STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lancaster County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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APR 22 2019

S.C. SUPREME COURT

BENECO A. GANSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001736

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding that Petitioner received effective assistance of counsel, where during trial counsel's first trial, counsel failed to object to a "hand of one is the hand of all" argument during the State's closing argument, where that concept was not charged to the jury?

STATEMENT

A Lancaster County grand jury indicted Petitioner for burglary in the first degree on April 10, 2014. App. 210 – 211. Petitioner proceeded to trial before the Honorable Brian M. Gibbons and a jury on June 24, 2014. App. 1. Petitioner was represented by Brandon Steen, and Randy Newman served as the solicitor.

The jury found Petitioner guilty as indicted following a two-day trial. App. 96 ll. 8 – 10. Judge Gibbons sentenced him to twenty years' incarceration. App. 100 ll. 20 – 21. Petitioner's conviction was affirmed. State v. Ganson, Op. No. 2016-UP-107 (S.C. Ct. App. March 2, 2016).

Petitioner filed a timely application for post-conviction relief on January 4, 2017. App. 102 – 119. It contained allegations of ineffective assistance of counsel, including allegations that trial counsel failed to adequately cross-examine a witness and failed to object to a portion of the State's closing argument. App. 109 – 112. The State made its Return on or about June 8, 2017. App. 120 – 125.

An evidentiary hearing took place before the Honorable Brooks P. Goldsmith on July 16, 2018. App. 126. Steven Fowler represented Petitioner, and DeShawn Mitchell appeared on behalf of the State. Petitioner and trial counsel testified at the hearing. Judge Goldsmith denied relief at the hearing, and an Order of Dismissal was signed on August 18, 2018. Judge Goldsmith found that trial counsel's representation was within reasonable professional norms. App. 205.

This petition follows.

ARGUMENT

The PCR court erred in finding that Petitioner received effective assistance of counsel, where during trial counsel's first trial, counsel failed to object to a "hand of one is the hand of all" argument during the State's closing argument, where that concept was not charged to the jury.

Relevant facts

Trial counsel began working as a public defender on May 27, 2014. App. 175 ll. 2 – 12. At that time, Petitioner was already on the trial list. Id. According to counsel, Petitioner's trial date was certain, and Petitioner was first on the trial docket the week of June 24, 2014, less than a month after trial counsel began his new employment. Petitioner's trial was counsel's first trial. App. 176 ll. 9 – 15.

Petitioner estimated a five-month window between the time he was charged and the beginning of his trial. App. 148 ll. 1 – 25. During that span, Petitioner's original counsel, Mark Grier, was relieved. Id. Trial counsel was then appointed to his case. App. 174 l. 23 – App. 175 l. 1.

The facts allegedly giving rise to Petitioner's arrest took place on or about December 6, 2013. App. 34 ll. 19 – 23. According to Rodynka Howze, Petitioner texted her and asked if she was home. App. 34 l. 24 – App. 35 l. 12. Petitioner had been at her house the night before. App. 34 ll. 1 – 11. Howze and Petitioner had known each other for no more than five years. App. 33 ll. 24 – 25. Howze testified that she heard Petitioner and another person on her front porch in the early morning hours when Petitioner was supposedly texting her. App. 35 ll. 9 – 21.

Howze indicated that she responded to Petitioner's texts and told him she was not home. App. 35 ll. 21 – 25. She claimed that she then heard Petitioner tell the other person to kick the

door in. App. 36 ll. 1 – 23. Howze testified that she then confronted Petitioner and the other person. App. 37 ll. 10 – 22. When she asked what they were doing, they ran. Id. Although it was not in her initial statement to police, Howze testified at trial that Petitioner and the other man were moving her television. Id.; App. 44 ll. 10 – 20. She called the police. App. 40 ll. 1 – 9.

Petitioner was arrested on January 9, 2015. App. 70 ll. 5 – 8. During the course of law enforcement's investigation, Howze misidentified the other individual but claimed that she was certain Petitioner was one of the men. App. 41 ll. 2 – 10. Notably, fingerprints taken from the television did not match Petitioner. App. 52 ll. 1 – 8; App. 58 ll. 4 – 15.

