

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County

J. Mark Hayes, II, Circuit Court Judge

ORIGINAL
RECEIVED

MAR 05 2019

S.C. SUPREME COURT

JAMAL HAKEEM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001116

JOHNSON PETITION FOR WRIT OF CERTIORARI

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court’s finding that trial counsel objected contemporaneously to key evidence offered by the state is not supported by the record, and trial counsel rendered deficient performance prejudicial to Petitioner by failing to object contemporaneously to the key evidence in light of his motion *in limine* that the state violated Petitioner’s Fourth Amendment rights by searching his house pursuant to consent obtained by police coercion.....5

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL.....12

ISSUE PRESENTED

Was the PCR court's finding that trial counsel objected contemporaneously to key evidence offered by the state supported by the record, and did trial counsel render deficient performance prejudicial to Petitioner by failing to object contemporaneously to the key evidence in light of his motion *in limine* that the state violated Petitioner's Fourth Amendment rights by searching his house pursuant to consent obtained by police coercion?

STATEMENT

During the afternoon of April 11, 2013, someone robbed the Shell gas station in Greenwood. App. 102, ll. 20-21; App. 104, ll. 1-5; App. 104, l. 20 – App. 105, l. 20; App. 133, ll. 10-18. The robber approached the counter with a beer and asked for three packs of Newport cigarettes. App. 104, l. 23 – App. 105, l. 3. The cashier requested the robber's date of birth due to the legal age requirements for purchases of tobacco and alcohol. App. 105, ll. 4-7. The robber provided his date of birth and revealed he was armed with a gun. App. 105, ll. 8-13. After the robber got cash from the register, he left. App. 105, ll. 18-20. The police arrived at the store within minutes of the robbery. App. 107, ll. 22-25; App. 133, ll. 22-25.

The cashier gave the responding officer the date of birth used by the robber. App. 108, ll. 8-11; App. 135, ll. 2-4. The officer contacted SLED with the name of the person associated with that date of birth to obtain a photographic line-up. App. 135, l. 14 – App. 136, l. 12. After the cashier selected Petitioner from a photographic line-up, the police went to Petitioner's house. App. 108, l. 12 – App. 109, l. 22; App. 137, ll. 5-15; App. 139, l. 20 – App. 140, l. 2. Although Petitioner was not at home, his wife was. App. 140, ll. 3-8. At the request of the police, Petitioner's wife called him and requested he return home to meet with the police. App. 141, ll. 2-6. Shortly thereafter, Petitioner arrived home, where he was immediately arrested and transported to the police station. App. 141, ll. 7-12; App. 142, ll. 15-21.

The police wanted to search Petitioner's home, but they did not request his consent or seek a search warrant. App. 155, ll. 2-9. Instead, the police requested Petitioner's wife consent. App. 146, ll. 6-16; App. 147, ll. 2-11. While the police denied any coercive conduct, Petitioner's wife explained that the police informed her they did not have a search warrant, but if she permitted the police to search, then the police would not rough up anything in the house. App,

171, ll. 13-16. The officer warned that if he had to get a search warrant, then the police officers would be upset and destroy the contents of the house. App. 171, ll. 16-19. Due to this threat, Petitioner's wife consented to the search. App. 171, l. 20.

Inside the home, the police seized a pair of jeans and a "multicolored with gray hooded jacket." App. 125, ll. 12-25; App. 147, ll. 20-25 (describing an item as a "hooded plaid sweatshirt type garment"). One officer claimed that in the pockets of the "plaid hoodie", the police found "two unopened packs of Newport cigarettes." App. 148, ll. 1-2. Additionally, the police found a pair of blue jeans and a white t-shirt. App. 148, ll. 7-15.

On June 5, 2015, a Greenwood County grand jury indicted Petitioner for armed robbery (2015-GS-24-855) and possession of a weapon during the commission of a violent crime (2015-GS-24-856). App. 325-326; App. 328-329. The state, represented by Yates Brown and Wade Downtin, called the case for trial before the Honorable Edward W. Miller and a jury on July 13-14, 2015. App. 1. Geddes Anderson represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 221, l. 23 – App. 22, l. 5. Judge Miller sentenced Petitioner to twenty-five years imprisonment for armed robbery and five years imprisonment for the weapon. App. 230, ll. 3-6; App. 327; App. 330.

Petitioner filed a direct appeal, which was perfected by Kathrine H. Hudgins. App. 232-244. In the brief filed pursuant to Anders v. California, 386 U.S. 738 (1967), Petitioner challenged the trial judge's refusal to suppress evidence found during a search of Petitioner's home. App. 232-244. The Court of Appeals dismissed the appeal. State v. Hakeem, Op. No. 2017-UP-075 (S.C. Ct. App. filed Feb 8, 2017); App. 245-246. Remittitur was sent on February 24, 2017. App. 247.

