counsel ineffective for failing to raise the issue of the validity of the third-party guilt jury instruction where the issue was not clearly superior to those raised by appellate counsel?

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

I. Where the State conceded during the PCR hearing that trial court's third-party guilt charge was both burden shifting and confusing was there any evidence to support the PCR judge's finding that trial counsel provided ineffective assistance of counsel by failing to preserve an objection that the trial court's third-party guilt charge permitted impermissible burden shifting?

II. Where the State conceded during the PCR hearing that the trial court's third-party Guilt charge was both burden shifting and confusing was there any evidence to support the PCR judge's finding that appellate counsel provided ineffective assistance of counsel by failing to assert on appeal that the trial court's third-party charge was erroneous as it was likely to have confused the jury?

STATEMENT OF THE CASE

Respondent agrees with the Petitioner's statement of the case.

ARGUMENT

I. Where the State conceded during the PCR hearing that trial court's third-party guilt charge was both burden shifting and confusing there was ample evidence to support the PCR judge's finding that trial counsel provided ineffective assistance of counsel by failing to preserve an objection that the trial court's third-party guilt charge permitted impermissible burden shifting.

No reason exists to grant certiorari in this PCR case. The standard of review controls because the only issue before the PCR court was prejudice, and this court must defer to Judge Goldsmith's factual finding that the trial court's third-party jury charge was both burden shifting and confusing. The trial record includes ample evidence that a third party was present at the time of the armed robbery and deaths of Jamilla Hightower and Monica Walls. In their closing arguments trial counsel for both defendants sought to discredit the testimony of the State's witness James Pearl and sought to highlight the evidence that supported their theory of third-party guilt. (R. p. 969 lines 10-15; R. p. 972 lines 2-25; R. p. 976 lines 11-15). The defendants were therefore prejudiced by the court's burden shifting jury charge regarding third-party guilt.

The trial judge charged the jury on the law of third part guilt as follows: *Evidence offered by an accused as to the commission of a crime by another person must be limited to facts that are inconsistent with the accused's guilt, and to such facts which raise an inference as to his innocence. There must be such connection with the crime, such facts or circumstances which tend to point out the other person as the guilty party.* (R. p. 1016, lines 16-21). At the PCR hearing the Attorney General was asked to address the issues arising from the trial court's third-part guilt jury instruction. In response she stated: *Yes, your Honor, I don't know if there is any way around that. It appears to be burden shifting, and it is a confusing charge.* (R. p. 1277 lines 16-18). On review of an order in a post-conviction relief (PCR) action, the reviewing

court must defer to a PCR court's findings of fact if there is evidence in the record to support them. Smalls v State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (S.C. 2018). For evidence that the trial court's charge was burden-shifting, this court need look no further than the Attorney General's own concession that the third-party guilt charge "appears to be burden-shifting."

The State having conceded that the court's third-party guilt charge was confusing and burden shifting, this court must find that trial counsel's failure object to the burden shifting charge satisfies the first of the Strickland two-part test. Strickland v Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). There is no evidence in the record that Counsel for Defendant Sessions objected the court's charge. However, after the Court charged the jury, Counsel for Defendant Stephens objected to the third-party guilt charge as follows:

(Counsel for Stephens): Just for the record we object to the charge on third-party guilt.

The Court: Your objection was that it should not have been charged at all; is that correct?

(Counsel for Stephens): Yes sir, or if it is charged I think the charge would be that the jury is free to consider it. The charge as given I feel is a rule of admissibility, and the fact is, once it's admissible the jury is free to consider it in any way that they think is appropriate.

(R. p. 1025 lines 4-12). Counsel for Stephens provided no further grounds for his objection and did not specifically assert that the charge placed an extra burden of proof upon defendant's third-party guilt evidence.

Jury charges that cause burden shifting presumptions are unconstitutional. State v Neva, 300 S.C. 450, 388 S.E.2d 791 (S.C. 1990). In order to preserve an objection for appellate review an objection *must be sufficiently specific to inform the trial court of the point being urged by the objector*. Wilder Corp v Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (S.C. 1998). At the PCR hearing, Stephens' appellate counsel opined that an objection to the burden shifting nature of the charge was not preserved for appeal. (R. p. 1196 lines 19-25). However

regardless of whether the objection by Stephens' counsel was sufficiently specific, the issue was not preserved for Sessions' appeal because he could not have bootstrapped his codefendant's objection in order to preserve. State v Carriker, 269 SC 553, 283 S.E.2d 678 (S.C. 1977); State v Nichols, 325 S.C. 111, 481 S.E.2d 118 (S.C. 1997).

