

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Honorable Letitia H. Verdin, Circuit Court Judge

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S.C. SUPREME COURT

FURMAN E. TAYLOR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001587

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of surveillance footage law enforcement obtained from a pawnshop pursuant to State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), where there was evidence an investigator had an opportunity to delete a portion of the footage which would have exonerated Petitioner, specifically, it would have shown the individual who committed the burglary with Amanda Caldwell, and where Petitioner was prejudiced because if trial counsel had objected on these grounds, there is a reasonable probability the trial judge would have excluded the footage or dismissed the indictments.9

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of surveillance footage law enforcement obtained from a pawnshop pursuant to State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), where there was evidence an investigator had an opportunity to delete a portion of the footage which would have exonerated Petitioner, specifically, it would have shown the individual who committed the burglary with Amanda Caldwell, and where Petitioner was prejudiced because if trial counsel had objected on these grounds, there is a reasonable probability the trial judge would have excluded the footage or dismissed the indictments?

STATEMENT OF THE CASE

During the afternoon hours of May 19, 2012, T.R. Perry and his brother, David, drove to Renna Taylor's house on Old White Horse Road in Travelers Rest to pick up her garbage. App. 259, ll. 22-23; App. 278, l. 16 – 279, l. 12. Taylor was out of town for the weekend visiting friends in North Carolina. App. 259, ll. 10-20. When T.R. and his brother arrived, they saw a blue and white Ford Aerostar van parked in the driveway. App. 281, ll. 14-20; App. 318, ll. 3-7. T.R., who occasionally did work for Taylor on the side, did not recognize the vehicle. App. 279, ll. 5-12; App. 282, ll. 9-12. Shortly after T.R. and David got out of T.R.'s truck, a white male and female came running out of the front door of the house. The woman got into the driver's seat of the van while the man jumped into the passenger seat saying, "Go, go, go." Neither T.R. nor David got a good look at them before they fled. App. 284, l. 5 – 285, l. 17; App. 318, l. 15 319, l. 5; App. 319, l. 25 – 320, l. 5. The man was wearing blue jeans, a black hoodie, and a black hat. He had a long ponytail and a goatee. App. 285, ll. 6-10; App. 287, l. 22 – 288, l. 10. However, neither T.R. nor David could provide any description of the woman. David thought she had reddish-brown hair.¹ App. 284, ll. 19-22; App. 320, ll. 6-18. After the man and woman left, T.R. told David, "I believe she [Taylor] just got robbed." App. 286, ll. 15-19.

T.R. immediately called Reena Taylor. He asked Taylor whether she knew anyone who owned a blue and white van. Taylor said no. He asked her whether anyone was supposed to be at her house. She again said no. T.R. then told Taylor what he observed. Taylor asked T.R. to wait for the police to arrive and to stay at the house until she came home. App. 260, l. 19 – 261,

¹ Both T.R. and David were later shown two photographic lineups—one of male subjects and one of female subjects—but neither could make any identification. App. 290, l. 19 – 291, l. 10; App. 413, ll. 10-20.

l. 9; App. 286, l. 15 – 287, l. 12; App. 318, ll. 8-14; App. 321, l. 20 – 322, l. 1. After she finished talking with T.R., Taylor called the Greenville County Sheriff's Office and reported the burglary. App. 261, ll. 9-17. When she arrived home, an officer was waiting for her. App. 261, ll. 18-22.

The storm door leading to Taylor's back porch was pried open. The door from the porch leading into the kitchen was also pried open and the glass panel nearest to the door lock was broken out. App. 261, l. 18 – 262, l. 10. There was glass all over the kitchen floor and the house was in disarray. App. 265, ll. 12-14; App. 299, l. 5 – 300, l. 22. A handgun was stolen from Taylor's nightstand beside her bed. A DVD player, a laptop computer, and some jewelry were also missing. App. 265, ll. 12-25.

