

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

Honorable Roger E. Henderson, Circuit Court Judge

DAVID T. GALLMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002197

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Deputy Chief Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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JUN 28 2019

S.C. SUPREME COURT

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ISSUE PRESENTED

Trial counsel erred in failing to object when the trial judge commented on the facts and invaded the province of the jury with undue influence by suggesting that they choose the space on the verdict form indicating that petitioner was guilty of the greater offense of PWID despite the fact that the jury had already marked a space indicating a guilty verdict on the lesser offense of simple possession of crack cocaine.

STATEMENT

Petitioner David T. Gallman was convicted of possession with intent to distribute crack cocaine per jury trial held during the July 2014 term of the Union County General Sessions Court before Judge John C. Hayes, III, who sentenced him to imprisonment for a period of thirty years. App. 1-193. Erik Delaney, Esquire, represented petitioner at trial, and Assistant Solicitor John C. Anthony appeared on behalf of the state.

Petitioner appealed and was represented on appeal by Benjamin Tripp, Esquire, formerly of the South Carolina Office of Appellate Defense. Petitioner's appeal was dismissed on January 20, 2016, per appellate review by the South Carolina Court of Appeals. See State v. David Terrell Gallman, Unpublished Opinion No., 2016-UP-041 (filed January 20, 2016).

On December 19, 2016, petitioner filed a PCR application with the Union County Office of the Clerk of Court. App. 198-215. The respondent filed a return dated May 18, 2017, requesting that a hearing be held in response to petitioner's PCR action. App. 216-220.

A PCR hearing was convened on April 17, 2018, at the York County Courthouse before Judge Roger E. Henderson. App. 222-264. On November 8, 2018, Judge Henderson filed an Order of Dismissal denying petitioner's allegations of the ineffective assistance of counsel in the case. App. 270-281.

Petitioner appealed Judge Henderson's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object when the trial judge commented on the facts and invaded the province of the jury via undue influence by suggesting that they choose the space on the verdict form indicating that petitioner was guilty of the greater offense of PWID despite the fact that the jury had already marked a space indicating a guilty verdict on the lesser offense of simple possession of crack cocaine.

This case was a drop drug case. Apparently, law enforcement officers had a warrant for petitioner and were looking him. The police found petitioner on December 19, 2013, and before his arrest, a police officer observed petitioner drop something (crack cocaine) at the scene. App. 69, l. 15 – p. 74, l. 13; App. 83, l. 8 – p. 91, l. 20.

During the PCR hearing, petitioner alleged that trial counsel erred in failing to object when the trial judge directed the jury to choose the greater offense on the verdict form after the jury returned a verdict sheet containing two check marks beside both the greater offense listed and the lesser offense listed, which in turn resulted in the selection of two verdicts instead of one verdict chosen by the jury. App. 262, l.5-19. Then, after the trial judge instructed the jury to choose one offense and that the chosen offense should be the greater offense, the jury returned a verdict of guilty on the greater offense per the trial judge's instruction. See the verdict page exhibit as Applicant's Exhibit #1 at App. 267. Petitioner testified at the PCR hearing regarding the matter and raised the issue of counsel's error in failing to object to the verdict matter. App. 233, l.16-p. 236, l.19.

Trial counsel testified at the hearing and admitted that he did not object during the verdict conversations between the trial judge and the jury. App. 251, .20-p. 252, l.20.

The PCR judge found that the trial judge properly instructed the jury to choose a verdict, and that such an instruction was not objectionable, and that therefore “counsel was not deficient for failing to object” and that “any objection would not have changed the outcome of the trial.” App. 278-280.

The colloquy in question that occurred at trial follows:

THE COURT: All right. You’ve got two places marked. It’s the top one. Do you want to go back and mark out and initial it.

THE FOREMAN: I can

THE COURT: I think the whole jury needs to go back out and correct it. Whichever one is inappropriate, just strike through it and initial it. Of course I will show it to everybody but the top two lines both have been checked. App. 185 lines 14-24.

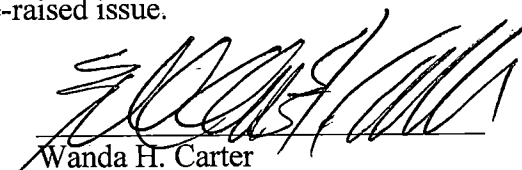
Clearly, the trial judge said “it’s the top one,” i.e., instructing the jury that the proper verdict to choose was the top one, which reflected the greater offense of PWID rather than the lesser offense listed underneath for was simple possession only.

A judge may not substitute his verdict for a jury verdict as such would invade the province of the jury because the verdict is what the jury intended it to be and not what the judge believes it should be in a case. Camden v. Hilton, 360 S.C. 164, 600 S.E.2d 88 (Ct. App 2004). The integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. State v. Franklin 341 S.C. 555, 534 S.E.2d 716 (2000). When an extraneous influence is imposed on the jury verdict or if an undue influence is exerted over the jury, and the verdict is not based on the evidence, then testimony may be used to investigate the allegation. State v. Hunter, 322 S.C. 85, 463 S.E. 21 314 (1995); S.C. Department of Highways and Public transportation v. Gallbreath, 315 S.C. 82, 431 S.E.2d 625 (1993).

At best, counsel should have objected to the verdict as being selected by the trial judge rather than the jury, and requested a hearing, or at the very least counsel should have moved to have the jury polled. Polling the jury is an avenue used to cure doubts regarding the jury verdict. State v. Stone, 320 S.C. 395, 465 S.E. 21 576(1995); State v. Roper, 274 S.C. 14, 260 SE.21, 705 (1979). Counsel's error as outlined above violated the Sixth Amendment right to competent counsel in a criminal case; and petitioner was prejudiced by counsel's deficient representation in this regard because if an objection had been entered, a reasonable probability exists that the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the argument raised above, counsel for petitioner requests that this Court grant this petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2019.

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V.

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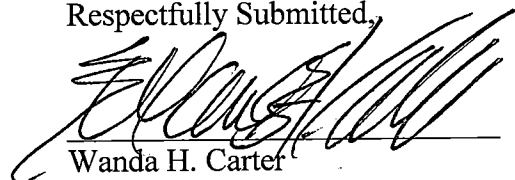
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Terrell Gallman states that:

1. She is Deputy Chief 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 Roger E. Henderson, which was held on April 17, 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 David Terrell Gallman.

Respectfully Submitted,

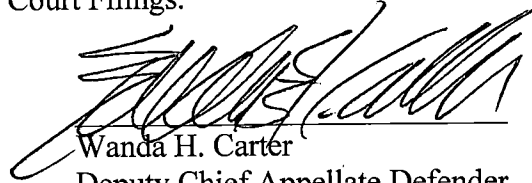


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of June, 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."



Wanda H. Carter

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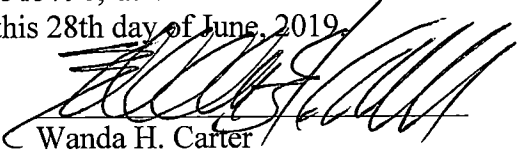
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RESPONDENT

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 David Terrell Gallman, #313796, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 28th day of June, 2019.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2019.



Notary Public for South Carolina
My Commission Expires: September 27, 2028.

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