Trial counsel provides deficient performance when he fails to object to an erroneous burden shifting jury charge. Gibson v State, 416 S.C. 260, 786 S.E.2d 121 (S.C. 2016); (finding that was deficient for not objecting to jury charge that malice may be inferred from use of a deadly weapon) Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (S.C. 1993). (finding that counsel was deficient in failing to object to a jury charge on intent element which shifted the burden of proof to the defendant); and, Dandy v. State, 301 S.C. 303 391 S.E.2d 581, (S.C. 1990), (finding that trial counsel was ineffective for failing to object to jury charge requiring defendant to prove self-defense by a preponderance of evidence).

II. Where the State conceded during the PCR hearing that the trial court's third-party Guilt charge was both burden shifting and confusing was there any evidence to support the PCR judge's finding that appellate counsel provided ineffective assistance of counsel by failing to assert on appeal that the trial court's third-party charge was erroneous as it was likely to have confused the jury?

This Court must defer to Judge Goldsmith's factual findings that: 1) the court's third-party guilt charge was likely to have confused the jury; 2) the issue was preserved by Stephens' counsel's general objection to the inclusion of the third-party guilt language; and, 3) appellate counsel was ineffective for not raising the issue on appeal. At the PCR hearing the Attorney General acknowledged that the Court's third-party guilt charge was confusing. (R. p. 1282 line 18). The Attorney General then asserted that trial counsel properly preserved

the objection. (R. p. 1283 lines 4-5). As noted above, Respondent's counsel is unaware of any evidence that Sessions' Counsel objected to the court's third-party guilt charge. Additionally Respondent's counsel is mindful of this court's decisions in State v Carriker and State v Nichols, *supra*. However, if this court were to find that the issue of the propriety of the court's third-party guilt charge would have been preserved for Defendant Sessions' appeal, appellate counsel was ineffective for failing to raise it on appeal.

Defendants are constitutionally entitled to effective appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, (1985). In deciding a claim of ineffective assistance of appellate counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) *citing* Strickland v. Washington, *supra* 466 U.S. at 685. Appellate counsel is not required to raise non-meritorious issues on appeal. Thrift v State, 302 S.C. 535, 397 S.E.2d 523 (S.C. 1990). "Appellate counsel has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, *as a matter of professional judgement* decides not to press those points." Jones v Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 3309, 77 L.Ed 2d. 987 (1983). (*emphasis added*). There is no evidence in the record to suggest that appellate counsel was exercising his professional judgement by deciding not to argue the impropriety of the court's third-party guilt charge.

The Evidence at Trial

Defense elicited ample testimony from which the jury could have concluded that unidentified third parties were responsible for the crimes of which their clients were accused. Defendants were prejudiced by the court's burden-shifting and confusing third-party guilt charge because it is likely that jury determined that it could not acquit the Defendants absent conclusive

proof that one or more third parties were responsible for the armed robbery and deaths of Monica Wall and Jamilla Hightower.

DNA and footprint evidence was offered at trial from which a jury could have concluded that a third party was responsible for the alleged crimes. The State called Detective Thomas Edward Darnell from S.L.E.D.'s Forensic Services Laboratory to testify. Detective Darnell was admitted as an expert in the area of footwear impression and examination. (R. p. 495 lines 2-4). Detective Darnell examined six gel lifts and two tape lifts of footprints recovered from Jamilla Hightower's home. He compared the impressions with five pairs of shoes one pair of which was recovered from Defendant Jimmy Sessions' property held at the J Reuben Long Detention center. (R. p. 485 line 13-14). These shoes were admitted as State's Exhibit 88. (R. p. 488 lines 2-7). Detective Darnell testified that the gel lifts recovered from the kitchen and bathroom floors were consistent with an impression from State's Exhibit 88. (R. p. 506 lines 2-6; and R. p. 510 lines 1-6). On cross examination Detective testified that he compared the print from the kitchen with five pairs of shoes that were not associated with Defendant Sessions and that the print was also consistent with three of those pairs of shoes. (R. p. 511 lines 6-19). Additionally Detective Darnell testified that he could not tell how long before actual crime occurred that the footwear impressions recovered from Jamilla Hightower's house were made. (R. p. 513 lines 8-17).

