STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge

JEFF CHESTNUT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000347

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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II. Whether the PCR court erred in denying relief, where trial counsel failed to obtain an eyewitness identification expert, where Petitioner was indigent and could not afford an expert, where the eyewitness who identified Petitioner saw only the eyes of the alleged robber and made the identification two weeks after the robbery, and where trial counsel failed to discuss with Petitioner the possibility of hiring an expert?

III. Whether the PCR court erred in denying Petitioner's request for funding for an eyewitness identification expert following both a written and oral motion, where the eyewitness's identification was unreliable, and where Petitioner requested funding to retain an expert witness in order to prove that he was prejudiced by trial counsel's errors?

STATEMENT

Petitioner was indicted by a Richland County grand jury on three counts each of armed robbery and kidnapping on July 18, 2012. App. 827 – 837. He proceeded to trial before the Honorable G. Thomas Cooper and a jury on September 17, 2012. Petitioner was represented by Mathias Chaplin; Joanna McDuffie, John Steadman, and Nicole Simpson appeared on behalf of the state. Following a four-day trial, Petitioner was found guilty as indicted. App. 650 l. 21 – App. 651 l. 13. Judge Cooper sentenced Petitioner to thirty years on each charge, concurrent. App. 673 ll. 2 – 9.

Petitioner filed an application for post-conviction relief on August 22, 2014. App. 675 – 689. It contained allegations of ineffective assistance of counsel. The state made its Return on or about March 11, 2015. App. 690 – 694. Through counsel, Petitioner filed an amendment to his post-conviction relief application on January 26, 2016. App 695 – 696. The amendment contained sixteen specific claims of ineffective assistance of counsel. Id.

An evidentiary hearing took place before the Honorable J. Derham Cole on February 3, 2016. App. 699. Jonathan Waller represented Petitioner, and J. Clayton Mitchell, III appeared on behalf of the state. Trial counsel and Petitioner testified at the hearing.

The PCR court took the matter under advisement. App. 786 ll. 24 – 25. An Order of Dismissal was filed over three years after the evidentiary hearing, on February 19, 2019. App. 789 – 825.

This petition follows.

ARGUMENT

I. The PCR court erred in denying relief, where trial counsel was ineffective in failing to object to the admission of Petitioner's statement to law enforcement, where counsel argued pre-trial that the statement was involuntarily made based on promises made by the officer, where counsel failed to renew and preserve the objection during trial.

Relevant facts

Trial counsel was appointed to represent Petitioner. App. 711 ll. 15 – 21. The primary trial strategy was to distance Petitioner from the robbery of a bingo parlor. App. 719 l. 23 – App. 720 l. 3. Petitioner's girlfriend, Teidra Dennis, worked at the Carolina Gold bingo parlor. App. 45 ll. 9 – 17. On a Friday night, "hot dog night," Petitioner went to the bingo parlor to take Dennis some cigarettes. App. 459 l. 12 – App. 460 l. 5. Petitioner's codefendant, Tyward Jordan, drove Petitioner to the bingo parlor. App. 460 ll. 13 – 16. Petitioner did not enter the bingo parlor that evening. App. 462, ll. 24 – 25. Jordan and another one of Petitioner's friends went into the parlor and bought some hot dogs. App. 461 l. 19 – App. 462 l. 2.

On the following Sunday, May 23, 2010, two men robbed the bingo parlor. App. 276 l. 5 – App. 279 l. 16. The men were disguised with bandanas. App. 276 l. 5 – App. 279 l. 16. One of the employees identified Jordan as one of the robbers. App. 182 l. 13 – App. 183 l. 25. She remembered seeing Jordan at hot dog night. App. 182 l. 13 – App. 183 l. 25. The same employee testified that Dennis was making suspicious phone calls from other employees' cellphones before the robbery. App. 171 ll. 10 – 14. Dennis did not wait to speak with the police after the robbery and immediately left. App. 176 l. 2 – App. 177 l. 8.

