STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Aiken County

Honorable Larry B. Hyman, Circuit Court Judge

---

WAYMON EUGENE NEWTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001995

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

---

Lara M. Caudy
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

## ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when she requested the trial judge instruct the jury on the lesser included offenses of strong armed robbery and petit larceny over Petitioner's strong objections since he preferred an "all or nothing" strategy and where Petitioner was prejudiced because the jury ultimately acquitted him of armed robbery and kidnapping but found him guilty of the lesser included offense of strong armed robbery?

## STATEMENT OF THE CASE

The jury found Petitioner guilty of taking Eartha Herrin's purse on September 30, 2014. The incident took place at Bryant's Auto Sales in Aiken where Herrin worked. A police report listed a purse, credit cards, driver's license, and money as being stolen, but made no mention of any checks missing. App. 159, ll. 3-13. When Investigator Prince with the Aiken County Sheriff's Department interviewed Herrin she did not tell him that any checks were missing. App. 163, ll. 14-19. Petitioner was the one who told the investigator that Herrin had given him the checks as collateral for a drug purchase she was unable to complete. App. 174, l. 1 – 175, l. 19. Herrin denied knowing Petitioner and denied any drug dealing. App. 87, l. 22-24; App. 200, 10-25.

A few days later on October 3, 2014, a vehicle and an individual who matched the description given by Herrin were involved in an accident. App. 143, l. 20 – 144, l. 2. Items belonging to Herrin and Petitioner were found in and around the car. App. 144, l. 17 – 146, l. 4. Herrin identified Petitioner from a six person lineup as the person who took her purse. App. 197, l. 4 – 136, l. 198, l. 18.

At trial, Petitioner admitted cashing the checks but testified that Herrin had given him the checks on September 29, 2014, the day before she reported her purse being stolen. App. 247, ll. 5-23. Petitioner testified that he met Herrin at a drug house in New Ellenton and knew her as "Nae Nae." App. 215, ll. 5-25. Petitioner eventually began to purchase cocaine from Herrin. App. 215, l. 22 – 217, l. 21. Petitioner explained that the checks were collateral for a drug deal Herrin had not been able to complete. App. 220, l. 8 – 227, l. 4. When Petitioner returned to Bryant's Auto Sales on September 30, 2014, Herrin claimed she still did not have the drugs and "the checks would have to be used." App. 227, ll. 1-18. Petitioner did not believe Herrin, grabbed her purse, and found a

bag of pills inside. App. 228, l. 22 – 229, l. 15. Petitioner and Herrin had a physical confrontation and Petitioner admitted to taking the purse. App. 230, l. 1 – 242, l. 10.

An Aiken County Grand Jury indicted Petitioner on April 9, 2015 for armed robbery and kidnapping. App. 346-349. After he was indicted, the state served Petitioner with notice of its intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 395, ll. 10-21. His case was called to trial on June 15, 2015 before the Honorable Doyet A. Early, III, and a jury. App. 1. Assistant Solicitors David Miller and Wilder Harte represented the stated. Wallis Alves and Barry Thompson represented Petitioner. App. 1.

At the end of the presentation of evidence, trial counsel, citing to State v. Abney, 408 S.C. 41, 757 S.E.2d 544 (2014), requested the trial judge instruct the jury on the lesser included offenses of strong arm robbery and petit larceny. App. 261, l. 15 – 262, l. 23. The assistant solicitor agreed the judge should charge strong arm robbery. He stated, "Judge, if the jury believes him [Petitioner], I guess we need to charge the strong-arm robbery." However, he objected to the judge charging petit larceny. App. 261, ll. 18-23. The judge ultimately agreed to charge both strong arm robbery and petit larceny. App. 263, ll. 22-25; See App. 316, l. 8 – 318, l. 2.

On June 16, 2015, the jury acquitted Petitioner of armed robbery and kidnapping, but found him guilty of the lesser included offense of strong arm robbery. App. 330, ll. 2-20. He was sentenced to fifteen years' imprisonment. App. 339, ll. 11-13.