Taylor was able to provide law enforcement with the serial number for the DVD player. App. 18-22. An investigator entered the serial number into LeadsOnline, a national database used by pawnshops and other businesses to report transactions. App. 394, l. 21 – 395, l. 8; App. 399, ll. 10-21. The investigator discovered that the stolen DVD player and a gold necklace had been pawned at Cash America Pawn on East North Street on May 19, 2012, the day of the burglary, by Amanda Caldwell. App. 395, ll. 9-18; App. 400, ll. 6-13. The investigator also learned that earlier that same day Amanda Caldwell had pawned a camera stolen during a separate burglary at a Cash America Pawn located on Forest Bridge Road. App. 400, ll. 11-25; App. 403, ll. 13-22. The investigator went to both pawnshops, recovered the stolen items, and obtained surveillance footage of Amanda Caldwell selling the items. App. 403, ll. 13-22.

Based on this evidence, law enforcement obtained arrest warrants for Caldwell. After receiving a tip, officers located Caldwell on May 31, 2012. She was sitting in the front passenger seat of a blue and white Ford Aerostar van parked in a McDonald's parking lot. Petitioner was sitting in the driver's seat of the van at the time of Caldwell's arrest. He was

permitted to leave after officers confirmed he had no active arrest warrants. App. 339, l. 18 – 342, l. 23; App. 360, l. 23 – 361, l. 16.

On June 1, 2012, the day after Caldwell was arrested, she was interviewed by Investigator Brady Mashak. App. 408, l. 15 – 410, l. 19. Caldwell “blamed” the burglary on Tyler Whitman and Katherine Sasser. App. 362, l. 19 – 364, l. 22; App. 368, l. 5 – 369, l. 20. However, several days later, Mashak interviewed Caldwell again. During this second interview, Caldwell implicated Petitioner. App. 365, l. 12 – 367, l. 11. Based on Caldwell’s allegations, Mashak obtained arrest warrants for Petitioner. App. 410, l. 23 – 412, l. 12.

A Greenville County Grand Jury indicted Petitioner on April 23, 2013 for first degree burglary and petit larceny. App. 928-931. The case was called to trial on February 11, 2014 before the Honorable R. Knox McMahan, and a jury. App. 1. Assistant Solicitor Mark Moyer represented the state, and Robert Ianuario represented Petitioner. App. 1. Judge McMahan declared a mistrial after the jury could not reach a unanimous decision. App. 191, l. 2 – 193, l. 4.

Petitioner’s case was called to trial again on January 5, 2015 before the Honorable D. Garrison Hill, and a jury. App. 196. Assistant Solicitor Matthew Wallace represented the state, and Alex Kornfield represented Petitioner. App. 196.

Amanda Caldwell testified against Petitioner at trial. App. 347, l. 23 – 391, l. 24. She had pled guilty to second degree burglary related to this case, but her sentencing was deferred until after she testified against Petitioner. App. 361, l. 21 – 362, l. 11. She was impeached on cross-examination with her various inconsistent statements concerning the burglary.

During the trial, the state sought to admit the surveillance footage from the two Cash America Pawn stores where Caldwell is seen pawning the stolen items. Investigator Brady Mashak, who obtained the footage from the pawnshops, testified that he requested a copy of the

footage from the time Caldwell “entered the store to when [she] exited the store.” App. 403, l. 21 – 404, l. 23; App. 416, l. 8 – 417, l. 6. He was given a copy of the footage from both stores. He testified that he brought the DVDs containing the footage back to his office, viewed them and burned a copy of each, and then ultimately turned the DVDs into “property and evidence.” App. 404, ll. 20-23.

Defense counsel objected to the admission of the surveillance footage. His argument pretrial was pursuant to Kyles v. Whitley, 514 U.S. 419 (1995) and Rule 5, SCRCrimP. Counsel explained that the footage provided began when Caldwell was seen at the counter of the pawnshop. It did not include the earlier footage when Caldwell first entered the store. Counsel said it appeared the state only included the footage it found relevant, but Petitioner wanted the “extended version” because it contained exculpatory evidence. Specifically, it would show that there was a man with Caldwell who was clearly not Petitioner. App. 237, l. 17 – 238, l. 10. Defense counsel told the judge he had subpoenaed this additional footage from the pawnshop, but the business said it could not produce the footage due to its limited retention period. The state further maintained it never had the “extended version.” App. 234, l. 10 – 239, l. 25.

The trial judge denied the motion to exclude the video. He found there was no evidence the extended footage was unavailable due to any bad faith or other improper conduct on behalf of the state. Moreover, he ruled the state could not “control the retention policy of a third party . . . [a]nd there’s no proof that the state ever had the longer version.” App. 240, ll. 1-8.

