STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

TYRONE JOSEPH WHATLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000111

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to move for a mistrial based on the State's failure to timely disclose an inconsistent statement given by a co-defendant?

STATEMENT

In July of 2010, the Florence County Grand Jury indicted Petitioner, Tyrone Joseph Whatley, for burglary first degree, two counts of armed robbery and conspiracy, indictment #2010-GS-21-1008. On January 31, 2011, Petitioner proceeded to jury trial before the Honorable D. Craig Brown. Scott P. Floyd represented Petitioner at trial. Fitzlee H. McEachin prosecuted the case. The jury returned verdicts of guilty. Judge Brown sentenced Petitioner to concurrent life sentences for the burglary and armed robbery charges[1] five years concurrent for conspiracy. A timely notice of intent to appeal was filed and the direct appeal perfected. On March 19, 2014, the South Carolina Court of Appeals affirmed the conviction after hearing arguments. State v. Whatley, 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014). A timely petition for rehearing was filed and then denied on April 25, 2014. A timely petition for writ of certiorari was filed and then denied on March 16, 2016.

On May 6, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on January 27, 2017. On January 30, 2018, an evidentiary hearing was held before the Honorable Michael G. Nettles. Jonathan Waller represented Petitioner at the PCR hearing. Lindsey McCallister represented the State. In a written order signed January 10, 2019, Judge Nettles denied relief and dismissed the application. A timely notice of intent to appeal was served on January 25, 2019. This petition for writ of certiorari follows.

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[1] Petitioner had a prior conviction for armed robbery, a most serious offense pursuant to S.C. Code §17-25-45. (App. p. 247, lines 4-15).

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to move for a mistrial based on the State's failure to timely disclose an inconsistent statement given by a co-defendant.

A jury found Petitioner guilty of barging into the motel room of Brandon Cross and Ciera Davis and robbing them on July 21, 2009. Co-defendants John Barfield and Jessica Ussery were also charged with the burglary and armed robbery. Davis testified that around midnight on July 21, 2009, she heard a knock on their hotel door. (App. p. 78, lines 9-11). When Davis looked to see who was knocking on the door, she saw a white woman and cracked the door. (App. p. 78, lines 12-22). When Davis cracked the door a black guy and a white guy, both with ball caps, rushed in. (App. p. 78, line 23 – p. 79, lines 1-10). The white guy had a gun and was demanding money. (App. p. 79, lines 11-16; p. 80, lines 1-8). Davis and Cross fled from the motel room and called 911. (App. p. 82, lines 18-23). Davis told the 911 operator that the people who had robbed them were leaving in a burgundy car. (App. p. 83, lines 1-12).

An officer responding to the 911 call stopped a burgundy car driven by Ussery. (App. pp. 93-97). A white male and a black male fled from the car once it was stopped. (App. p. 94, lines 1-13). Ussery was arrested and initially told the investigator that John Anderson and Jamal Bryant were involved in the incident. (App. p. 130, line 21 – p. 131, lines 1-2). She later admitted that her boyfriend, John Barfield, was involved. (App. p. 171, lines 15-20). Davis identified Barfield as one of the robbers. (App. p. 172, lines 1-9). Neither Cross nor Davis ever identified the second male robber. Barfield was arrested in July of 2009. (App. p. 160, lines 21-22).

In March of 2010, after Barfield had been in jail for over seven months, he provided officers with a nickname – Rom - as the third individual involved. He also provided officers with a general idea of where Rom was living at the time of the incident. (App. p. 160, line 17 – p. 161,

lines 1-7; p. 173 lines 13-19). Searching in the general area described by Barfield, officers learned that Petitioner was listed as an occupant. (App. p. 173, lines 13-25). The officer obtained a photo of Petitioner and Barfield identified Petitioner as Rom. (App. p. 174, lines 1-10). Ussery identified Petitioner as Rom for the first time at trial. Ussery admitted that Barfield wrote letters to her while she was in jail. (App. p. 131, line 20 – p. 132, lines 1-4).

