

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

OTIS MAURICE ROBINSON,

RECEIVED

OCT 01 2019
PETITIONER

v.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000740

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
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INDEX

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT OF THE CASE2

ARGUMENT

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to conduct an independent investigation of the facts and circumstances of Petitioner’s case and Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of Petitioner’s trial would have been different if counsel had properly investigated.....7

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL.....11

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to conduct an independent investigation of the facts and circumstances of Petitioner's case, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly investigated?

STATEMENT OF THE CASE

On May 31, 2011, Robert Fabian, Jr. stopped at his grandfather's house on St. Andrews Boulevard in Charleston to check on the property and discovered an intruder inside the home. App. 146, l. 5 – 148, l. 24. Fabian parked his car in the driveway and approached the backdoor of the residence where he normally entered. App. 147, ll. 5-14. He noticed the bay window located to the left of the backdoor was broken. App. 147, ll. 15-18. Before entering the house, Fabian yelled, "Who's there?" and heard someone say, "It's me. It's me." Assuming the intruder was someone he knew, Fabian entered the house through the backdoor. Upon entering the kitchen, Fabian discovered it had been "ransacked" and that there was blood on the counter. He then heard someone running and leaving the home through the back window. App. 147, l. 19 – 148, l. 14. He immediately ran out the backdoor and saw someone in the backyard. The individual had dropped something and was bending over to pick it up. The intruder then fled the backyard and Fabian gave chase. However, he was unable to catch the person. App. 148, ll. 14-24.

Fabian called 911 to report the burglary. App. 149, ll. 5-6. He told the 911 dispatcher that the intruder was a black male with a heavy build. He described the individual as being in his twenties or early thirties and maintained he had on dark pants, but was not wearing a shirt. Additionally, Fabian said the man may be bleeding. App. 166, ll. 2-15; App. 177, ll. 17-25.

Detective Robert Keller responded to the burglarized home and interviewed Fabian. App. 178, ll. 11-14. While Keller was at the residence, he was informed that patrol officers had detained an individual matching the description Fabian had given about a quarter of mile away. App. 179, ll. 16-19. Keller drove Fabian to the location where the individual was stopped to see if Fabian could identify the suspect. App. 179, l. 16 – 180, l. 2. The individual detained was Petitioner. He was wearing dark blue jeans, had no shirt on, and was bleeding. He was found with several DVD cases

on his person along with a screwdriver in his pocket. App. 194, l. 3 – 197, l. 2. Fabian identified Petitioner as the man he saw fleeing his grandfather's house. App. 180, ll. 3-12.

Richard Wiersma, the officer who processed the scene, testified that the house was in disarray. Dresser drawers had been pulled out and rifled through and a mattress in the bedroom had been moved. App. 204, l. 2 – 205, l. 7. While processing the scene, Wiersma collected a DVD case and a shirt that were found on the ground in the backyard near the broken window. App. 203, ll. 15-19. He also collected a bloody rag that was found in the kitchen sink. App. 204, ll. 12-19. In addition to collecting these items, Wiersma also attempted to lift fingerprints from inside the house, but was unsuccessful. However, he was able to lift two fingerprints from the DVD case that was found in the backyard. App. 205, l. 22 – 206, l. 25. Moreover, he observed “a reddish brown substance later determined to be blood” in several different areas inside the home, including the broken window, the curtains near the broken window, the refrigerator door, and the rag in the kitchen sink. He swabbed these areas and collected a sample of the blood for later analysis. App. 207, l. 1 – 208, l. 10.

Nada Kerstein, a latent print examiner for the Charleston Police Department, testified that one of the two prints lifted from the DVD case found in the backyard matched the left thumb print of Petitioner. App. 238, ll. 4-23. Moreover, Catherine Leisy, a forensic scientist employed by the South Carolina Law Enforcement Division (SLED) in its DNA and Serology Unit, testified that the blood found on the curtain and the rag matched the DNA profile of Petitioner. App. 252, l. 7 – 254, l. 20.