On May 16, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 248-259. On February 20, 2018, Petitioner filed an amended PCR application. App. 268-270. On February 27, 2018, an evidentiary hearing convened before the Honorable J. Mark Hayes, II. App. 271. Ashley McMahan represented Petitioner. App. 271. Justin Hunter represented the state. App. 271. By an order filed on May 7, 2018, Judge Hayes denied relief. App. 309-324.

On June 15, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR court's finding that trial counsel objected contemporaneously to key evidence offered by the state is not supported by the record, and trial counsel rendered deficient performance prejudicial to Petitioner by failing to object contemporaneously to the key evidence in light of his motion *in limine* that the state violated Petitioner's Fourth Amendment rights by searching his house pursuant to consent obtained by police coercion.

Relevant facts

Trial counsel moved *in limine* to exclude the items seized during a warrantless search of Petitioner's home based upon a violation of the Fourth Amendment to the United States Constitution. App. 22, ll. 19-21. During the pre-trial hearing on the motion, the state presented evidence that Petitioner's wife consented to the search. App. 25, l. 16 – App. 26, ll. 21. Petitioner presented evidence that his wife consented to the search only after law enforcement threatened her. App. 52, ll. 13-18; App. 58, ll. 9-18. The trial judge concluded that Petitioner's wife lived in the home and had custody of the home. App. 71, ll. 13-15. He further found that Petitioner's wife "testified she gave free and voluntary consent." App. 71, ll. 15-16. Based upon this finding, the judge denied Petitioner's motion to suppress. App. 71, ll. 16-19.

When the state sought to introduce these items into evidence, trial counsel renewed his motion *in limine* as to the jeans, but he failed to renew his objection to the distinctive hoodie. App. 150, ll. 5-7; App. 157, ll. 5-7.

During his closing argument, trial counsel claimed the video of the robbery was "somewhat fuzzy." App. 191, ll. 6-7. However, the perpetrator's clothing was clear. App. 191, l. 11. The solicitor focused on the perpetrator's clothing as well. He noted the cashier described the perpetrator as wearing a plaid jacket. App. 200, l. 21. The jacket was central to

the prosecutor's case: "Again, what does he have on? He's got on a distinctive colored jacket. Some jacket that can be picked out like a sore thumb. The jacket is plaid. It's got a hoodie on it." App. 201, ll. 13-15. Regarding the jacket found in Petitioner's home, the solicitor claimed it was the "[s]ame jacket Ms. Hakeem says belonged to her husband. Same jacket that's on video from the inside of the Shell gas station, and it's the same jacket that had been burned in the back of the memory of Shea Smith when he put that gun at her – pointed that gun at her." App. 204, ll. 4-9.

During the PCR hearing, Petitioner complained about trial counsel's failure to object contemporaneously to the admission of the jacket into evidence at his trial. App. 276, ll. 11-16. Trial counsel recalled the video showed a perpetrator in a "distinctive" "hoodie-type of clothing." App. 296, ll. 8-10. Trial counsel further recalled that he moved to suppress the evidence seized in Petitioner's home as the product of an illegal search. App. 297, ll. 1-12. He acknowledged that he failed to renew his objection when the state moved to introduce the jacket into evidence. App. 297, ll. 13-15. He tried to excuse this failure, claiming he was "distracted by something. App. 297, ll. 13-15. He further claimed that when he said, "no objection" it was "an inadvertent remark." App. 297, ll. 18-24. Trial counsel indicated the jacket was crucial to the state's case: "[O]nce they get that in, I don't see how in the world you're going to come out favorably in this trial." App. 298, ll. 2-5.

The PCR judge denied Petitioner relief on his claim that trial counsel failed to object contemporaneously to the hooded jacket. App. 312-313. The PCR judge explained that trial counsel moved to excluded prior to trial. App. 313. Next, the PCR judge noted counsel objected when a photograph of the jacket was admitted. App. 313. Thus, the PCR court found counsel "was not ineffective as he did effectively challenge the introduction of the hooded jacket and

contemporaneously as it was entered into evidence.” App. 313. As explained, the PCR judge’s conclusion was not supported by facts in the record because it was undisputed that trial counsel failed to object when the jacket was introduced.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Respondent must establish that counsel’s representation fell below an objective standard of reasonableness, and that counsel’s deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). “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.” Strickland, 466 U.S. 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.

