

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Jocelyn J. Newman, Circuit Court Judge

JAMES R. FRADY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001817

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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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel filed a pre-trial motion to change venue in a double murder case in a small community, where the matter had received significant press coverage such that the case had a fair amount of notoriety, and where trial counsel withdrew the motion?

STATEMENT

Petitioner was indicted by an Oconee County grand jury in December 2004 for arson in the second degree, burglary in the first degree, grand larceny, two counts of murder, and possession of a weapon during the commission of a violent crime. App. 974 – 985. He proceeded to trial before the Honorable Perry M. Buckner and a jury on August 29, 2006. Donald Allen and C. Elizabeth Waldrep represented Petitioner, and Mindy Hervey and David Wagner served as the assistant solicitors.

After a three day trial, the jury found Petitioner guilty as indicted. App. 666 ll. 5 – 25. Judge Buckner sentenced him to a life sentence on each of the murder charges, twenty-five years on the arson charge, five years on the grand larceny charge, five years on the possession of a weapon charge, and thirty years on the burglary charge, all concurrent. App. 671 l. 17 – App. 672 l. 19.

Petitioner's convictions were affirmed. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. filed November 12, 2008). The remittitur was sent on December 3, 2008. App. 685. A timely application was then filed on or about April 13, 2009. App. 868. It contained numerous allegations of ineffective assistance of counsel. App. 691 – 693. The state made its Return on or about October 19, 2009. App. 701. Petitioner thereafter amended his application. App. 699. As a result, the state filed an Amended Return. App. 708.

An evidentiary hearing was convened on October 3, 2011 before the Honorable. J. Cordell Maddox, Jr. App. 716. Rodney Richey represented Petitioner, and Kaelon May appeared on behalf of the state. Multiple witnesses testified, but the first forty-four minutes of the hearing were not preserved. App. 717 – 718. An Order of Dismissal was filed on January 19, 2012. App. 729.

A Motion to Remand for Record Reconstruction was filed on July 12, 2012 by Appellate Defender Breen Stevens. App. 752 – 754. On August 10, 2012, this Court issued an Order granting the motion and remanding the case for reconstruction of the missing portion of the record. App. 832 – 833.

Judge Maddox wrote this Court a letter on February 28, 2013 indicating that the record could not be reconstructed adequately. App. 834 – 835. On December 9, 2015, this Court affirmed in part, vacated in part, and remanded Petitioner's matter. App. 837 – 839. Because meaningful appellate review was impossible for six grounds, the case was remanded.

An evidentiary hearing was then held before the Honorable Jocelyn Newman on June 26, 2017. App. 840. Robert Mills Ariail, Jr. represented Petitioner, and Lindsey McCallister appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. An Order of Dismissal was issued on September 5, 2018. App. 955.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel filed a pre-trial motion to change venue in a double murder case in a small community, where the matter had received significant press coverage such that the case had a fair amount of notoriety, and where trial counsel withdrew the motion.

Relevant facts

The charges in Petitioner's case originated following Petitioner's alleged killing his of father and brother. At Petitioner's trial, the trial judge noted that counsel filed a written pre-trial motion for change of venue. App. 10 ll. 3 – 8. When asked, however, whether counsel wanted to be heard on the motion, counsel withdrew it instead. App. 11 ll. 1 – 6.

The motion was supported by seven separate exhibits, including press releases from the Oconee County Sheriff's Office as well as media reports from Greenville Online, WYFF4, and WIS10. App.941 – 848. The motion itself set forth the grounds for a change of venue; based upon "extensive pre-trial publicity including extensive television and news media coverage ... and community attitudes regarding the charge," Petitioner will be deprived "a fair and impartial trial." Id.

At his evidentiary hearing, Petitioner remarked that every juror indicated during *voir dire* that they had heard something about the case, and half of the jurors had heard something on the radio the morning trial began. App. 859 ll. 4 – 23; App. 860 ll. 5 – 11. Although the state objected to testimony regarding this claim, the PCR judge overruled the objection. App. 855 ll. 3 – 23. Later, in the Order of Dismissal, this allegation was categorized as part of Petitioner's assertion that trial counsel failed to discharge his professional responsibilities. App. 960 – 964.

Petitioner testified that he opposed the withdrawal of the motion. App. 858 ll. 11 – 24. He was never asked by the trial court whether he agreed to the withdrawal. Id.

