

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

ORIGINAL

RECEIVED

AUG 09 2019

LEROY CLIFTON GIBBS, III

PETITIONERS S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002044

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

INDEX1

ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when, based on an unreasonable strategy, he failed to call Dianne Williams, Latroy Gibbs, and Darnell Green to testify at trial, all three of whom testified during Petitioner’s first trial, which ended in a mistrial due to a hung jury, that Petitioner lived with his mother and not with his estranged wife, when counsel admitted Petitioner’s defense was that the drugs found in his wife’s house were not his and that he did not live there, and where Petitioner was prejudiced because there is a reasonable probability he would have been acquitted if counsel had called these witnesses to testify.....10

CONCLUSION.....14

ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when, based on an unreasonable strategy, he failed to call Dianne Williams, Latroy Gibbs, and Darnell Green to testify at trial, all three of whom testified during Petitioner's first trial, which ended in a mistrial due to a hung jury, that Petitioner lived with his mother and not with his estranged wife, when counsel admitted Petitioner's defense was that the drugs found in his wife's house were not his and that he did not live there, and where Petitioner was prejudiced because there is a reasonable probability he would have been acquitted if counsel had called these witnesses to testify?

STATEMENT OF THE CASE

On the morning of December 23, 2008, officers with the Sumter County Sheriff's Office responded to a home on Mattison Avenue searching for Petitioner. App. 543, l. 19 – 545, l. 5. The house was rented by Petitioner's estranged wife, Kimberly Gibbs, with whom Petitioner shared a young child. Investigator Wayne Dubose knocked on the front door and announced Sheriff's Office. App. 545, l. 6 – 546, l. 7. After a couple of minutes, Kimberly answered the door. App. 546, ll. 8-20. Investigator Dubose told Kimberly he was looking for Petitioner and had warrants for his arrest. Dubose then saw Petitioner standing in the hallway behind Kimberly. App. 546, l. 21 – 547, l. 2. He placed Petitioner under arrest. App. 547, ll. 15-23. Petitioner, who was only wearing boxers, "asked about getting a pair of pants. He said his pants were in the bedroom laying on the floor." App. 547, l. 20 – 548, l. 2. Dubose retrieved Petitioner's pants and searched them before handing them to Petitioner. He located approximately \$1,355 inside one of the pockets. App. 548, ll. 3-7.

Investigator Dubose claimed that when he entered the house to arrest Petitioner, he smelled marijuana. App. 549, ll. 19-25. He asked Petitioner for consent to "bring a drug dog into the residence." App. 552, ll. 8-11. However, Petitioner told Dubose he did not live there. App. 552, ll. 8-13; App. 553, ll. 6-9. Dubose then turned to Kimberly, who ultimately consented to a search of the home. App. 552, ll. 13-15; App. 553, ll. 10-23. During the search, officers found cocaine, benzocaine, which is a cutting agent, and items commonly used to manufacture cocaine base in the kitchen. App. 556, l. 22 – 564, l. 4; App. 626, l. 21 – 629, l. 25. In Kimberly's purse, which was sitting on the kitchen table, officers found bags of marijuana, cocaine, and crack cocaine. App. 568, l. 2 – 569, l. 17; App. 630, l. 1 – 634, l. 10. Lastly, in the master bedroom, officers found a small marijuana blunt in an ashtray. App. 570, l. 22 – 571, l. 8.

The following day, Investigator Dubose served Petitioner, who was incarcerated on unrelated warrants at the detention center, with warrants related to the search of Kimberly's house. App. 580, l. 24 – 581, l. 5. Petitioner told Dubose that none of the drugs were his and that he did not live at the residence. He suggested the drugs were either Kimberly's or belonged to someone Kimberly had invited over to the house. App. 585, l. 17 – 586, l. 3.

A Sumter County grand jury indicted Petitioner on July 21, 2011 for trafficking cocaine base, manufacturing cocaine base, and possession with intent to distribute cocaine. App. 911-914. His case was called to trial on February 21, 2013 before the Honorable George C. James, and a jury. App. 1. Judge James ultimately declared a mistrial after the jury could not reach a unanimous verdict. App. 427, ll. 1-12. Assistant Solicitors John Meadors and Tyler Brown represented the state, and Charles Brooks represented Petitioner. App. 1.

