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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

CASE NO.: 2018-001674

JOHN UPSON,..... Respondent,

vs.

THE STATE,..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Statement of Issue

Did the Post-Conviction Relief Judge err by finding—in a legally-erroneous manner and without factual support—defense counsel was constitutionally ineffective for: (1) Ailing to either seek a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; (2) failing to challenge the victim's testimony about her belief Upson had a "lazy eye" on cross-examination; and (3) failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own?

A. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing either o seek a pre-trial hearing to determine the admissibility of the eyewitness identification evidence or to challenge the admission of that evidence during trial when – just as the post-conviction relief judge found in his order incorrectly granting relief – the victim made the identification without the involvement of any suggestive circumstances created by law enforcement, which necessarily meant defense counsel could not have been deficient for failing to challenge the identification evidence through a pre-trial hearing request or a trial objection since there were no valid legal grounds supporting such a request or objection?

B. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to cross-examine Alston in some unspecified manner about testimony indicating Upson had a "lazy eye" when defense counsel thoroughly attacked Alston's identification of Upson as the robber in an appropriate and reasonable manner throughout the trial and when no prejudice could have resulted from defense counsel's failure to question Alston about her "lazy eye" testimony in light of the fact the jurors had a full opportunity to view Upson's eyes throughout the trial, which enabled them to make their own determinations regarding the reliability of Alston's testimony even without any additional questioning?

C. Did the post-conviction relief judge err as a matter of law by finding defense counsel constitutionally ineffective for failing to challenge the State's testimony discrediting Upson's alibi defense with an expert of his own when the evidence the post-conviction relief judge found should have been presented by defense counsel did not yet exist at the time of trial, which meant defense counsel could not have been deficient for failing to obtain it since doing so would have been impossible under the circumstances, and, even if the evidence had somehow existed, its presentation could not have had any impact on the result of the proceeding?

Statement of the Case

Procedural History

Respondent is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Respondent for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Respondent. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Respondent proceeded to trial before the Honorable Donald B. Hocker. The jury found Respondent guilty as indicted. Judge Hocker sentenced Respondent to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

Respondent filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The issue raised on appeal was whether trial court erred in denying Respondent's directed verdict motion where the evidence presented at Respondent's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Respondent's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In his application for Post-Conviction Relief, which was filed on January 23, 2017, Respondent alleged that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"

    a. "Failure to fully cross-examine Jameshia Alston."
    b. "Failure to ask for Neils v. Biggers hearing."
    c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
    d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Respondent."
    e. "Failure to object to Respondent being charges and standing trial for armed robbery when the 14th and 6th Amendments were violated by the confrontation clause."
    f. "Failure to object to in-court identification."
    g. "Failure to object to bolstering by the State during closing arguments."

The State filed its Return on May 16, 2017. Present at the evidentiary hearing, held on May 5, 2018 before the Honorable R. Scott Sprouse, was Julie Coleman, Esquire from the Office of the Attorney General representing Petitioner. Respondent was present and represented by his attorney, Tommy A. Thomas. Respondent testified on his own behalf and called Tom Slovenski. Petitioner called Second Circuit Public Defender De Grant Gibbons. At the close of the hearing, Judge Sprouse ordered, at the State's request and without objection from Respondent, that the record remain open for thirty (30) days in the event that lead trial counsel, who was not available for the hearing, wished to submit testimony.

An order granting post-conviction relief was signed by Judge Sprouse July 13, 2018, and amended order was signed August 10, 2018. The Court found, in part, the basis for granting post-conviction relief was:

> The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the [Respondent's] claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.
>
> Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the [Respondent] was a key issue at trial.

2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the [Respondent's] name. Counsel for the [Respondent] failed to challenge this by either requesting a Neil v. Biggers hearing or by objecting to its admission at trial.