As mentioned earlier, Fabian's grandfather, James Fabian, Sr., was the owner of the burglarized house on St. Andrews Boulevard. However, the grandfather was ill and no longer lived at the property. Ap. 157, l. 14 – 158, l. 5. Fabian testified that he stopped by the property about

every other day and stored a drum set there. When he stopped by the property, he would play his drums and “hang out.” App. 158, ll. 6-9. He explained that he had recently moved back to the Charleston area from Montana and was “couch surfing” at the time. He would sleep at his father’s house, his girlfriend’s house, and his aunt’s house. Fabian also claimed he occasionally slept at his grandfather’s house on St. Andrews Boulevard, but “was trying not to stay there as much as [he] could” because the home was “old and in disrepair.” App. 158, l. 10 – 162, l. 19.

When he was interviewed by law enforcement on the afternoon of the burglary, Fabian provided his home address and other contact information. The address Fabian provided as his home address was a residence on Garden Street in Charleston, not the burglarized home on St. Andrews Boulevard. App. 270, l. 2 – 271, l. 15.

In response to the testimony trial counsel elicited regarding whether Fabian actually lived and slept at the burglarized house, the state recalled Fabian to the stand. He testified that he had slept at his grandfather’s home on St. Andrews Boulevard in the past, that he intended to sleep there at some point in the future, that he had possessions at the house, and that he had a bedroom at the house. App. 272, l. 13 – 275, l. 7. There was no evidence presented that anyone else was living or sleeping at the house on St. Andrews Boulevard the day that it was burglarized.

A Charleston County Grand Jury indicted Petitioner on September 12, 2011 for first degree burglary. App. 457-458. His case was called to trial on October 28, 2013 before the Honorable R. Knox McMahon, and a jury. App. 1. Assistant Solicitors Stephanie Linder and Lindsey Byrd represented the state, and Wesley Locklair represented Petitioner. App. 1.

At the conclusion of the trial on October 29, 2013, the jury found Petitioner guilty. App. 321, l. 23 – 322, l. 9. Judge McMahon sentenced Petitioner to life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 327, l. 12 – 328, l. 18.

The Court of Appeals dismissed Petitioner's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Robinson, 2016-UP-273 (S.C. Ct. App. filed June 8, 2016).

On October 13, 2016, Petitioner filed an application for post-conviction relief (PCR). App: 372-378. The state filed a return to this application on June 28, 2017. App. 379-384. An evidentiary hearing was convened on February 2, 2018 before the Honorable Maite Murphy. App. 1. Assistant Attorney General Jessica Kinard represented the state, and Christopher Murphy represented Petitioner. App. 1.

Petitioner testified that he and trial counsel had a "strained" relationship and the few discussions the two had ended in argument. App. 392, ll. 3-17. Because of the conflict, they "never talked about anything." App. 403, ll. 9-18. Petitioner testified that counsel failed to conduct any sort of investigation or prepare a defense to the allegations. App. 404, ll. 1-5.

Wesley Locklair, Petitioner's trial counsel, was disbarred by this Court in part for his failure to properly file the notice of appeal in Petitioner's case after Petitioner was convicted. In Re Locklair, 418 S.C. 467, 795 S.E.2d 9 (2016). Locklair could not be located at the time of Petitioner's PCR hearing and consequently did not testify. App. 389, ll. 21-23.

Stephanie Linder, the assistant solicitor who prosecuted the case, testified that she made a fifteen year plea offer to Petitioner while he was represented by Jason King before Locklair was ultimately appointed. However, Petitioner refused the offer. App. 405, ll. 1-12. Linder then served Petitioner and King with notice of the state's intent to seek a sentence of life without parole based on the recidivism statute. App. 405, ll. 13-15. Once Locklair was appointed in 2013, there were no offers on the table and Linder refused to make any additional offers. App. 405, ll. 15-16; App. 415, l. 20 – 416, l. 6.

Linder claimed the state had a “very strong case” against Petitioner given that his blood was found inside the residence and his fingerprint was found on the DVD case that was discarded in the background. App. 411, ll. 17-24. She maintained Locklair presented the best defense he could to the first degree burglary charge, which was to argue no one lived at the residence and therefore it was not a dwelling for purposes of the statute. App. 411, l. 11 – 412, l. 10.

