STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

ORIGINAL

Honorable Paul M. Burch, Circuit Court Judge

ROBERT J. PHIPPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001548

JOHNSON PETITION FOR WRIT OF CERTIORARI

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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Was trial counsel ineffective for questioning Petitioner, in front of the jury, about his nine- page extensive criminal record, dating back to 1977, and then again mentioning the nine-page criminal record in closing argument?

STATEMENT

In June of 2007, the Spartanburg County Grand Jury indicted Petitioner, Robert J. Phipps, for murder, indictment #07-GS-42-2902. On April 13, 2009, Petitioner proceeded to jury trial before the Honorable Roger L. Couch. Doug Brannon represented Petitioner at trial. Derrick Bulsa and Bryan Kelley prosecuted the case. The jury returned a verdict of guilty and Judge Couch sentenced Petitioner to life in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 25, 2012, the South Carolina Court of Appeals, after argument, affirmed the sentence and conviction. State v. Phipps, Op. No. 2012-UP-018 (S.C. Ct.App. filed January 25, 2012). (App. pp. 608-609). A timely petition for rehearing was filed and denied. A timely petition for writ of certiorari was filed and denied on August 8, 2013.

On May 19, 2014, Petitioner filed an application for post-conviction relief [PCR]. Petitioner filed an amended application on October 3, 2014. The State filed a return on October 27, 2014, and an amended return and motion for more definite statement on July 25, 2016. On September 19, 2016, an evidentiary hearing was held before the Honorable Paul M. Burch. J. Brandt Rucker represented Petitioner at the PCR hearing. Ruston W. Neely represented the State. In a written order filed June 8, 2017, Judge Burch denied relief and dismissed the application. A timely notice of intent to appeal was served on August 16, 2018. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective for questioning Petitioner, in front of the jury, about his nine-page extensive criminal record, dating back to 1977, and then again mentioning the nine-page criminal record in closing argument.

A jury found Petitioner guilty of the murder of Samuel Gossett. At trial Petitioner argued that he and another man were at Gossett's house smoking crack with Gossett when the other man and Gossett got into an argument. (App. p. 100, lines 20-24). Petitioner separated the two men and Gossett left the room and walked down the hallway, followed by the third man. (App. p. 101, lines 1-4). Petitioner then saw the third man beating Gossett. Petitioner left the house. (App. p. 101, lines 5-8). Petitioner's fingerprints were found on a can that had been used as a crack pipe at Gossett's house. (App. p. 103, lines 6-7). A spot of Petitioner's blood was found on Gossett's pants. (App. p. 103, lines 7-9).

During direct examination the following took place between trial counsel and Petitioner:

Q. Mr. Phipps, this document that I have consists of one, two, three, four, five, six, seven, eight, nine pages. Do you know what this is?

A. Yeah, that's my criminal record.

Q. Would it be fair to say, sir, that you have an extensive criminal record?

A. Yes.

Q. You have robbed banks in your lifetime, haven't you?

A. Yes.

Q. You have stolen property in your lifetime, haven't you?

A. Yes.

Q. And you have been to prison, correct?

A. Yes sir.

(App. p. 401, lines 9-21). Trial counsel then asked Petitioner about being in a federal prison for a violation charge during the time that police were investigating the death of Samuel Gossett. (App. p. 401, line 22 – p. 402, lines 1-9). Trial counsel then asked, "Mr. Phipps, during any of your robberies or your burglaries, have you ever hurt anyone in your lifetime?" (App. p. 402, lines 10-11). Petitioner answered, "No." (App. p. 402, line 12).

In closing argument trial counsel told the jury:

> And then he got on the witness stand, a man with a criminal record nine pages long, a man, if he had not taken the stand you wouldn't have known about nine pages, but he got on the witness stand and he told you his story. There was another man in the house. His name was New York. He went and beat the man down and I went and called 911 to try and save his life.

(App. p. 557, lines 17-23).