3. The Court is particularly concerned with the testimony regarding [Respondent's] "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the [Respondent] failed to challenge this on cross-examination.

a. The Court observed the [Respondent] at the evidentiary hearing and had the opportunity to personally study the [Respondent's] facial features. The Court found that the [Respondent] clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the [Respondent's] conviction.

4. The [Respondent] also asserted an alibi defense that the State discredited through expert testimony that Counsel for the [Respondent] failed to challenge.

a. At the evidentiary hearing, the [Respondent] presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically found and concluded that both prongs of Strickland have been met by the [Respondent]. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the [Respondent].

App. 475-483.

Appellant filed a Motion to Alter or Amend Pursuant to Rule 59(e) on or about August 20, 2018. App. 494-506. Judge Sprouse denied the Motion on August 24, 2018. App. 508. Appellant filed a Notice of Appeal on September 17, 2018.

Factual History

On November 27, 2013, a Captain D's restaurant in Aiken, South Carolina, was held up by two men in black clothing (described as hoodies) and bandanas covering their

faces. One robber took an employee, Scott Hall, whom they initially approached outside the restaurant, to the safe at the front of the store while the other stayed in the back with another employee, Jameshia Alston. Hall led the man holding him to the store's manager, Devin Johnson, who complied with his demands for cash. Afterward, the men forced the three employees into the freezer at the back of the restaurant. The employees left the freezer once the men left the restaurant and called 911. Alston reported that one of the men looked familiar and had been in the restaurant earlier that week, but she did not know his name.

Argument

The post-conviction relief judge did not err, as a matter of law or in a deficient manner, in ruling that trial counsel was ineffective for 1) failing to seek either a pre-trial hearing to determine the admissibility of eyewitness identification evidence or challenge the admission of that evidence during trial; 2) failing to challenge the victim's testimony regarding Respondent's "lazy eye;" or 3) failing to challenge the State's testimony discrediting Respondent's alibi defense with an expert of his own.

1) **The post-conviction relief judge's concerns about the admissibility of eyewitness testimony due to the inconsistencies in Alston's story regarding her Facebook research and conversations with law enforcement were valid, and trial counsel's failure to attempt to suppress this testimony or object when it emerged was deficient and prejudicial to the point where one cannot rely upon the outcome of the case.**

Petitioner has cited many cases for the proposition that there was nothing suspect about Jameshia Alston's identification of Respondent as a perpetrator of the Captain D's robbery. The issue, however, is not so simple. At trial, and even through the evidentiary hearing, Respondent and his counsel questioned the timeline of events regarding Alston's discovery via Facebook of Respondent's identity and her exposure to the list of names from law enforcement.

Respondent admitted to visiting the restaurant where he spoke to an employee, William Keels, earlier that week. He had once dated Keels' sister, so the two had a brief conversation that Alston witnessed. At trial, Alston testified that she knew she recognized the robber, so she "went home and looked it up." App. 58;5-9. Respondent referred to this and subsequent testimony at the evidentiary hearing to show the potential confusion between Alston's research and information she may have received from law enforcement. Specifically, the following passage is particularly telling:

> Mr. Smith: You scrolled down through the pictures?
> Ms. Alston: Yes, sir. I did.
> Mr. Smith: Or, did you type in John Upson's name?

Ms. Alston: No, I went on William Keels' page and I found his name. And when I saw his picture I jumped up because I knew that was him. And then I, like, clicked on his name and I was scrolling through his pictures. As I was looking I jumped up again. I told my mom that was him.

...

Mr. Smith: Does he have a lot of pictures of other people on his –
Ms. Alston: I didn't look at that.
Mr. Smith: You didn't look at anybody else's picture?
Ms. Alston: No, sir. I just looked at his name, who I was looking for.
Mr. Smith: You were just looking for John Upson?
Ms. Alston: Yes, sir.