During Petitioner's first trial, Kimberly testified that she and Petitioner and their then one year old son began renting the house on Mattison Avenue in April 2008. App. 200, ll. 7-25. Kimberly admitted she signed the lease and listed Petitioner and their son as occupants in addition to herself. App. 201, ll. 6-25. She denied that any of the drugs found in the house belonged to her. App. 210, ll. 19-20; App. 216, ll. 22-25. She admitted she told Investigator Dubose after he found the drugs in her purse that Petitioner must have put them there. App. 209, l. 2 – 210, l. 18. Lastly, Kimberly claimed she had seen Petitioner "turning cocaine into crack" in the kitchen on previous occasions and that she knew he had sold drugs from the house before. App. 211, l. 6 – 212, l. 22. She concluded the drugs found by police on December 23, 2008 must have belonged to Petitioner. App. 213, l. 7 – 214, l. 7.

Petitioner testified that in December 2008 he was living with his mother on South Pike East because he and his wife had recently separated. He did not live at the residence on Mattison

Avenue. However, he stayed there “off and on” because of his son. App. 273, l. 2 – 274, l. 13. Petitioner explained that on the night before his arrest, Kimberly called him and asked him to come over the following morning to spend time with her and their son. Petitioner agreed and his brother dropped him off that morning before he was arrested. App. 274, l. 14 – 275, l. 5. Petitioner denied the drugs found at Kimberly’s house were his. App. 274, ll. 1-8. He suggested the drugs belonged to someone Kimberly had invited over to the house. App. 275, l. 12 – 276, l. 14.

Petitioner was ultimately impeached with his pending distribution charges, which alleged he sold a quantity of crack cocaine to an undercover informant on three occasions from the house on Mattison Avenue between October 2008 and December 2008. App. 300, l. 24 – 302, l. 3; See App. 312, l. 13 – 320, l. 6.

Petitioner called Dianne Williams, Darnell Green, and Latroy Gibbs to testify in his defense. Dianne Williams, his mother, testified that in the latter part of 2008 Petitioner was living “back and forth” between her house and the house where Kimberly and their son lived. She explained that Petitioner received his mail at her house and kept his clothes and other belongings there. App. 304, l. 13 – 305, l. 12.

Darnell Green, Petitioner’s friend, testified that in December 2008, Petitioner lived with his mother on South Pike East. App. 306, ll. 22-25; App. 307, ll. 20-22. His mother’s house was within walking distance to where Green lived at the time. Green testified that Petitioner was at his house on the night of December 22, 2008 and presumably walked home to his mother’s house at the end of the night. App. 307, ll. 1-14. Green said he and Petitioner’s brother dropped Petitioner off at Kimberly’s house on Mattison Avenue on the morning of December 23, 2008 shortly before his arrest. App. 307, ll. 15-19.

Petitioner's brother, Latroy Gibbs, testified that Petitioner lived with their mother on South Pike East during the latter part of 2008 "because him and Kim use to always get into it." App. 309, ll. 3-9. Latroy explained that he dropped Petitioner off at Kimberly's house on Mattison Avenue on the morning of Petitioner's arrest so he could visit with Kimberly and their son. App. 309, ll. 10-24.

During its deliberations, the jury asked to rehear Kimberly's testimony. App. 386, ll. 9-15. It also asked to be recharged on the definition of possession. App. 418, ll. 15-19. The jury ultimately informed the judge that it could not reach a unanimous decision on any of the charges. App. 421, ll. 14-16. Shortly after receiving an Allen charge, the jury remained firm that it was deadlocked. App. 426, ll. 2-4. Consequently, the judge declared a mistrial. App. 427, ll. 6-12.

Petitioner's case was called to trial again on June 3, 2013 before the Honorable William Jeffrey Young, and a jury. App. 443. Assistant Solicitors John Meadors and Tyler Brown represented the state, and Charles Brooks represented Petitioner. App. 443.

During Petitioner's second trial, Kimberly's testimony changed slightly from what she claimed during Petitioner's first trial. She now denied seeing Petitioner "cook crack cocaine" at her house on Mattison Avenue. App. 660, l. 23 – 661, l. 2; App. 666, ll. 10-18. However, she was adamant that the drugs were not hers, that Petitioner lived at the house with her and their son on Mattison Avenue, and that the drugs did not belong to anyone else who did not live at the residence, implying they were Petitioner's. App. 656, l. 20 – 657, l. 3; App. 661, ll. 5-22; App. 665, ll. 7-13; App. 667, ll. 7-16; App. 673, ll. 12-13.

