STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

JOHNNY NEAL SEXTON, II

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000424

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective for failing to call Petitioner's aunt to testify where she was Petitioner's only alibi witness and could have testified that Petitioner had moved out of the home prior to the alleged criminal activity taking place there?

STATEMENT

Petitioner was indicted by the Lexington County grand jury in April 2015 of three counts of unlawful conduct towards a child. App. 388 – 395. His jury trial was held from April 15 – 17, 2015 before the Honorable Thomas A. Russo and a jury. App. 1. Petitioner did not appear for his trial and was tried in his absence. Petitioner was represented by David M. Mauldin and the state was represented by Rhonda Patterson and Shannon Davis. App. 1.

Petitioner was accused of manufacturing and using methamphetamine in his camper where he allegedly lived with his three minor children and their mother. App. 89, l. 12 – 94, l. 4. The minors' mother, Jamie Norris, was also charged with three counts of unlawful conduct towards a child but she was permitted to plead guilty to two counts and was sentenced to ten years imprisonment suspended upon the service of four years, followed by two years of probation.[1] App. 106, l. 15 – 107, l. 2.

Norris testified against Petitioner at his trial. She claimed that she and Petitioner smoked meth in their camper while their children were present and that Petitioner "cooked" meth there as well. App. 89, l. 12 – 94, l. 4. A Lexington County Sheriff's Deputy, Stephen Bair, served a rule to vacate the property on Petitioner on January 23, 2014 for his alleged failure to pay rent. App. 111, l. 15 – 112, l. 20. Bair then served a writ of ejectment on Norris on February 21, 2014. App. 113, ll. 9 – 21.

The same day that Bair served the writ of ejectment, a Lexington County DSS worker happened to be responding to the camper as well to investigate an allegation of child neglect. App. 205, l. 1 – 206, l. 17. Petitioner was not present at the time but Norris and all three of their

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1 Petitioner was offered the same plea deal as Norris which was to plead "straight up" to two counts of unlawful conduct towards a child with no recommendation as to sentencing. App. 361, ll. 9 – 22.

children were home. App. 113, ll. 22 – 23; app. 116, l. 21 – 117, l. 7. Norris gave the DSS worker and Bair permission to enter the home. App. 115, l. 24 – 116, l. 2.

Once inside the camper, Bair claimed that he observed "open mason jars in the kitchen area, funnel, filter, other items that I believe may possibly be used in the manufacture of methamphetamine." App. 116, ll. 3 – 6. Bair got Norris and the children out of the camper and called the narcotics division to come investigate. App. 116, ll. 10 – 22. The three children were placed into emergency protective custody by law enforcement at that time. App. 212, ll. 2 – 10.

Mike Merckle, with the Lexington County Sheriff's Department, was qualified as an expert in "clandestine meth labs and detection" over defense counsel's objection. App. 170, ll. 7 – 12. Merkle then claimed, over defense counsel's objection, that he found two mason jars in the camper which contained Coleman fuel and ether. App. 179, l. 5 – 180, l. 24. Merckle testified in detail about the meth manufacturing process including the use of items such as Coleman fuel, ether, and pseudoephedrine. App. 173, l. 1 – 175, l. 20. He said that the process is extremely dangerous and would be very harmful to children. App. 176, ll. 1 – 23.

Petitioner was convicted as charged and the judge sealed his sentence and issued a bench warrant for his arrest. App. 261, l. 3 – 267, l. 10. On May 6, 2015, Petitioner appeared before the Honorable R. Keith Kelly for the unsealing of his sentence. App. 269. The judge imposed a sentence of eight years imprisonment on each count, all to run consecutively to one another for a total of twenty-four years imprisonment. App. 272, ll. 3 – 22.

Petitioner filed an appeal and was represented by LaNelle C. Durant with Appellate Defense. App. 275 – 293. On appeal, Petitioner raised the following two issues:

1. The court erred in allowing Agent Mike Merckle to give his opinion that the substances in two mason jars were Coleman fuel and ether, both necessary ingredients for making "meth," when the substances were never tested in Appellant's case although Agent Merckle had tested similar substances in prior cases; therefore,

the opinion was not reliable as shown by the judge instructing the jury on the spoliation of the evidence; thus, the judge failed to fulfill his role as gatekeeper of the reliability of the evidence; and

2. The court erred by ruling that the testimony that Appellant did not attend the subsequent DSS legal hearings on his three children, which were outside the time period stated in the indictments, and the lay witness's testimony that Appellant did not show interest in getting his children back was admissible since it was irrelevant to the crime of unlawful conduct towards a child, and was highly prejudicial.