App. 73;1-25. Paraphrased by Respondent on App. 428;2-429;12. When reviewing the transcript, it is apparent that Alston contradicts herself. She states that she was scrolling through pictures on Facebook until she found Respondent's name. Then she jumped when she saw his picture. This testimony reads as if she knew his name and went to find his picture for confirmation. Additionally, Alston testified that she was shown a list of names (without photos) by law enforcement. App. 75;20-76;2. Based on her testimony, it is possible that her timeline could be confused. At the very least, it is enough to question the veracity and reliability of her identification.

For these reasons, trial counsel should have requested a hearing pursuant to Neil v. Biggers, 408 U.S. 188 (1972) or, at the very least, objected to the admission of this testimony during trial. The State argues that a Neil v. Biggers hearing would be inappropriate because there is no legal basis on which to make the motion due to its perceived lack of a suggestive circumstance created by government officials as required by the case. However, based on Alston's testimony, it is actually quite unclear whether she was affected by suggestive circumstances created by law enforcement. Her testimony shows confusion regarding whether she was looking for a name or a photo; therefore, if

she were looking for a name, where did she get it? From the list she admits law enforcement showed her?

Though the order granting post-conviction relief included a finding she conducted her independent Facebook research before speaking to law enforcement, both the trial and PCR transcripts show Alston's confusion regarding the timeline and, therefore, the involvement of law enforcement before she made her out-of-court identification. Had Alston seen the list of names before she conducted her Facebook search, she would have had a very short list of people about whom she could research and find photos. This would be in contravention of the cases cited by Petitioner that require suggestive circumstances created by government officials or state action. See Perry v. New Hampshire, 565 U.S. 228 (2012); State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). Because it was only after the Facebook search that Alston identified Respondent, trial counsel should have requested a pre-trial hearing to ensure that there were no improper actions taken by law enforcement. After all, "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 154 (1977).

At the very least, trial counsel should have objected or otherwise drawn attention to Alston's conflicting testimony when it was presented at trial. The most confusing parts of her testimony were on trial counsel's cross-examination, and trial counsel did very little, if anything, to elucidate these errors or call attention to her conflicting statements. While it is unclear how much of this testimony trial counsel received in pre-trial discovery, he could certainly have taken the opportunity to impeach Alston on her conflicting statements during cross-examination. With any criminal case, the issue of

identification is crucial and, in this instance, Alston was the only eyewitness to identify Respondent. With only one individual identifying Respondent while trial counsel is presenting an alibi defense, the credibility or lack thereof for this sole witness becomes even more critical. Trial counsel should have used every possible tool in his arsenal to attempt to exclude, suppress, or discredit Alston's testimony and, had he done so, he may have proven that Alston's identification was incorrect. His failure to do so created prejudice such that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Petitioner's request for certiorari must be denied.

2) **The post-conviction relief judge's concern about the validity of eyewitness testimony due to the incorrect "lazy eye" testimony was valid, and trial counsel's failure to address it in any form or fashion was deficient performance and prejudicial to Respondent.**

During trial, Alston testified that she recognized Respondent because of his "bald head and lazy eye." App. 58;1-3. In fact, she said "that's the thing that caught [her] eye." App. 58;1-3. This is, surprisingly, despite the fact the perpetrators of the robbery had their heads and faces covered. The post-conviction relief court held Alston's incorrect description of Respondent's eyes caused it "particular[] concern[]" because it could have led to a misidentification that resulted in Respondent's conviction.

The State argued that, essentially, this is an instance where common sense should have prevailed – the jury had the opportunity to observe Respondent in the courtroom throughout the trial and could clearly see that he does not have a lazy eye, just as the post-conviction relief judge did. Even assuming this is true and the jury observed this fact, it actually harms the State's argument because it further dents Alston's credibility. If

she was so certain that she had identified the perpetrator because of his lazy eye that she jumped up to tell her mother upon finding his photograph, how can we actually trust her identification if the man she points to in the courtroom does not have a lazy eye?