However, Linder admitted there was a “breakdown in communication” between Locklair and Petitioner. App. 417, ll. 12-24. Locklair repeatedly told Linder he had difficulty communicating with Petitioner and that Petitioner constantly yelled at him during their meetings. App. 406, ll. 2-6; App. 418, ll. 6-14. Petitioner was allegedly “fixated” on the fact that his preliminary hearing was waived without his consent by Jason King, his prior counsel. App. 417, ll. 12-24.

By order filed April 5, 2019, the PCR judge denied Petitioner relief. App. 438-444. She found Petitioner failed to prove trial counsel was ineffective or that Petitioner was prejudiced by any alleged deficiency on the part of counsel. App. 441-443.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to conduct an independent investigation of the facts and circumstances of Petitioner’s case, and since Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly investigated, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to conduct an independent investigation of the facts and circumstances of Petitioner's case and Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly investigated.

Trial counsel failed to properly communicate with Petitioner or conduct any sort of independent investigation of the facts and circumstances of Petitioner's case. Counsel was subsequently disbarred in part for his failure to properly file the notice of appeal in Petitioner's case. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly investigated and presented a viable defense to the charges.

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).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691) (alterations in original); See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). “When evaluating the reasonableness of counsel’s conduct, ‘the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.’” Ard, 372 S.C. at 331, 642 S.E.2d at 597 (quoting Strickland v. Washington, 466 U.S. at 690). “Moreover, while the scope of a reasonable investigation depends upon a number of issues, ‘at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.’” Id. at 331-332, 642 S.E.2d at 597 (quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986), *aff’d*, 828 F.2d 670 (11th Cir. 1987)) (emphasis in original).

In this case, trial counsel was ineffective for failing to conduct any independent investigation before Petitioner’s trial. Petitioner testified that counsel “didn’t do anything.” App. 400, ll. 4-6. Counsel also failed to properly communicate with Petitioner. It was undisputed that counsel and Petitioner had a strained relationship that led to difficulties communicating with each other. Petitioner testified that the two discussions he had with counsel ended in argument. Assistant Solicitor Linder confirmed that trial counsel admitted before Petitioner’s trial that he had difficulties communicating with Petitioner.

Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of Petitioner’s trial would have been different if counsel had

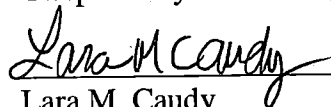
conducted a proper investigation. Petitioner testified that the state used “tampered evidence” against him and he “was not even there” when the burglary occurred. App. 393, l. 24 – 394, l. 7; App. 397, ll. 8-15. If counsel had investigated the case and discovered this tampered evidence, Petitioner likely would have been acquitted at trial.

Respectfully, this Court should reverse Petitioner’s 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. Petitioner ultimately requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Lara M. Caudy", is written over a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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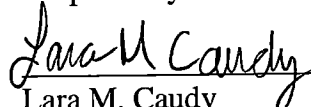
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Otis Maurice Robinson 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 record of Petitioner's post-conviction relief hearing, which was held on February 2, 2018 before the Honorable Maite Murphy, 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 Otis Maurice Robinson.

Respectfully Submitted,



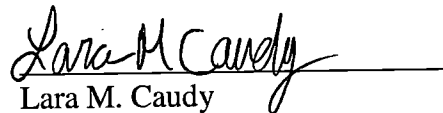
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of October, 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
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ATTORNEY FOR PETITIONER

This 1st day of October, 2019.

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ORIGINAL

OTIS MAURICE ROBINSON,

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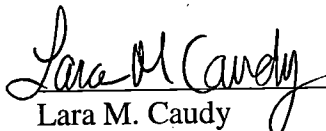
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

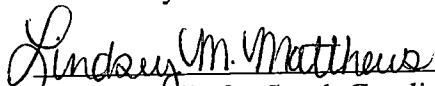
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Otis Maurice Robinson, #288206, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of October, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of October, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.