During the State's closing argument, the assistant solicitor alluded to the "hand of one" theory:

> Someone kicked the door in, and it doesn't matter who kicked it. The guy who said to kick it in is just as guilty as the guy who did that. All you need to do to commit a burglary is enter the house without permission.

App. 79 ll. 2 – 6. Trial counsel did not object to this statement.

In addition to failing to object to the above remark, Petitioner indicated that counsel could have better investigated his case and suggested that a more thorough investigation would have resulted in a different outcome at trial. App. 131 l. 20 – App. 132 l. 2. Petitioner opined that counsel did not have enough time to review the case and then, in turn, adequately defend him. App. 149 ll. 1 – 5.

Petitioner outlined some of the weaknesses in the State's case against him and suggested that counsel could have discovered these shortcomings had he thoroughly investigated and prepared. For example, Petitioner did not kick in the door at the time of the alleged burglary, and he did not intend to commit a crime inside. App. 165 ll. 1 – 24. Petitioner just wanted to go into Rodynka Howze's house and get his clothes and leave. App. 165 ll. 8 – 13. Had trial

counsel met with Petitioner more than twice, these important facts would have been uncovered. Because no more discussions took place, the two never discussed any possible defenses prior to the day of trial. App. 167 ll. 1 – 17. As confirmed by trial counsel, the topic of a bond hearing was the main item of discussion. Id.; App. 175 l. 24 – App. 176 l. 8. Petitioner never intended to commit a crime after entering the house. App. 172 ll. 4 – 8. Additional meetings between counsel and Petitioner could have discovered this information.

Nonetheless, Petitioner proceeded to trial and received a twenty year sentence instead of accepting a seven year plea deal. App. 145 ll. 6 – 17. Petitioner testified that had he known counsel was deficient, he would have accepted the plea. Id. He instead relied on trial counsel who "felt like he could get [Petitioner] off by saying that [he] wasn't there" at the scene of the alleged burglary. App. 168 ll. 8 – 15.

Trial counsel admitted at the evidentiary hearing that Petitioner's trial was his first trial. App. 175 l. 2 – 176 l. 15. Petitioner's case was on the "trial list" when trial counsel was appointed his case on his first day at the public defender's office. App. 175 ll. 2 – 10.

Discussion

Petitioner correctly asserted that trial counsel was ineffective, because he did not object during the State's closing argument. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. "'[T]he court should keep in mind that counsel's function, as elaborated

in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

" 'Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.' " State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." Id. at 262, 647 S.E.2d at 705. "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].' " Id. (alteration in original) (quoting State v. Hill, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987); see Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime.").

Had trial counsel objected to the State's incomplete explanation of the law which went unchallenged and uncharged, the trial court could have remedied the situation by explaining the concept. Trial counsel then could have defended Petitioner's alleged actions by suggesting that

even if Petitioner was at the scene, he did not intend to commit a crime upon entry. As a result, the jury may not have convicted him.

"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The State's case against Petitioner largely relied on Howze's testimony. She alleged he was at the scene with another man. However, had trial counsel objected to the "hand of one is the hand of all" remark during the State's closing argument, the jury could have received guidance from the trial judge about Petitioner's presence at the scene. It was unclear that Petitioner intended to commit a crime upon entry into Howze's home; had trial counsel requested more detailed jury instructions following an objection, the jury could have been more informed about additional defenses available to Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Brooks P. Goldsmith, Circuit Court Judge

BENECO A. GANSON,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Beneco Ganson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brooks P. Goldsmith, which was held on July 16, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Beneco Ganson.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of April, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."

Taylor D Gilliam
Appellate Defender

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ATTORNEY FOR PETITIONER

This 22nd day of April, 2019.

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 has been served upon Samuel Key, 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 Beneco Ganson, #306785, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of April, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of April, 2019.

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