The State cites State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015) and State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (1996) for the proposition that jurors' ability to observe defendants during trial and attach whatever credibility they deem necessary to a witness's identification. While that is true, it also leaves defense counsel open to exploit inconsistencies between the witness's description and the appearance of the defendant. In this case, the obvious fact that Respondent does not have a lazy eye should have been identified and exaggerated by trial counsel in order to discredit her testimony at every juncture.

As argued above, Alston's identification of Respondent is crucial to this case, and trial counsel should have taken every opportunity to discredit it. The State argues trial counsel "thoroughly attacked the reliability of Alston's identification in other ways," thus leaving it unlikely the failure to explore this avenue altered the course of the trial so as to create a reasonable probability that the result of the trial would have been different as required by Strickland v. Washington, 466 U.S. 668 (1984). PWC, 20. This is patently false. Had trial counsel gone down this path of questioning to directly challenge Alston's description of a bald head and lazy eye, he may have totally discredited her testimony and identification, thus preventing Respondent's conviction. It is clear from the phrasing of the order granting relief that this potential for misidentification was the court's main concern and foundation for finding ineffective assistance of counsel. Petitioner's request for certiorari must be denied.

3) **The post-conviction relief judge properly ruled that trial counsel failed to challenge the State's expert testimony at trial regarding cell phone tower data and, upon presentation of an expert at the evidentiary hearing, Respondent created significant doubt about the accuracy of the initial expert's testimony.**

At trial, the State presented an expert from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to analyze the cell phone data retrieved from Respondent's phone. In doing so, the State attempted to show Respondent was near the Captain D's at the time of the robbery. Though trial counsel had the cell phone data prior to trial, it was not analyzed by an expert nor was any expert testimony presented on behalf of Respondent. Second chair trial counsel testified that the information was discussed with someone in the office who was familiar with cell phone data, but no true expert opinion was sought. App. 441;9-13. He as not aware an expert would be called by the State because it was not until shortly before trial they became aware ATF was involved or an agent testifying. App. 447;25-448;2. He further testified he did not know if a motion for continuance was made or if any objection was possible, whether due to a discovery violation or otherwise. App. 448;16-449;16.

Regardless, trial counsel had information at hand that could have been analyzed and presented in the light most favorable to them. At the evidentiary hearing, Respondent presented such an expert in Tom Slovenski. He testified, initially, that the PenLink system used by ATF to analyze cell phone data with the pie method was highly susceptible to user error, more than other methods or manual analysis. App. 402;9-12. In fact, Slovenski testified he would have manually plotted the data using the pie method if he were analyzing the data at the time of trial because that was all that was available.

The State argues repeatedly that Slovenski used a method – TraX – that was unavailable at the time of trial to develop his testimony for the evidentiary hearing. While that is true, it was for the purpose of doublechecking the analysis done in 2013 due to the likelihood of incorrect results from PenLink. He testified extensively to the necessity of peer verification and "getting another examiner to look at what you've done." App. 398;25-399;12. In fact, he testified you "have to" manually check results after using any program. PCR TR 39;10-15. The errors in the ATF report Slovenski pointed out were as simple as not having the name or phone number of Respondent on the documents, the date and time of reference, or even an indicator of the precise location of Captain D's. App. 398;9-12;389;14-24. Furthermore, they did not use best practices in the industry, primarily meaning they did not reveal as specific enough detail as they should. App. 387;18-388;11. The thrust of the testimony was not about the program used, but about the veracity and reliability of the analysis presented at trial. Slovenski used a new method to verify the analysis presented by ATF based upon the call data in trial counsel's possession and found the ATF analysis to be quite inaccurate.

Regarding the factual differences of the reports, Slovenski's analysis shows Respondent farther from Captain D's at the time of the incident than the ATF's did. App. 395;9-14. Also, there are areas of overlap in several maps that were not identified or explained by Fraser, the ATF expert. App. 396;21-25. Ultimately, Slovenski testified that, without knowledge of cell phone data or the ability to analyze the maps and analysis presented by ATF, trial counsel would not have had the ability to ask appropriate questions to rebut this information. App. 399;13-16.