Petitioner testified consistent with his testimony during the first trial. He asserted the drugs found in the residence and in Kimberly's purse did not belong to him. App. 682, l. 3 – 683, l. 23. He also maintained that he did not live at the house on Mattison Avenue because he

and Kimberly were separated. Instead, he was living with his mother. App. 687, l. 1 – 689, l. 5. Petitioner was again impeached with his pending distribution charges, which alleged he sold crack cocaine to an undercover informant on three occasions in 2008 from the house on Mattison Avenue. App. 689, l. 14 – 690, l. 13; App. 705, l. 4 – 713, l. 2.

For reasons that will be explored *infra*, trial counsel did not call Dianne Williams, Darnell Green, nor Latroy Gibbs to testify in Petitioner’s defense during his second trial despite the fact that all three were available and willing to testify.

The jury ultimately found Petitioner guilty as indicted. App. 759, l. 15 – 760, l. 6. He was sentenced to ten years for trafficking cocaine base, fifteen years for possession with intent to distribute cocaine, and fifteen years for manufacturing cocaine base. The sentences were ordered to be served concurrently. App. 773, ll. 3-25.

The Court of Appeals affirmed Petitioner’s convictions and sentence. State v. Gibbs, 2016-UP-121 (S.C. Ct. App. filed March 2, 2016); App. 830-832.

On July 1, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 834-839. The state filed a return to this application dated February 14, 2017. App. 840-846. With the assistance of counsel, Petitioner filed an amended application on July 3, 2018 raising the claim argued in this petition. App. 847-848. An evidentiary hearing was convened on July 26, 2018 before the Honorable Kristi F. Curtis. App. 849. Assistant Attorney General Julie Coleman represented the state, and Lance Boozer represented Petitioner. App. 849.

During the PCR hearing, Petitioner testified that he declined three favorable plea offers, including an offer with a sentence recommendation of three years imprisonment, because he “wanted to go to trial.” App. 857, l. 6 – 858, l. 3. He “always wanted a trial.” App. 858, ll. 4-5. Petitioner asserted that his defense during both trials was that the drugs were not his and that he

did not live at the house on Mattison Avenue where the drugs were found. App. 858, ll. 15-17. During his first trial, which ended in a mistrial because of a hung jury, his counsel, Charles Brooks, called three witnesses to testify in his defense: Dianne Williams, his mother; Darnell Green, his friend; and Latroy Gibbs, his brother. App. 858, l. 18 – 859, l. 10. Petitioner identified these individuals as witnesses and asked Brooks to call them in his defense. App. 859, ll. 8-10. However, during his second trial, Brooks refused to call Williams, Green, and Gibbs as witnesses despite the fact that all three were present at trial and willing to testify. App. 863, ll. 9-17; App. 864, ll. 4-8.

Dianne Williams, Petitioner's mother, explained at the PCR hearing that she testified during Petitioner's first trial in February 2013 that Petitioner was living with her in December 2008 and travelled "back and forth" between her house and his wife's house on Mattison Avenue. App. 869, l. 2 – 870, l. 5. She said she was present during Petitioner's second trial in June 2013 and willing to testify consistent with what she testified to during the first trial. App. 870, ll. 5-25. In fact, she expected to testify. App. 870, ll. 13-14. However, Mr. Brooks, Petitioner's trial counsel, told her "he didn't need us." App. 870, ll. 11-17.

Latroy Gibbs, Petitioner's brother, likewise explained that he testified during Petitioner's first trial in February 2013 that Petitioner was living with their mother on South Pike East. App. 872, l. 21 – 873, l. 11. He said he was present during the second trial and willing to testify consistent with his previous testimony, but trial counsel "said he didn't need us." App. 873, l. 12 – 874, l. 8.

Charles Brooks, Petitioner's trial counsel, admitted Petitioner's defense during both trials was "the drugs were not his and he didn't live there." Petitioner was living with his mother on

South Pike East and not with his wife on Mattison Avenue where the drugs were found. App. 878, l. 15 – 879, l. 15.

