

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable Thomas A. Russo, Circuit Court Judge

JARVIS HUGHES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000459

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
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

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when she failed to investigate multiple leads in Petitioner's case where trial counsel did not investigate the discrepancies in the confidential informant's story; phone records that would show Petitioner did not set up a drug deal with the confidential informant; and potential witnesses that were involved in the incident?

STATEMENT

During the November 2015 term, the York County grand jury indicted Petitioner for distribution of crack cocaine. App. 382 – 383.

Petitioner proceeded to trial on June 20 – 21, 2016, before the Honorable John C. Hayes, III, and a jury. App. 1. Melissa Inzerillo represented Petitioner. Id. Matthew Shelton represented the state. Id.

Due to trial counsel's failure to properly investigate his case, Petitioner was found guilty as indicted. App. 290, ll. 2 – 7. Judge Hayes sentenced Petitioner to twenty years' imprisonment. App. 302, l. 22 – 303, l. 10.

On April 5, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 309 – 315. On July 13, 2018, the state filed its Return. App. 318 – 322. On December 4, 2018, Petitioner filed an amended PCR application that alleged trial counsel provided ineffective assistance of counsel for failure to properly investigate Petitioner's case. App. 324 – 325.

On January 28, 2019, Petitioner's PCR hearing before the Honorable Thomas A. Russo. App. 326. Donae Alecia Minor represented Petitioner. Id. Janell H. Gregory represented the state. Id. In an order filed on February 22, 2019, Judge Russo denied Petitioner relief. App. 368 – 378.

ARGUMENT

Trial counsel provided ineffective assistance of counsel when she failed to investigate multiple leads in Petitioner's case where trial counsel did not investigate the discrepancies in the confidential informant's story; phone records that would show Petitioner did not set up a drug deal with the confidential informant; and potential witnesses that were involved in the incident.

Relevant Facts

On June 12, 2015, August 7, 2015, and August 20, 2015, confidential informant (CI) Derrick Doss alleged he purchased crack cocaine from an individual named "Pootie" or "Lucky." App. 33, l. 12 – 34, l. 13; App. 44, ll. 20 – 25. The state alleged that Petitioner was that individual. App. 54, l. 14 – 55, l. 4.

Derrick Doss worked as a contract CI for law enforcement. App. 164, l. 13 – 166, l. 16. Doss was the state's key witness in this case.

Investigator Harrelson was the agent who handled Doss. App. 170, ll. 2 – 17. Harrelson set up controlled drug buys with Doss and an individual known only by the alias "Pootie" or "Lucky." App. 194, l. 13 – 197, l. 21.

Although Doss alleged that he purchased crack from "Pootie" or "Lucky" three times, only the June 12, 2015 incident had audio and video recordings. App. 63, ll. 23 – 25. Doss met with police officers and they dropped him off near the Bestway Inn where Doss was to meet the seller "Pootie." App. 37, l. 25 – 38, l. 23.

After Doss met with the seller in a room at the Bestway Inn, he came back to law enforcement with a small amount of crack cocaine. App. 204, l. 21 – 205, l. 2-6, l. 5. Harrelson paid Doss sixty dollars for participating in the controlled drug buy. App. 168, ll. 17 – 19.

Harrelson took photographs of the seller from video footage of the June 12, 2015 drug buy at the Bestway Inn. App. 51, l. 24 – 55, l. 4; App. 65, ll. 14 – 20. Harrelson sent those photographs to “Street Crimes” which matched the seller to Petitioner. App. 64, ll. 20 – 25.

Harrelson then showed a photo identification lineup to Doss to identify the alleged seller. App. 212, l. 25 – 215, l. 20. Doss identified Petitioner as the seller. Id.