When the DVDs of the surveillance footage were ultimately offered into evidence, defense counsel failed to renew his previous objection. Instead, his contemporaneous objection was based on relevance grounds. App. 429, ll. 1-6; App. 438, l. 10 – 439, l. 23. The judge admitted the DVDs over objection. App. 439, l. 23. The surveillance footage from Cash

America Pawn on the morning before the burglary where Caldwell was seen pawning a camera showed a male wearing a black hat, dark shirt, and blue jeans. Caldwell identified this individual as Petitioner. The footage from the second Cash America Pawn showed Caldwell pawning the DVD player stolen from Renna Taylor's residence. A man is seen on this footage wearing a John Deere hat, a reddish-orange shirt, and blue jeans. Caldwell again identified this individual as Petitioner. She claimed he had changed clothes after the burglary of Taylor's residence. App. 440, l. 9 – 444, l. 14.

The jury found Petitioner guilty as indicted. App. 506, l. 22 – 507, l. 9. Judge Hill sentenced Petitioner to life without parole for first degree burglary pursuant to S.C. Code Ann. § 17-25-45 and thirty days for petit larceny. App. 512, ll. 15-23.

Petitioner's direct appeal was dismissed by the Court of Appeals after a review pursuant to Anders v. California, 386 U.S. 738 (1967). App. 611-612.

On October 3, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 614-626. The state filed a return to this application on March 7, 2017. App. 627-636. An evidentiary hearing was convened on October 27, 2017 before the Honorable Letitia H. Verdin. App. 637. Assistant Attorney General DeShawn Mitchell represented the state, and Susannah Ross represented Petitioner. App. 637.

Petitioner testified at the evidentiary hearing that Investigator Brady Mashak stated he had requested footage from Cash America Pawn showing from the time Amanda Caldwell entered the store until she left the store. However, the footage Petitioner received through discovery began when Caldwell was already at the counter and did not show her entering the store. Petitioner testified that the additional footage would have exonerated him because the individual the Perry brothers described "was on the first part of that video. He came there [to the

pawnshop] with her [Caldwell].” Petitioner explained he only came to the pawnshop later to jumpstart the man’s vehicle who was with Caldwell. App. 643, l. 21 – 644, l. 25.

Petitioner testified that Investigator Mashak admitted that after he obtained the footage from the pawnshops he brought the DVDs back to his office to view them and make copies before placing them in property and evidence. This showed Mashak “had the opportunity to distort those videos.” App. 647, ll. 1-10. Petitioner asserted, “[T]here’s no telling what he [Mashak] distorted or changed in the video before it was used at trial.” App. 649, ll. 1-3.

By order filed July 31, 2018, the PCR judge denied Petitioner relief ruling Petitioner had failed to prove deficient performance or resulting prejudice. App. 899-923. The judge found trial counsel “made a motion to exclude the video from the pawnshop and diligently sought to protect [Petitioner’s] rights.” App. 916. The PCR judge emphasized “the trial court found that there was no proof that the State had evidence that was not available due to some bad faith on their part or other improper conduct or that they ever had the longer version of the video.” App. 916. The judge concluded Petitioner had failed to show an extended version of the surveillance video ever existed. App. 916.

On August 7, 2018, Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC. App. 924. The PCR judge denied this motion by a Form 4 order filed August 15, 2018. App. 925.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of the surveillance footage Investigator Mashak obtained from Cash America Pawn pursuant to State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), where there was evidence Mashak had an opportunity to delete a portion of the footage which would have exonerated Petitioner, and since Petitioner was

prejudiced because if trial counsel had objected on these grounds, there is a reasonable probability the trial judge would have excluded the footage or dismissed the indictments, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of surveillance footage law enforcement obtained from a pawnshop pursuant to *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001), where there was evidence an investigator had an opportunity to delete a portion of the footage which would have exonerated Petitioner, specifically, it would have shown the individual who committed the burglary with Amanda Caldwell, and where Petitioner was prejudiced because if trial counsel had objected on these grounds, there is a reasonable probability the trial judge would have excluded the footage or dismissed the indictments.