The Defense called Donald C Girndt to testify and he was also admitted as an expert in the area footwear identification and impressions. (R. p. 665 l. 4-6). Girndt was asked to comment on Defendant Stephens' Exhibit 16 which was a photograph of a footwear impression taken from the bathroom. (R. p. 667 line 23- R. p. 668 line 7). Mr. Girndt testified that the photograph appeared to be of a footwear impression in fecal material. Mr. Girndt opined that the footwear impression depicted in Defendant Stephens' Exhibit 16 was made contemporaneous to the crime scene. (R. p.

666 lines 11-16). Mr. Girndt explained that in his review, one of the victims had defecated and that she was then drug down the hallway into the bathroom. (R. p. 666 lines 20-24). Mr. Girndt then opined that the State's Exhibit 88, the impression attributed to Defendant Sessions' shoes, was excluded from producing the print depicted in Defendant Stephens' Exhibit 16. (R. p. 667 lines 4-12). Based upon Mr. Girndt's expert testimony, someone other than the Defendants made the footprint impression that was contemporaneous with the crime scene.

The State offered no DNA evidence. The defense called Agent Manuel John Ortuno to testify. Agent Ortuno was with S.L.E.D. and was admitted to testify as an expert in the field of D.N.A. analysis and forensic testing. (R. p. 826 line 19- R. p. line 9). Agent Ortuno compared DNA samples S.L.E.D. agents recovered from Monica Wall with swabs taken from Defendants Sessions and Stephens. S.L.E.D. Items 47 and 48 were samples recovered from Monica Wall's feet. Both samples were found to be a mixture of one male and one female contributor. Jamilla Hightower and Monica Wall could not have been excluded as the female contributor to the mixtures. (R. p. 832 lines 4- 9). However, both Defendants Sessions and Stephens were excluded as the male contributors to those two samples. (R. p. 828 line 23- R. p. 829 line 15).

Agent Ortuno also examined S.L.E.D item 53 which was identified as fingernail clippings from the right hand of Monica Wall. Agent Ortuno testified that the D.N.A recovered from this sample was also a mixture of contributors and that both Defendants Sessions and Stephens were excluded as possible contributors to the mixture. (R. p. 829 lines 16- 24). Agent Ortuno further testified that neither Jamilla Hightower nor Monica Wall could be excluded as contributors to that sample. (R. p. 834 lines 1-17).

Agent Ortuno then considered other DNA samples recovered from the crime scene. Defendants Sessions and Stephens were excluded from all of these samples. However, the samples

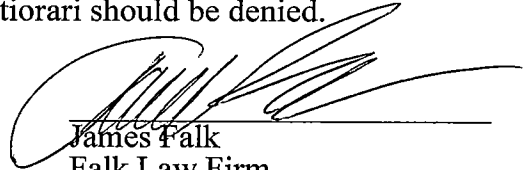
do suggest that individuals, both male and female and other than Jamilla Hightower and Monica Wall were present at Jamilla Hightower's house. S.L.E.D. items 61.2 and 61.3 were samples recovered from cigarette filters found inside Jamilla Hightower's house. The contributors to the DNA found on these filters was determined to belong to a female and Jamilla Hightower or Monica Wall were excluded as possible contributors. (R. p. 834 line 18 – R. p. 835 line 15). S.L.E.D. Item 12.1 was another cigarette filter. The DNA recovered was a mixture of a male and a female. Jamilla Hightower could not be excluded as the female contributor and both Defendants Sessions and Stephens were excluded as the male contributors. (R. p. 835 line 16 – 836 line 7; and R. p. 839 1 3-). S.L.E.D. items 13.1 and 13.2 were more cigarette butts. There were multiple contributors to the DNA recovered from the samples. Jamilla Hightower could not be excluded as a contributor to the mixtures. However, Monica Walls, along with Defendants Sessions and Stephens were excluded as contributors. (R. p. 836 lines 9-23). S.L.E.D. Item 61.7 was another cigarette filter containing DNA from a male and female contributor. Both Jamilla Hightower and Monica Walls along with the Defendants Sessions and Stephens were excluded as potential contributors to the mixture. (R. p. 839 lines 3- 17). Item 29.1 was a swab from the pillow found in the bathroom. There were multiple contributors to the DNA mixture recovered from the pillow. Monica Wall could not be excluded as a contributor but Jamilla Hightower along with Defendants Sessions and Stephens were excluded as possible contributors. (R. p. 837 lines 3- 23). Finally Item 67 was a swab taken from the left shoe of either Jamilla Hightower or Monica Wall. The DNA profile shows that it was a mixture of a two individuals, one male and one female. Jamilla Hightower, Monica Wall, Jimmy Sessions and Christopher Stephens were all excluded as possible contributors to this DNA sample.