“Representation of a criminal defendant entails certain basic duties.” Id. at 688. Counsel has “the overarching duty to advocate the defendant’s cause” and “a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Id. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. South Carolina’s preservation rules require a contemporaneous objection in order to preserve for appeal a motion *in limine*. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600(1999); State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993); Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011). In a case strikingly similar to Petitioner’s, McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013), this Court held that McHam’s counsel’s “failure to renew the Fourth Amendment objection” when the drugs were actually admitted into evidence “constituted deficient performance” where the drugs were the most critical piece of evidence. See also Gibbs v. State, 403 S.C. 484, 493-495, 744 S.E.2d 170, 174-176 (2013) (analyzing trial counsel’s failure to object contemporaneously to the identification testimony under the prejudice prong only).

The record does not support the PCR judge’s finding that trial counsel challenged the hooded jacket contemporaneously when it was admitted into evidence. In fact, the trial transcript makes clear that trial counsel did not object contemporaneously. Instead, trial counsel said, “no objection.” Furthermore, trial counsel admitted during the PCR hearing that he did not object contemporaneously when the jacket was introduced into evidence. Trial counsel claimed his response of “no objection” was inadvertent. Nonetheless, it was a failure to contemporaneously object, which was deficient performance.

“It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is ‘per se unreasonable ... subject only to a few

specifically established and well-delineated exceptions.” Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347 (1967)). One of those exceptions “is a search that is conducted pursuant to consent.” Id. The burden is on the state to prove the consent was freely and voluntarily given. Id. at 222 (citing Bumper v. North Carolina, 391 U.S. 543, 548 (1968)). “[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.” Id. at 228.

“[T]he question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.” Id. at 227. “The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the circuit judge.” State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005). “A trial judge’s conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion.” Id. at 106, 623 S.E.2d at 851-852. “In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.” Schneckloth, 412 U.S. at 229. “[A] threat to obtain a warrant is a factor to be considered in determining the voluntariness of consent.” State v. Wallace, 269 S.C. 547, 551, 238 S.E.2d 675, 676 (1977); see also State v. Greene, 330 S.C. 551, 558, 499 S.E.2d 817, 820 (Ct. App. 1997).

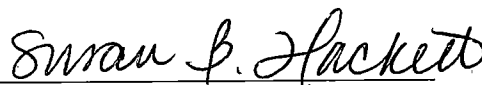
Some of the additional factors considered by the South Carolina appellate courts when evaluating the totality of the circumstances surrounding a purported consent to search include

whether the individual giving consent was in custody, the competency of the person giving consent, whether the police engaged in any overt act, threat of force, or other form of coercion, whether the individual had the ability to read if the consent to search were requested via a written form, whether the person unlocked the door for police. See e.g., State v. Mattison, 352 S.C. 577, 584-585, 575 S.E.2d 852, 855-856 (Ct. App. 2003); Greene, 330 S.C. at 558, 499 S.E.2d at 820.

Had trial counsel preserved his objection to introduction of the jacket based upon law enforcement conducting a warrantless search based upon involuntary consent, then an appellate court, reviewing the trial judge's decision regarding the voluntariness of the consent to search, would likely have reversed the conviction. Petitioner's wife made clear that her consent was given only after multiple police officers had drawn weapons on her causing tremendous emotional stress, after an officer threatened to destroy the contents of her home if she did not consent rendering the obtaining of a search warrant necessary, and after her husband had been arrested at gunpoint. Petitioner's wife's consent was not freely given. The jacket was key evidence for the state. The identity of the robber was unclear from the video, but the jacket was clear in the video. Additionally, it was a distinctive jacket, making it a key piece of evidence for identifying the robber. The state's closing argument demonstrated the necessity of the jacket to the state in making its case against Petitioner. Trial counsel's failure to object contemporaneously at the time the jacket was introduced into evidence was not mere inadvertence; rather, it was deficient performance prejudicial to Petitioner as the jacket provided the lynchpin in the state's case against him.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.


Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County

J. Mark Hayes, II, Circuit Court Judge

JAMAL HAKEEM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamal Hakeem 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 J. Mark Hayes, II, which was held on February 27, 2018, 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 Jamal Hakeem.

Respectfully Submitted,


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of March, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

J. Mark Hayes, II, Circuit Court Judge

JAMAL HAKEEM,

PETITIONER

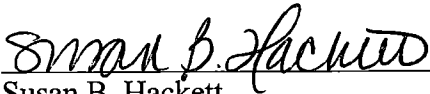
V.

STATE OF SOUTH CAROLINA,

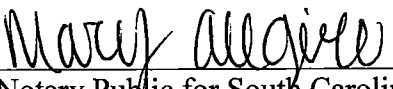
RESPONDENT

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 Janell Gregory, 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 Jamal Hakeem, #364712, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of March, 2019.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.