At trial Ussery testified that the third person involved in the robbery was Barfield's friend, Rom. (App. p. 116, lines 9-13). She testified that Barfield told her that Rom's real name was Jamal Bryant. (App. p. 116, lines 14-17). Barfield, however, testified at trial that he never knew Rom's full name. (App. p. 161, lines 16-22). At trial Ussery identified Petitioner, seated at defense table, as Rom or Jamal Bryant. (App. p. 116, line 18 – p. 117, line 1). She admitted that at the time she did not know Petitioner as Tyrone. (App. p. 125, lines 18-22). On cross examination she testified that she had been charged with two counts of armed robbery, failure to stop for a blue light, and false information to police. (App. p. 130 lines 2-4). She admitted, however, that the armed robbery charges had been reduced to accessory before and after the fact. (App. p. 130 lines 13-17). At the time of Petitioner's trial the false information to police and accessory charges were still pending against Ussery. (App. p. 130, lines 13-15; p. 141, lines 13-21). Ussery admitted that she initially did not tell police the whole truth. (App. p. 124, lines 6-11). When questioned about her second statement to police she testified that it was "pretty much" what she told the jury at trial. (App. p. 124, line 17 – p. 125, lines 1-8).

Barfield also identified Petitioner in court as Rom. (App. p. 145 line 24 – p. 146 line 4). On cross examination, Barfield admitted that he had been charged with two counts of armed robbery, burglary in the first degree, weapon possession and criminal conspiracy. (App. p. 158, lines 21-22). Barfield testified that he pled guilty to two counts of attempted armed robbery and received a seven-

year sentence. (App. p. 159 lines 3-10). All other charges against him were dismissed. (App. p. 159 lines 11-13).

At the PCR hearing Petitioner alleged that trial counsel was ineffective for failing to object to a statement from a witness that was not provided to defense counsel until the day of trial. (App. p. 275, lines 21-23). Specifically, PCR counsel stated, "Your Honor, it was – It was a statement that had been – a seven-page written statement and a however-long videotaped statement that had never been disclosed by a cooperating co-defendant, and a prior statement had been disclosed. So when she testified that she had given this second statement, Mr. Floyd [trial counsel] and Mr. Whatley had never heard of it." (App. p. 276, lines 5-11). PCR counsel argued that the second non-disclosed statement was inconsistent with the initial statement Ussery provided to police on the night she was arrested. (App. p. 276, line 16 – p. 277, lines 1-11). While the second statement was not introduced in evidence at the PCR hearing, from her testimony at trial it appears that in her second statement she named the second male robber as Rom, Jamal Bryant's nickname. There was no reference to Rom in her first statement. The State's case against Petitioner was based on the co-defendants identifying Petitioner as Rom. Other than the identifications by the co-defendants, the State offered no evidence that Petitioner, Tyrone Whatley, was known as Rom or Jamal Bryant.

During the PCR hearing trial counsel admitted that the State did not provide him with Ussery's second statement prior to trial. (App. p. 299, lines 1-7). When asked if he made any motions in regard to the inconsistent statement that was not provided prior to trial, trial counsel testified, "You know, I'm not – the way I understand it and what has been – I mean I normally now, you know, they give us the statements, but technically, under Rule 5, I'm not sure they have to give them before the witness actually testified. I'm not sure that's required." (App. p. 300, lines 4-8).

It appears from the record that **after** some cross-examination of Ussery, trial counsel stated, "Your Honor, I need to take up a matter with the Court if I could?' (App. p. 133, lines 3-4). The judge asked the attorneys to approach and held an off the record bench conference. (App. p. 133, lines 5-8). The judge then asked the jury to retire and trial counsel asked for a few minutes, presumably to review the undisclosed second statement. (App. p. 133, line 9 – p. 134, line 1). The trial judge told trial counsel, " . . . I'm going to give you a few minutes, Mr. Floyd, to look at that. You take whatever time you need to look at it." (App. p. 134, lines 2-4). After a short break the trial judge asked, "Any motions pursuant to that statement just being given to you?" (App. p. 134, lines 23-24). Trial counsel made no motions and told the judge he had "ample opportunity to read it." (App. p. 134, line 25 – p. 135, lines 2-4).