The Court of Appeals affirmed. State v. Sexton, 2017-UP-454 (filed December 6, 2017).

Petitioner filed an application for post-conviction relief on April 3, 2018 and the state filed its Return on July 5, 2018. App. 317 – 333. Petitioner filed an amended PCR application through his counsel, Ashley A. McMahan on January 24, 2019. App. 334 – 336. An evidentiary hearing was held on January 24, 2019 before the Honorable Walton J. McLeod, IV. App. 337. Ashley McMahan represented Petitioner and Kelly Oppenheimer represented the state. App. 337. Petitioner and his trial counsel, David Mauldin, were the only witnesses who testified. App. 338.

Petitioner testified that he had an alibi defense and that his aunt was the only witness that could verify this. App. 344, ll. 4 – 8. Petitioner said that he told defense counsel Mauldin about his aunt being his alibi witness and that he wanted Mauldin to call her as a witness at his trial. App. 347, ll. 2 – 13.

Mauldin admitted that Petitioner had informed him that he moved out of Norris' house prior to the police responding and was staying with his aunt, Debbie Wright. App. 354, ll. 8 – 15. Mauldin also acknowledged that he spoke with Wright who confirmed that Petitioner had been living with her, but claimed she was unable to account for his whereabouts at *all times*. Wright also said that Petitioner would still occasionally go back to spend the night with Norris. App. 354, ll. 16 – 24. Mauldin said that he was only going to use Wright to supplement

Petitioner's testimony and he reasoned that "her testimony alone would not have assisted in any way." App. 354, l. 25 – 355, l. 4.

The PCR judge found that Mauldin's failure to call Wright as a witness at trial was not deficient performance because Mauldin testified that her testimony would have only been useful in supplementing Petitioner's testimony had he appeared for his trial and testified. App. 383 – 384. The PCR judge further ruled that Petitioner failed to show prejudice because he did not present testimony from Wright at the evidentiary hearing. App. 384. Petitioner's application was denied.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective for failing to call Petitioner's aunt to testify because she was Petitioner's only alibi witness and could have testified that Petitioner had moved out of the home prior to the alleged criminal activity taking place there.

In order to prove ineffective assistance of counsel, Petitioner must show 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.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it 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.

Petitioner's trial counsel was deficient for failing to call Wright as an alibi witness to testify that Petitioner had moved out of the house prior to the alleged criminal activity taking place. Trial counsel admitted at the PCR hearing that he had spoken with Wright regarding Petitioner's potential alibi defense but chose not to present her testimony. App. 354, ll. 16 – 24. Counsel claimed that her testimony, by itself, would not have been helpful and that he would

have only used her testimony to "supplement" Petitioner's testimony. App. 354, l. 25 – 355, l. 4. Because Petitioner did not testify, counsel chose not to call Wright. App. 357, ll. 15 – 25.

Counsel's decision not to call Petitioner's aunt because of Petitioner's failure to testify in his own defense did not constitute a valid trial strategy. Counsel argued in his closing that the state had not proven that Petitioner was living in the house at the time the criminal activity took place which demonstrated his attempt to capitalize on this potential defense. App. 247, l. 25 – 248, l. 21. However, because counsel failed to present the testimony of Wright, his argument was significantly less persuasive.

In Glover v. State, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995), the Supreme Court stated: "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." However, in Martin v. State, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019), the Supreme Court clarified this rule in holding that trial counsel's candid admission at the PCR hearing that he was aware of the specific alibi timeline but failed to elicit that testimony was deficient performance which resulted in prejudice to the petitioner. In Martin, the alibi witness did not actually testify at the PCR hearing. Nevertheless, the Court found that trial counsel's admission was enough. Id.

In this case, while Petitioner did not present Wright's testimony at the PCR hearing, trial counsel admitted that he had spoken to Wright who told him that Petitioner had moved out of the trailer where Norris and the children were staying and into her house. App. 354, ll. 16 – 24. Counsel chose not to call her as a witness for no other reason than that Petitioner did not testify at trial. This did not constitute a valid trial strategy and was deficient performance.

Petitioner was prejudiced by counsel's failure to present the testimony of Wright because, as counsel acknowledged, she would have testified that Petitioner had moved out of the home and was living with her prior to his arrest. This would have significantly increased the strength of counsel's closing argument that Petitioner was not living in the house and therefore, was not guilty of the offenses. Thus, the PCR judge erred in finding that trial counsel was not ineffective. See Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of November, 2019.

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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 Taylor Z. Smith, 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 Johnny Neal Sexton, II, #363922, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 8th day of November, 2019.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of November, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.