The third potential type of forensic evidence offered in this case were fingerprints. The State called Agent Carol Ann Allen to testify and she was admitted as an expert in the area of fingerprint analyses. (R. p. 463 line 23- 464 line 13). Agent Allen was able to recover approximately 10 usable fingerprints throughout Jamilla Hightower's house. (R. p. 469 lines 8-10). Agent Allen ran the fingerprints through A.F.I.S., and was unable to match any of the fingerprint impressions with those of Defendant Sessions or Defendant Stephens. (R. p. 471 lines 8-16). The testimony regarding the fingerprints was similar to the testimony regarding the DNA recovered from the various cigarette filters- it is not evidence of third party guilt but it does support Defendant's claims that they were not in the house at the time of the crimes.

The forensic evidence supported the defense's theory that unidentified individuals were present at the crime scene. Donald Girndt's testimony regarding the footwear impression depicted in Defendant Stephen's Exhibit 16 allowed the jury to conclude that an individual other than Jimmy Sessions or Christopher Stephens dragged Monica Wall's dead body toward the bathroom. Moreover Agent Ortuno's testimony that neither Jimmy Sessions nor Christopher Stephens were contributors to DNA recovered from Monica Wall's fingernails allowed the jury to conclude that Monica Wall was struggling with an unidentified third party immediately before her death.

CONCLUSION

For the foregoing reason, the petition for certiorari should be denied.



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This 2 day of January, 2019

Attorney for Jimmy Sessions

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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S.C. SUPREME COURT

JIMMY LEE SESSIONS,

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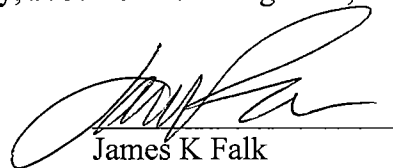
STATE OF SOUTH CAROLINA,

APPELLANT

APPELLATE CASE NO 2018-000117

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari Johnny Ellis James Jr via U.S. Mail, postage prepaid, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy has been served upon Jimmy Lee Sessions #215137, at Lieber Correctional Facility, P.O. Box 205 Ridgeville, SC 29472 this 4th day of January 2019.



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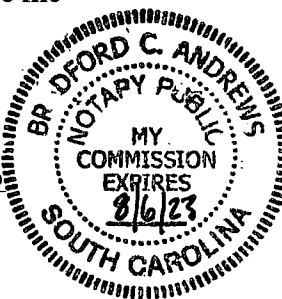
SUBSCRIBED AND SWORN TO before me

This 4th day of January, 2018



Notary Public for South Carolina

My Commission Expires: 8/6/2023



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January 4, 2019

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S.C. SUPREME COURT

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Jimmy Lee Sessions v State of South Carolina,
Appellate Case No. 2018-000117

Dear Clerk Shearouse:

Please find the enclosed original and seven (7) copies of the Return to Petition for Writ of Certiorari in the above Horry County PCR action. Please return one clocked copy of this Return in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,


James K. Falk

Thank you for your assistance.

Cc:

Johnny Ellis James. Jr.

Jimmy Lee Sessions 215137

PRIORITY MAIL ★

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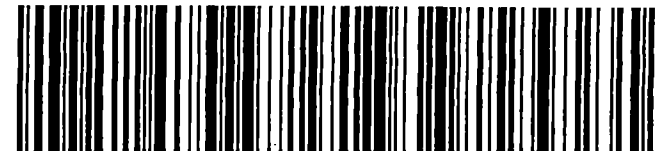
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