Brooks acknowledged that he called Dianne Williams, Darnell Green, and Latroy Gibbs as witnesses during Petitioner's first trial to support Petitioner's defense that he lived with his mother and not with his estranged wife. App. 879, l. 16 – 880, l. 6. His explanation for why he did not call Williams, Green, and Gibbs to testify during the second trial was based solely on the differences between Kimberly Gibbs' testimony during the two trials. App. 880, ll. 8-11. Brooks asserted that Kimberly's testimony "was much more powerful for the State" during the first trial. App. 881, ll. 1-6; App. 887, ll. 14-23. During the first trial, Kimberly said, "it was his [Petitioner's] dope. I've seen him cook it up." However, during the second trial, Brooks maintained Kimberly testified consistent with Petitioner that "sometimes he's here [at her residence on Mattison Avenue], sometimes he's not. Sometimes other people come over here." Importantly, during the second trial, Kimberly denied ever seeing Petitioner "cook" crack cocaine. App. 881, ll. 5-25.

Brooks maintained that he did not "need" Petitioner's mother or the other witnesses to testify because Kimberly testified that Petitioner did not "stay" at her house "all the time." App. 883, l. 13 – 884, l. 5. Kimberly was the state's "lone star witness" and, according to Brooks, because Kimberly allegedly testified that Petitioner "comes and goes" between her house and his mother's house, the state did not present any evidence during its case in chief that "connected him [Petitioner] to the dope." App. 883, l. 13 – 884, l. 5.

Brooks admitted Petitioner's mother and brother were present during the second trial, but he chose not to call them. App. 885, l. 25 – 886, l. 15. Again, his reasoning for not calling them was "the State doesn't have anything" because Petitioner's "wife, who was their star witness,

says [Petitioner does not] live there. She says other people come in here [her house on Mattison].” App. 886, l. 16 – 887, l. 7. Lastly, Brooks concluded the mother’s testimony that Petitioner “comes and goes” between her house on South Pike and his wife’s house on Mattison Avenue would have been “overkill considering the wife had said that.” App. 888, ll. 13-24.

By order filed November 8, 2018, the PCR judge denied Petitioner relief. App. 900-910. The judge found trial counsel was not effective for failing to call Dianne Williams, Latroy Gibbs, and Darnell Green as witnesses, all who testified during the first trial, because counsel “articulated a valid strategic reason for choosing not to call these witnesses based on the new testimony of the State’s witnesses at trial.” App. 907. Moreover, the judge found Petitioner could not prove prejudice from the failure to call these witnesses because their testimony would have been cumulative to the testimony of Petitioner’s wife. App. 908. Consequently, the judge concluded their testimony would not have changed the outcome of Petitioner’s trial. App. 908.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to call Dianne Williams, Latroy Gibbs, and Darnell Green as witnesses at trial based on an unreasonable trial strategy and since there is a reasonable probability Petitioner would have been acquitted if these witnesses had testified, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when, based on an unreasonable strategy, he failed to call Dianne Williams, Latroy Gibbs, and Darnell Green to testify at trial, all three of whom testified during Petitioner's first trial, which ended in a mistrial due to a hung jury, that Petitioner lived with his mother and not with his estranged wife, when counsel admitted Petitioner's defense was that the drugs found in his wife's house were not his and that he did not live there, and where Petitioner was prejudiced because there is a reasonable probability he would have been acquitted if counsel had called these witnesses to testify.

There is no evidence of probative value to support the PCR judge's finding that trial counsel articulated a valid strategic reason for failing to call Dianne Williams, Darnell Green, and Latroy Gibbs as witnesses at trial, all three of whom were available and would have testified that Petitioner lived with his mother and not with his estranged wife. Trial counsel's explanation for failing to call these witnesses was that Kimberly Gibbs, Petitioner's wife, testified as a state's witness that Petitioner "comes and goes" between her house on Mattison Avenue and his mother's house on South Pike East. However, Kimberly's testimony at trial directly contradicts counsel's recollection as she unequivocally testified that Petitioner lived with her and their son at the house on Mattison Avenue where the drugs were found. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability he would have been acquitted if counsel had called these witnesses to testify in his defense.

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." Strickland v. Washington, 466 U.S.

668, 686 (1984); 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.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and 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).

Trial counsel was ineffective for failing to call Dianne Williams, Darnell Green, and Latroy Gibbs as witnesses at trial. All three testified during Petitioner’s first trial, which resulted in a mistrial due to a hung jury, that Petitioner lived with his mother on South Pike East and not with his estranged wife on Mattison Avenue. Green and Gibbs further testified that they dropped Petitioner off at his wife’s home the morning of his arrest, indicating Petitioner did not sleep at the house the night before and had only been at the house for a short period of time that morning. This testimony would have countered the state’s theory that the drugs found in Kimberly Gibbs’ house belonged to Petitioner and that he was in constructive possession of the drugs.