On September 5, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 369-377. The state filed a return to this application dated December 29, 2017. App. 378-384. On April 2, 2018, with the assistance of counsel, Petitioner filed an amended application raising the claim argued in this petition. App. 385-386. An evidentiary hearing was held on August 27, 2018

before the Honorable Larry B. Hyman, Jr. App. 387. Assistant Attorney General Julie Coleman represented the state, and Lance Boozer represented Petitioner. App. 387.

Petitioner testified at the evidentiary hearing that he did not want any lesser offenses charged because he "knew the jury would not want to convict on the armed robbery." App. 405, ll. 22-24. Petitioner "knew he had the jury" and did not want them to consider the lesser charges. App. 406, ll. 5-6. He testified that trial counsel mentioned requesting jury charges on the lesser offenses during his trial, but he specifically told her that he "did not want it." App. 406, ll. 12-24. He explained, "It was all or nothing. That's what I wanted to go for. It was either going to be life [for armed robbery] or it was going to be not guilty." App. 406, l. 25 – 407, l. 12. Petitioner made clear, "I was adamantly against any lesser-included charges." App. 408, ll. 3-4. However, trial counsel told Petitioner, "I control strategy," and requested the judge charge the jury on the lesser included offenses of strong armed robbery and petit larceny despite Petitioner's strong objections. App. 409, ll. 1-7.

After Petitioner was convicted of strong arm robbery, trial counsel moved for a new trial arguing there was no evidence to support the conviction. Petitioner did not understand why counsel would have requested an instruction on strong armed robbery if she believed there was no evidence to support the charge. App. 409, ll. 15-22.

Wallis Alves, Petitioner's trial counsel, testified that, while she had no independent recollection, her notes indicated that she spoke to Petitioner before trial about the possibility of requesting a jury instruction on lesser included offenses. App. 413, l. 6 – 414, l. 22; App. 416, l. 23 – 418, l. 1. As far as during the trial, Alves could not remember whether she and Petitioner discussed requesting the judge charge strong arm robbery. However, she explained, "I can't say we had a conversation or didn't. Most likely we did, because in every single trial I've tried, if I'm

asking for a lesser . . . included offense, the defendant and I discuss it, because it's their life; it's ultimately whether they want to go all or nothing or whether they want to make sure the jury has something lesser to consider, depending on what the evidence is." App. 418, ll. 2-21. Alves maintained that there was evidence to support the instruction on strong arm robbery based on Petitioner's testimony. App. 420, l. 7 – 421, l. 1. Alves continued to believed that it was in Petitioner's best interest to request the lesser included offenses because it the jury believed Herrin then Petitioner may have been convicted of armed robbery and kidnapping and "was looking at life in prison." App. 421, 2-22.

The PCR judge found the evidence in the case warranted an instruction on the lesser included offense of strong arm robbery because there was testimony presented that Petitioner did not cut Herrin until after he had taken her purse. App. 467. Moreover, the judge found trial counsel "cannot be ineffective for requesting the lesser-included offense because she made a calculated, strategic decision to do so." App. 468. Citing to Abney v. State, the judge concluded "the decision to request or reject a charge on a lesser-included offense is a tactical decision to be made by trial counsel, not the defendant." App. 468. Regardless of whose decision it was to make, the judge found trial counsel credibly testified that she discussed this decision with Petitioner and Petitioner agreed with the decision to request the lesser included offense. App. 470. Lastly, the judge found Petitioner could not prove prejudice because "it is very unlikely that the instruction on the lesser-included offense prevent [Petitioner] from being convicted of the principal charge of armed robbery." App. 471.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel requested the trial judge instruct the jury on the lesser included offenses of strong arm robbery and petit larceny when Petitioner was adamantly opposed

to the request and since Petitioner was prejudiced by counsel's deficient performance where he was found guilty of strong arm robbery, this petition for writ of certiorari follows.

## ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when she requested the trial judge instruct the jury on the lesser included offenses of strong armed robbery and petit larceny over Petitioner's strong objections since he preferred an "all or nothing" strategy and where Petitioner was prejudiced because the jury ultimately acquitted him of armed robbery and kidnapping but found him guilty of the lesser included offense of strong armed robbery.