Trial counsel was appointed to represent Petitioner by way of an order from June 2005. App. 891 ll. 6 – 19. He was the third attorney to represent Petitioner. Id. At the outset, he admitted that he did not want the case. App. 891 l. 25 – App. 892 l. 10. He brought in co-counsel Elizabeth Waldrep to assist him. Id. She prepared the motion to change venue, and trial counsel signed it. App. 892 l. 11 – App. 893 l. 24.

Trial counsel estimated the population of Oconee County at around 75,000 to 80,000 people. App. 893 ll. 6 – 24. He admitted that the alleged crime “had some notoriety in this community,” which he referred to as small. Id. He remarked that he was initially concerned about that fact. He could not recall whether the motion to change venue was drafted in collaboration with Petitioner. Id. He suggested that not every part of the trial strategy was discussed with Petitioner. App. 913 l. 19 – App. 914 l. 9. Contrary to what the transcript reflected, he did not believe the motion was formally withdrawn. App. 893 l. 25 – App. 894 l. 13; App. 916 ll. 13 – 22.

The Order of Dismissal contained a finding that “trial counsel rendered effective assistance of counsel and [Petitioner] was not prejudiced by trial counsel’s decision to forego the motion at the conclusion of jury selection.” After weighing the credibility of Petitioner and counsel, the PCR court found that counsel “made a reasonable decision not to pursue the motion, and that the decision was made based on strategy rather than neglect.” App. 964.

The PCR court also surmised that Petitioner seemingly would have had to call jurors as witnesses in order to present evidence that “the jury was impartial due to the trial venue and/or the pre-trial publicity.” App. 964.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984). A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRPC). 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. at 687. “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.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Sheppard v. State, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). A denial of a change of venue is not error if the jurors are

found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. State v. Tucker, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999).

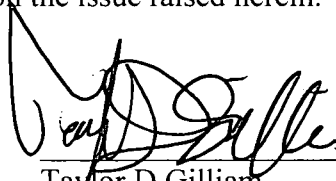
The motion to change venue should have been both argued and granted due to the large percentage of potential jurors that were aware of the media coverage. This caused inherent prejudice, because the case was easily remembered. Without the benefit of counsel even pursuing the motion, Petitioner was prejudiced: he did not receive a ruling from the trial judge, and he could not pursue a potentially erroneous ruling on direct appeal.

Although the trial was in 2006, counsel was able to locate numerous examples of inflammatory press coverage both online and in print media. According to Petitioner, each juror who was questioned admitted to having knowledge of the case. Therefore, each juror likely walked into the courthouse with preconceived notions and understandings of the case. This undoubtedly prejudiced Petitioner. Without the benefit of being heard on the record regarding the change of venue motion, Petitioner was denied effective representation. The compilation of media reports and press releases was rendered moot the moment the motion was withdrawn. Rather than being heard, trial counsel removed a potential remedy that would have benefitted Petitioner. At worst, the trial judge would have denied the motion and the trial would have progressed.

Had trial counsel pursued the motion, it could have been granted. If nothing else, counsel could have preserved the record for an argument on direct appeal. However, by waiving the matter without a reasonable trial strategy, Petitioner received deficient performance from his attorney. He was prejudiced by being tried in the county where multiple jurors had admittedly heard of his case and therefore made assumptions and perhaps even heard about facts not admitted at trial. The motion should not have been withdrawn.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issue raised herein.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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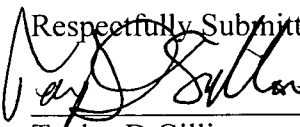
STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Randolph Frady 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 Jocelyn J. Newman, which was held on June 26, 2017, 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 James Randolph Frady.

Respectfully Submitted,


 Taylor D Gilliam
 Appellate Defender
 ATTORNEY FOR PETITIONER

This 29th day of July, 2019.

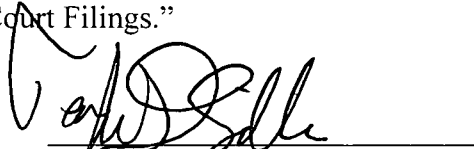
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CERTIFICATE OF COUNSEL

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."



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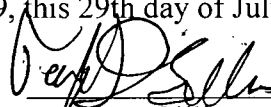
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CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 James Randolph Frady, #317328, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of July, 2019.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of July, 2019.

Mary Allgood (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2027