At his PCR hearing Petitioner alleged that trial counsel provided ineffective assistance of counsel for failing to conduct a proper investigation into his case. App. 333, l. 14 – 334, l. 9. Petitioner explained that trial counsel did not investigate into a discrepancy in Doss’ testimony between motel rooms in which the state alleged the drug deal took place. Id.; App. 74, ll. 1 – 23. Doss’ made a statement to police said that the transaction occurred in room 225; however, later he gave another statement that it occurred in room 223. Id.; App. 335, l. 25 – 336, l. 11. Furthermore, it was determined that room 223 was not rented on June 12, 2015 and that room 225 was rented by a third party. Id. Trial counsel never discovered whom rented room 225.

Petitioner informed the court that trial counsel also failed to investigate into multiple witnesses in his case. App. 333, l. 14 – 334, l. 9. One missing witness was a man named Christopher Roof, who met with Doss during one of the August 2015 controlled buys where Roof was the person who made the hand to hand transaction. App. 334, l. 12 – 335, l. 8. The other missing witness was a woman named Sheila Harvey, who faced “the same... charges that [Petitioner] was charged with.” Id.

Doss made a phone call on June 12, 2015 to the seller to set up the controlled buy. App. 37, l. 17 – 38, l. 6. Petitioner explained that there were phone records that trial counsel failed to investigate that would have showed he never spoke with Doss on the phone to set up the transaction. App. 333, l. 14 – 334, l. 9; App. 341, ll. 10 – 16; App. 342, l. 7 – 343, l. 1. Trial

counsel never discovered whom Doss called to set up the drug deal. Moreover, trial counsel failed to investigate the discrepancy between the nicknames Doss alleged Petitioner went by, “Pootie” and/or “Lucky,” and Petitioner’s actual nickname “Jay” that was recorded in the “Moss Justice System.” App. 49, l. 9 – 50, l. 3; App. 335, l. 24 – 336, l. 20.

Trial counsel also testified at the PCR hearing. App. 347, l. 10. She argued that she conducted an independent investigation of the witnesses Petitioner mentioned. App. 348, l. 20 – 350, l. 23. She claimed that the two missing witnesses, Roof and Harvey, were involved in Petitioner’s other cases and not relevant to the present charges. Id.

Trial counsel claimed that she investigated the alias issue as well. App. 351, l. 10 – 352, l. 4. She testified that she contested the identification of Petitioner as “Pootie” or “Lucky” during the Neil v. Biggers, 409 U.S. 188 (1972), motion she made pretrial. Id. During the pretrial motion, trial counsel argued that Harrelson’s testimony that “Pootie” or “Lucky” were aliases for Petitioner should be inadmissible because Harrelson relied on someone¹ at “Street Crimes” to identify the seller as Petitioner. Id. However, trial counsel admitted at PCR that she did not investigate the phone records and had nothing in her notes regarding them. App. 352, ll. 5 – 14.

In an order filed on February 22, 2019, Judge Russo denied Petitioner relief. App. 368 – 378. Russo found that trial counsel’s testimony was credible regarding her investigation into Petitioner’s case. App. 375 – 376. Russo also found that Petitioner failed to explain how more investigation would have changed the outcome of his case. Id.

Discussion

Trial counsel provided ineffective assistance of counsel when she failed to investigate into several potential leads in Petitioner’s case. App. 333, l. 4 – 334, l. 9. Trial counsel failed to

¹ The identity of the officer working at “Street Crimes” was never revealed. The officer was not called as witness and Investigator Harrelson did not recall his or her name. App. 64, ll. 1 – 12.

investigate into: the two different motel rooms that Doss alleged the drug deal took place; Petitioner's phone records which would show that Doss did not call him to set up the transaction; and the multiple witnesses that Petitioner asked her to examine. Id.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) this Court held that trial counsel failed to conduct a reasonable investigation into McKnight's death by child abuse case. Id. at 47, 661 S.E.2d 361. Although McKnight was not a death penalty case, this Court cited Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883, n. 8 (2006) and Wiggins v. Smith, 539 U.S. 510 (2003) because the principle that an attorney must conduct a reasonable investigation into "all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence introduced by the State," to provide effective assistance of counsel, applies equally in the non-death penalty context. McKnight, at 46, 661 S.E.2d at 360.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Then Petitioner must show trial counsel's ineffective assistance prejudiced Petitioner case because, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is alleged, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) this Court held that Lounds' attorney provided ineffective assistance when he failed to adequately prepare for trial. Lounds, at