At the end of the PCR hearing PCR counsel argued:

> Your Honor, the – as far as the statements, the statement was provided to Mr. Floyd during the course of the trial. I believe that's on page 133 of the transcript or 134 when it's actually handed to him. Your Honor, there was no objection to it. He did review it right there in the court. It was seven pages long. He told the Court he had enough time to review it.
>
> Your Honor, I think that the – because it was provided to him, I don't think it was a de facto Brady violation, but I think that Mr. Floyd – and certainly, until it was handed to him, I think it was. I think that it potentially was favorable to the defendant. It was something that was in the possession of the prosecution. It was – was not turned over by the prosecution; so it was suppressed by them. And it was – it was impeachment evidence.
>
> So I think at that point definitely three of the four factors were in Mr. Whatley's favor and certainly I think it is questionable as to whether it would have have been favorable to him or not. So I think Mr. Floyd needed to make a motion or take other action regarding that statement that wasn't provided.

(App. p. 311, line 17 – p. 312, lines 1-12).

In the order of dismissal the PCR judge wrote:

> This Court finds no deficiency in Counsel's handling of witness statements turned over to the defense for the first time during trial. Pursuant to Rule 5(a)(2), SCRCrimP, witness statements must only be provided after the witness testifies. This Court has reviewed the transcript and notes the trial court offered Counsel a break in which to review the statement, which was only seven pages. Tr. p. 134. When the trial resumed, Counsel informed the court he had "ample time" to review the statement, and he was ready to go forward.

The PCR judge erred. After the direct examination of Ussery, trial counsel should have moved for disclosure of the statement prior to cross-examination and pursuant to Rule 5(a)(2), SCRCrimP. After review of the statement, trial counsel should have moved for a mistrial. The State's failure to disclose Ussery's second statement to police, naming Rom as the second male robber, constituted a Brady violation.

Rule 5(a)(2), SCRCrimP. Provides:

> Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

Trial counsel was ineffective in failing to move, after Ussery's direct examination, to have the prosecution produce Ussery's second statement pursuant to Rule 5(a)(2).

As to the Brady violation, in State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219–20 (Ct. App. 1998), the South Carolina Court of Appeals wrote:

> The rules encompassed in Brady, and its progeny, and Rule 5 are separate and impose different duties. Therefore, separate analysis must be used to determine if either has been violated.
>
> The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. It requires the prosecution to disclose evidence that is: 1.) in its

> possession; 2.) favorable to the accused; and 3.) material to guilt or punishment. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The prosecution has the duty to disclose regardless of whether the defendant makes a specific request. Bagley, supra.

The constitutional dictates of the Brady disclosure rule required the State to disclose Ussery's second statement to police prior to trial even though the judicially created discovery mechanism provided by Rule 5, SCRCrimP, did not.

"In South Carolina, an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching.[5] Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006); State v. Carlson, 363 S.C. 586, 609, 611 S.E.2d 283, 295 (Ct.App.2005)." State v. Moses, 390 S.C. 502, 515–16, 702 S.E.2d 395, 402 (Ct. App. 2010). Ussery's second statement to police was favorable to Petitioner as impeachment evidence. "Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. Kennerly, 331 S.C. at 452–53, 503 S.E.2d at 220." Moses, 390 S.C. at 517, 702 S.E.2d at 403. Her second statement was in the State's possession and suppressed. Finally, her second statement was material to guilt as it was the first time she named Rom as the second male robber and it was impeaching. A review of the cross examination of Ussery, both before and after the second statement was disclosed, reflects that counsel did not adequately highlight the inconsistencies. (App. pp. 126-133; pp. 140-143). The State's failure to disclose Ussery's second statement to police constituted a Brady violation. Once a Brady violation is established, reversal is required. See Kennerly, Kyles.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective for failing to move for a mistrial based on the Brady violation. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. In Gibson v. State, 334 S.C. 515, 526, 514 S.E.2d 320, 325 (1999), the South Carolina Supreme Court wrote:

> The overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play. In close cases, "the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." Kyles v. Whitley, 514 U.S. at 438–40, 115 S.Ct. at 1568, 131 L.Ed.2d at 509 (quotes

omitted) (citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)).

The present case was not a close case. Pursuant to Brady the State had a duty to disclose Ussery's second statement to police. Even if the prosecutor believed the question was close, the prosecutor's responsibility to do justice and be fair required disclosure. Trial counsel was ineffective in failing to move for a mistrial when he discovered that the State failed to disclose her second statement, in which for the first time, she named Rom as the other robber.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of November, 2019.

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TYRONE JOSEPH WHATLEY,

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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 Lindsey McCallister, 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 Tyrone Joseph Whatley, #208735, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 7th day of November, 2019.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 7th day of November, 2019.

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