Ultimately, this is a question of reliability and accuracy of the information presented by ATF's expert. Trial counsel had the data, knew or should have known that they did not fully understand it, and did not bother to seek the assistance of an expert. The fact that TraX was used by Slovenski to analyze the data for the evidentiary hearing has no bearing on whether it was available in 2013, despite what the State argues. Many of the problems Slovenski enumerated dealt with the ability of a layperson to interpret the maps and analysis. Trial counsel, as a layperson in the field of cell phone data, would have also been at a disadvantage and would not have been able to adequately cross-examine Fraser at trial. The State pointed to several factors that it argues diminish the likelihood of prejudice to Respondent, such as how Slovenski acknowledged the State never argued the maps showed Respondent at the scene, or that the solicitor conceded in his closing that the maps showed Respondent downtown, where his alibi witnesses placed him. Regardless, this does not remove the likelihood that a more thorough and scientific analysis of these records on Respondent's behalf at the time of trial would have discredited Fraser's testimony. Because of the failure of trial counsel to fully research and use the cell phone data, this "trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Therefore, Petitioner's request for certiorari must be denied.

Conclusion

For all the foregoing reasons, it is respectfully requested that Petitioner's request for certiorari be denied and dismissed. If this Court sees fit to grant its petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

Tommy A. Thomas, Esquire
Bar #5536

BY: _____
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JOHN UPSON,..... Respondent,

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of a Return to Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

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September 17, 2019

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September 17, 2019

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RE: John Upson v. State of South Carolina
Docket No.: 2018-001674

Dear Mr. Shearouse:

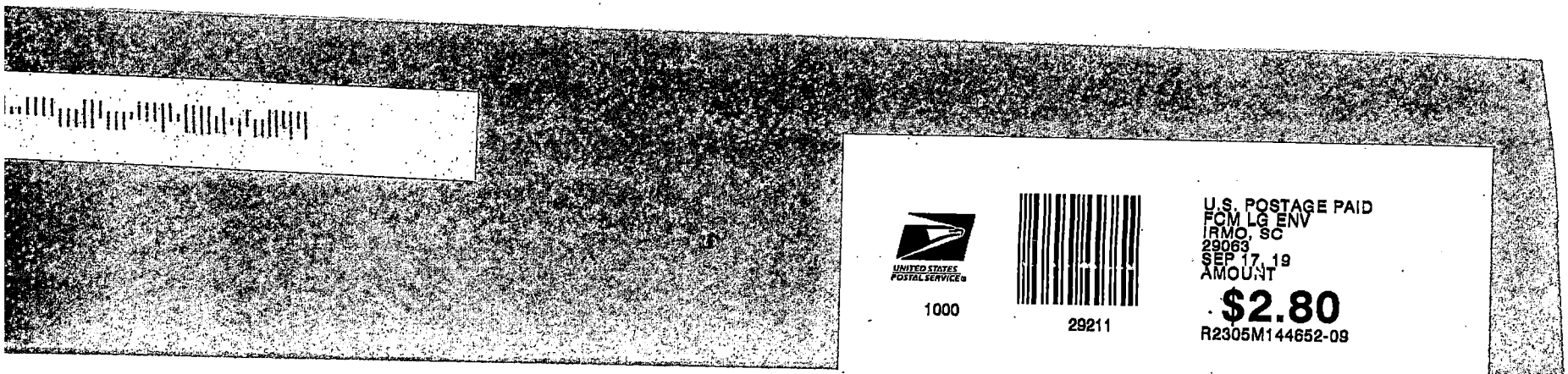
Enclosed please find an original and six (6) copies of my Return to Petition for Writ of Certiorari as well as a Certificate of Service.

Kindly return the clocked copy to me in the enclosed envelope. Thank you and please feel free to contact me should you have any questions or require additional information.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Mark R. Farthing, Esq.
John Upson



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