463, 670 S.E.2d at 463. Lounds was convicted of kidnapping and sentenced to life without parole. Id. at 457, 670 S.E.2d at 647. During his trial, Lounds testified in his own defense that he did not kidnap the victim and force the victim to give him money. Instead, Lounds met with the victim because of an outstanding debt and the victim volunteered to go to a relative's home to ask for the money to pay Lounds back. Id. at 458, 670 S.E.2d at 648.

At Lounds' PCR hearing he claimed he was provided ineffective assistance of counsel because Lounds' trial attorney failed to call witnesses that would have corroborated Lounds' testimony. Id. This Court agreed with Lounds and held that his trial counsel had a duty to, "at a minimum... interview potential witnesses." Id.; quoting Ard v. Catoe, 372 S.C. 318, 321, 642 S.E.2d 590, 597 (2007).

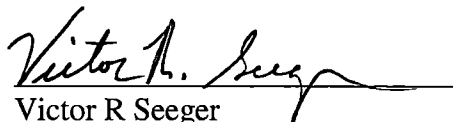
Here, as in Lounds, trial counsel provided ineffective assistance of counsel when she failed to investigate into the potential witnesses that Petitioner mentioned. App. 334, l. 12 – 335, l. 8. Trial counsel also failed to conduct a reasonable investigation into "all reasonably available mitigation evidence," when she did not investigate Petitioner's phone records to show that Doss never called him to set up the drug deal. McKnight, at 46, 661 S.E.2d at 360. During the PCR hearing, trial counsel admitted that she did not investigate into Petitioner's phone records and had nothing in her notes about it. App. 352, ll. 5 – 14.

Had trial counsel conducted a reasonable investigation, the outcome of Petitioner's case would have likely been different. Doss testified that the drug deal took place in room 223 and room 225. App. 74, ll. 1 – 23. Trial counsel failed to investigate into that discrepancy in Doss' story, which would have undermined Doss' credibility. App. 333, l. 4 – 334, l. 9. She did not examine Petitioner's phone records which would have shown that Petitioner was not the person whom Doss called to set up the drug deal. Id. Furthermore, Petitioner asked plea counsel to

follow up on multiple witnesses and she did not speak to them. Id. Accordingly, Petitioner was provided ineffective assistance of counsel that prejudiced his case.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.

A handwritten signature in black ink, appearing to read "Victor R. Seeger", written over a horizontal line.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of November, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Thomas A. Russo, Circuit Court Judge

JARVIS HUGHES,

PETITIONER

V.

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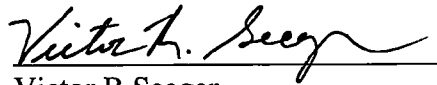
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jarvis T. Hughes 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 Thomas A. Russo, which was held on January 28, 2019, 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 Jarvis T. Hughes.

Respectfully Submitted,

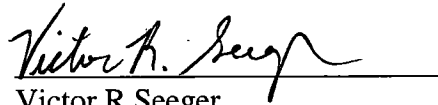


Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of November, 2019.

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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Appellate Defender

South Carolina Commission on Indigent
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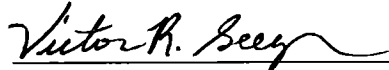
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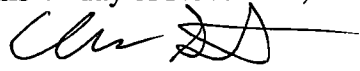
CERTIFICATE OF SERVICE

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 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 Jarvis T. Hughes, #280975, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4th day of November, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029