Trial counsel was ineffective when he failed to object to the admission of the surveillance footage from Cash America Pawn pursuant to *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) when there was evidence Investigator Mashak had an opportunity to alter the footage before he placed the DVDs into property and evidence. Mashak testified that he requested the pawnshop provide him with footage from when Amanda Caldwell entered the store until when she left the store. However, the footage Petitioner received from the prosecution, which was ultimately admitted over objection during trial, began when Caldwell was already at the counter. Footage of what occurred before Caldwell reached the counter would have exonerated Petitioner because it would have shown the individual Caldwell was with when she committed the burglary for which Petitioner was being tried. Petitioner was prejudiced by counsel's deficient performance because if counsel would have objected to the admission of the footage on these grounds, there is a reasonable probability the trial judge would have excluded the footage or dismissed the indictments.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “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; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant’s fundamental right to a fair trial.” State v. Reaves, 414 S.C. 118, 125, 777 S.E.2d 213, 216 (2015) (citing U.S. Const. amend. XIV). “Where a defendant’s right to a fair trial due to missing or destroyed evidence is at issue, the applicable standard is derived from the United States Supreme Court’s opinion in Arizona v. Youngblood, 488 U.S. 51 (1988). Id. “Rejecting an approach which would impose on the State an absolute duty to retain and preserve

all potentially exculpatory evidence, the Court instead crafted a standard which focused on police conduct where evidence was lost or destroyed.” Id. at 126, 777 S.E.2d at 217. The United States Supreme Court stated:

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Youngblood, 488 U.S. at 58.

“To establish a due process violation, 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.” State v. Cheeseboro, 346 S.C. 526, 538-539, 552 S.E.2d 300, 307 (2001) (citing State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991) and State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990)).

Here, it is undisputed that after Investigator Mashak obtained the DVDs containing the surveillance footage from Cash America Pawn, he returned to his office before placing the DVDs into property and evidence. While Mashak maintained he merely viewed the footage and burned a copy of the DVDs, he clearly had an opportunity to distort or alter the footage, which is evidence the missing footage was destroyed in bad faith. Given this clear evidence, trial counsel should have objected to the admission of the DVDs pursuant to Cheeseboro and argued Mashak acted in bad faith. In the alternative, counsel should have argued the footage possessed an exculpatory value apparent before it was destroyed. Footage of what occurred before Caldwell reached the counter would have exonerated Petitioner because it would have shown the

individual Caldwell was with when she committed the burglary for which Petitioner was being tried. The exculpatory nature of this footage would have been obvious to Mashak. Counsel's failure to object on these grounds constitutes ineffective assistance of counsel.

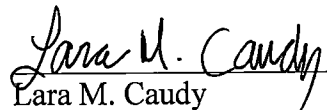
Petitioner was prejudiced by counsel's deficient performance because had counsel objected to the admission of the surveillance footage pursuant to Cheeseboro, there is a reasonable probability the trial judge would have excluded the footage, which would have affected the outcome of Petitioner's trial, or would have dismissed Petitioner's indictments.

Consequently, the PCR court erred by denying Petitioner relief. Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court, find trial counsel rendered ineffective assistance, and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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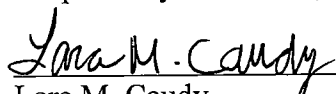
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Furman Eugene Taylor 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, which was held on October 27, 2017 before the Honorable Letitia H. Verdin, and, in her opinion, seeking certiorari from the order of dismissal is without merit.
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 Furman E. Taylor.

Respectfully Submitted,



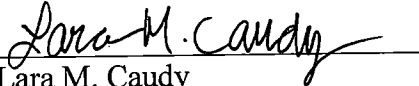
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of February, 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."


Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
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PO Box 11589
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ATTORNEY FOR PETITIONER

This 13th day of February, 2019.

STATE OF SOUTH CAROLINA
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FURMAN E. TAYLOR,

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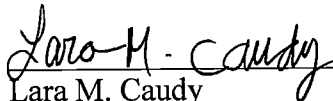
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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

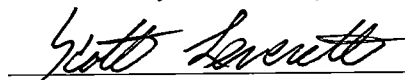
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Furman Eugene Taylor, #198161, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 13th day of February, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of February, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.