Counsel maintained he did not call these witnesses because he thought their testimony would have been “overkill” given that Kimberly testified Petitioner “comes and goes” between her house and his mother’s house. While Kimberly admitted on cross-examination that “a lot of times” Petitioner stayed at his mother’s house, she unequivocally testified on numerous occasions that

Petitioner lived at the house on Mattison Avenue with her and their son and that the two shared the master bedroom. See App. 671, ll. 17-24. Specifically, Kimberly testified:

Q: This was your house at Mattison, right?

A: Yes.

Q: **It was the defendant's house?**

A: **Yes.**

Q: And your child's house?

A: Yes.

Q: **You all lived there?**

A: **Yes.**

Q: I mean that was your home?

A: Yes.

App. 667, ll. 7-16 (emphasis added).

The assistant solicitor later confirmed:

Q: **But he [Petitioner] did live there; didn't he?**

A: **Yes.**

App. 673, ll. 12-13 (emphasis added).

Again, Kimberly maintained:

Q: Who all stayed at your house?

A: Me and the defendant and my son.

Q: You, the defendant, and your son?

A: Right.

Q: Did anybody else stay there?

A: No.

App. 661, ll. 5-10.

Kimberly also testified:

Q: And State's Number 4, whose room is that?

A: That's the master bedroom.

Q: The master bedroom at Mattison Avenue and who stayed there?

A: Me and the defendant.

Q: You and Mr. Gibbs [Petitioner] stayed there?

A: Right.

Q: And that was y'all's room. Let me ask you this much. Is that right?

A: Right.

App. 656, l. 20 – 657, l. 3.

Consequently, it would not have been “overkill” to present Williams, Green, and Gibbs as witnesses to testify that Petitioner lived with his mother on South Pike East and not with Kimberly on Mattison Avenue. Counsel's explanation for failing to call these witnesses was objectively unreasonable and not supported by the record. Accordingly, the PCR judge's finding that trial counsel articulated a valid strategic reason for failing to call these witnesses was error.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability he would have been acquitted if counsel had called these witnesses to testify. The testimony of Williams, Green, and Gibbs would have undermined the state's theory of the case and corroborated Petitioner's testimony that he did not live with Kimberly. The assistant solicitor argued during closing that Petitioner was not merely present, that he lived in the house at Mattison Avenue, and that he was in constructive possession of the drugs. Specifically, the solicitor asserted:

You know **it's a possession, constructive.** This isn't a mere presence case, as His Honor may charge you on that. A mere presence case where I'm just here where drugs are and just the fact I'm here means you can't convict me. Well, this isn't a mere presence case. **What we have to show is, okay, person is here, the drugs are here. Has he got any ties to this place where the drugs are? Does he have dominion and control over the place? Yes, ma'am. Yes, sir. It's his house.**

App. 730, l. 22 – 731, l. 6 (emphasis added).

The solicitor later continued:

Yes, sir, you do live here. Number one, you're here. Number two, you're on the lease. Your child is here. Your hat is on the bed. **This is where you sleep. You are here. This is your house. You do have dominion and control.** This is where you stay and take care of your baby, and we submit through inference deal drugs during the day where you're taking care of your child. **This is your house. You do live here. You're going to try to distance yourself from it, but you can't. Constructive possession, dominion and control.**

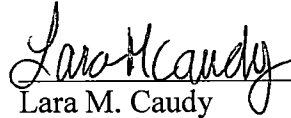
App. 731, ll. 16-24 (emphasis added).

Consequently, the testimony of Williams, Green, and Gibbs was necessary to challenge the evidence presented by the state and its theory of the case and certainly would not have been “overkill.” Respectfully, this Court should reverse the ruling of the PCR judge, vacate Petitioner's convictions 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
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

LEROY CLIFTON GIBBS, III

PETITIONER

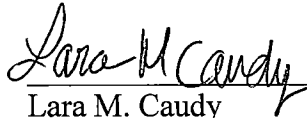
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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 Petition for Writ of Certiorari and a copy of the Appendix have been served on Leroy Clifton Gibbs, III, at 1230 South Pike East, Lot 28, Sumter, SC 29153, this 9th day of August, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of August, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.