During the PCR hearing PCR counsel asked trial counsel if he challenged the admission of Petitioner's convictions. (App. p. 697, line 25 – p. 698, line 1). Trial counsel answered, "I, I did, and, and I don't believe they used anything that was more than ten years old." (App. p. 698, lines 2-3). PCR counsel then asked, "Do you – if one—did you open the door to any of the – did you mention the convictions when he first testified?" (App. p. 698, lines 12-14). Trial counsel answered, "I, I – now that you mentioned that, I did – again, I was trying to put my bullet holes in front, and so I did, yes." (App. p. 698, lines 15-17). PCR counsel then asked, "Would you agree that if any of those convictions could not of been used based on a 403 balancing test that that could prejudice the jury against my client?" (App. p. 698, lines 18-20). Trial counsel answered, "It could have." (App. p. 698, line 21). Trial counsel also agreed the convictions could have affected Petitioner's credibility. (App. p. 698, lines 22-25).

PCR counsel asked trial counsel, "Was it part of your strategy to open the door to convictions that could not be used against my client in front of the jury." (App. p. 699, lines 9-

11). Trial counsel answered, "It was not." (App. p. 699, line 12). Trial counsel then explained, "And – but I would, I would, again, go into the – even, even if I said, if I mentioned a crime that would not have been admissible on the 403 balancing scale, nobody got hurt, there were – was no weapons used, and, and that the point I was trying to make. While, while he had a criminal history, it was not a physically violent criminal history." (App. p. 699, lines 14-20). The following then took place between PCR counsel and trial counsel:

> Q. But, by definition, under the law, those crimes are limited in their -- in front of the jury because it can prejudice the jury?
>
> A. I agree with that statement.
>
> Q. And you have no reason to believe that it, in this case, if some of them were admitted that shouldn't of been admitted, that it would of – it could of prejudiced the jury?
>
> A. It could have.
>
> Q. It could of called the trial into question of whether the actual facts of the case were being tried or the reputation of my character – of my client's character was being tried?
>
> A. It could have.

(App. p. 699, line 21 – p. 700, lines 1-9).

After the trial and prior to sentencing the judge asked about Petitioner's prior record and the prosecutor stated, "Dating – these are from the State of Ohio, dating back to 1977, burglary, robbery, and forgery. 1981, grand theft. 1984, theft. Appears to be two counts. 1991, drug abuse. That's the way they phrased it on the rap sheet. Two counts of drug abuse. 2001, bank robbery." (App. p. 602, lines 10-16). Petitioner's trial took place on April 13, 2009.

Trial counsel was ineffective for questioning Petitioner, in front of the jury, about his nine-page extensive criminal record, dating back to 1977, and then again mentioning the nine-page criminal record in closing argument. Pursuant to Rule 609(b), the State could only have

2001 bank robbery to impeach Petitioner's credibility. Any preemptive reference by trial counsel should have been limited to the 2001 bank robbery.

Rule 609(b) SCRE provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

The 2001 bank robbery is the only conviction that is not precluded by the ten year time limitation set forth in the rule and there is no evidence that the State provided written notice of intent to use the older convictions. Trial counsel was ineffective for referencing inadmissible convictions. As Petitioner's credibility was a critical factor to be determined by the jury, Petitioner was prejudiced by trial counsel's error.

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 for questioning Petitioner, in front of the jury, about his nine-page extensive criminal record, dating back to 1977, and then again mentioning the nine-page criminal record in closing argument. The only conviction that should have referenced was the 2001 bank robbery conviction. There is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue. Alternatively, this Court should remand the case to allow the PCR court to make specific findings in regard to this issue that was raised during the PCR hearing.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of January, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert J. Phipps 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 Paul M. Burch, which was held on September 19, 2016, 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 Robert J. Phipps.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of January, 2019.

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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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 Johnny Ellis James, Jr., Esquire, and Jacob Isenberg, 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 Robert J. Phipps, #334249, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of January, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.