Petitioner was adamantly against trial counsel requesting the judge instruct the jury on the lesser included offenses of strong arm robbery and petit larceny because he "knew the jury would not want to convict on the armed robbery." App. 405, ll. 22-24. He preferred an "all or nothing" strategy. App. 406, l. 25 – 407, l. 12. However, trial counsel told Petitioner, "I control strategy," and requested the judge charge the jury on the lesser included offenses despite Petitioner's strong objections. App. 409, ll. 1-7. The PCR judge erred by finding the decision whether to request lesser included offenses was trial counsel's "call to make" not Petitioner's. App. 470. Trial counsel's decision to request charges on strong arm robbery and petit larceny over Petitioner's objection constitutes deficient performance since it was ultimately Petitioner's decision to make. Petitioner was prejudiced by trial counsel's deficient performance because the jury acquitted him of armed robbery and kidnapping but found him guilty of strong arm robbery.

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).

Armed robbery is defined as the commission of a "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." S.C. Code Ann. § 16-11-330. "Strong arm robbery is defined under common law 'as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" Abney v. State, 408 S.C. 41, 45, 757 S.E.2d 544, 546 (Ct. App. 2014) (quoting State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003)).

"The trial court is required to charge a jury on a lesser included offense 'if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was

committed.'" Abney, 408 S.C. at 45-46, 757 S.E.2d at 546 (quoting State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996)). "However, the trial court should refuse to charge on a lesser included offense when there is no evidence that the defendant committed the lesser rather than the greater offense." Id. at 46, 757 S.E.2d at 546 (citing State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994)).

In Abney, the petitioner alleged his counsel was ineffective for failing to request a jury instruction on the lesser included offense of strong arm robbery where there was evidence to support the charge. He argued he was prejudiced by counsel's decision because he would have been convicted of strong arm robbery instead of armed robbery if the jury had received the instruction. Abney, 408 S.C. at 44, 757 S.E.2d at 545. The Court of Appeals held Abney's counsel articulated a valid reason for deciding not to request the lesser included offense. Id. at 47, 757 S.E.2d at 547. His counsel testified that during a break in the trial, he and Abney felt they were winning the case and he would be found not guilty of armed robbery. Id. Therefore, Abney's counsel did not feel it was in his client's best interests to ask for a jury instruction on strong arm robbery. Id. Based on this testimony, the Court concluded Abney did not meet his burden of proving counsel's performance was deficient. Id.

In this case, Petitioner's trial counsel was deficient because she requested the trial judge instruct the jury on the lesser included offenses of strong arm robbery and petit larceny when Petitioner was adamantly opposed to the request and preferred an "all or nothing" strategy. Petitioner testified he did not want any lesser offenses charged because he "knew the jury would not want to convict on the armed robbery" and he "knew he had the jury." App. 405, ll. 22-24; App. 406, ll. 5-6. For whatever reason, trial counsel blatantly ignored Petitioner's choice to "go for" either a not guilty verdict or life imprisonment if convicted of armed robbery and requested the trial

judge instruct the jury on strong armed robbery and petit larceny. See App. 406, l. 25 – 407, l. 12. This constitutes deficient performance. It was Petitioner's decision to decide whether to request the lesser included offenses, not trial counsel's.

Petitioner was prejudiced by counsel's deficient performance because he was ultimately convicted of strong arm robbery. If trial counsel had not requested the judge instruct the jury on strong arm robbery, there is a reasonable probability the jury would have acquitted him of armed robbery and kidnapping, which they ultimately did, and Petitioner would have been found not guilty altogether. Consequently, the PCR judge erred by denying Petitioner relief.

Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

## CONCLUSION

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

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Aiken County

Honorable Larry B. Hyman, Circuit Court Judge

---

WAYMON EUGENE NEWTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Waymon Eugene Newton 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 records and transcript of Petitioner's post-conviction relief hearing, which was held on August 27, 2018 before the Honorable Larry B. Hyman, Jr. 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 Waymon Eugene Newton.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 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 Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 17th day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Aiken County

Honorable Larry B. Hyman, Circuit Court Judge

---

WAYMON EUGENE NEWTON,

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 have 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 upon Waymon Eugene Newton, 2304 Hertford Drive, Columbia, SC 29210, this 17th day of May, 2019.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of May, 2019.

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