Petitioner testified that the Sunday of the robbery, he caught a ride with Jordan to the Comedy House which was next door to the bingo parlor. App. 464 ll. 7 – 22. Jordan was on the

telephone during the car ride. App. 464 l. 25 – App. 465 l. 2. Jordan was planning a robbery. App. 465 ll. 3 – 12. His partner in the robbery was going to be a man named Quantis Sims. App. 465 ll. 10 – 22.

Petitioner initially asked Jordan whether he could join in the robbery, but later decided against it. App. 466 ll. 6 – App. 467 l. 7. Petitioner loaned his shirt and hat to Sims, but did not participate in the robbery. App. 467 l. 8 – App. 468, l. 2. Petitioner testified that by loaning his clothes to Sims, he was able to extricate himself from their robbery plan. App. 467 l. 8 – App. 468 l. 2. He was still at the Comedy House when he saw Jordan and Sims run back to their car and leave. App. 469, l. 19 – App. 470 l. 22. Petitioner did not leave with Jordan and Sims. App. 470 l. 18 – 471 l. 6. Petitioner later learned that Jordan spent that night with Dennis. App. 474 l. 20 – App. 475 l. 9.

Prior to trial, the court held a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). After Dennis implicated Petitioner in the robbery, law enforcement arrested him when he reported to his probation officer. App. 45, ll. 9 – 17. On June 8, 2012, Petitioner was interrogated at the Richland County Sheriff's Department headquarters on Two Notch Road by Kevin Isenhoward. App. 45 l. 6 – App. 46 l. 1. Both Petitioner and Isenhoward testified at the Denno hearing.

A witness, Angela Diaz-Garcia, seemingly identified Petitioner on June 9, 2010 from a line-up during a meeting with Isenhoward. App. 103 l. 13 – App. 107 l. 4. Both robbers had bandanas across their faces. App. 726 ll. 5 – 8. The man identified by Diaz-Garcia was also wearing a hat or stocking cap. App. 726 ll. 9 – 13. She testified that the man who she later identified as Petitioner was wearing a bandana which came "right above his nose," although she could see his eyes. App. 111 ll. 15 – 24. She identified him out of photographic lineup and also

identified him in the courtroom. App. 114 l. 5 – App. 115 l. 24. Counsel asked that Diaz-Garcia's identifications, both the photographic lineup one as well as the in-court one, be suppressed. App. 124 ll. 11 – 16. The trial court denied the motion but expressed concern about the two-week lapse following the robbery. App. 125 l. 12 – App. 126 l. 15.

Regarding expert witnesses, counsel testified that he never spoke with Petitioner about hiring an expert in eyewitness identification. App. 725 ll. 13 – 17; App. 727 ll. 12 – 14. Counsel was aware that the state was going to call an investigator to discuss cell phone records; he was unsure, however, whether that individual was going to testify as an expert. App. 727 ll. 15 – 24.

Discussion

Petitioner testified that Isenhoward did not read him his rights at the beginning of the interview. App. 78 l. 23 – App. 79 l. 9. Isenhoward promised that if he gave a statement, Petitioner would receive a low bond and would only be charged with one count. App. 79 l. 14 – App. 80 l. 2. Isenhoward threatened that he could charge Petitioner "for every person in the building." App. 79 l. 22 – App. 80 l. 2. Instead of allowing Petitioner to handwrite a statement, Isenhoward presented a typed document and told him to sign it. App. 79 ll. 10 – 13.

The statement contained several serious inaccuracies. The statement falsely claimed that Petitioner told Isenhoward he was "a lookout." App. 84 ll. 2 – 7. As Petitioner pointed out, from his position at the Comedy House, he would have been a useless lookout. App. 482 ll. 12 – 18; App. 84 ll. 4 – 7. The statement also falsely claimed that Petitioner told Dennis he had planned to do the robbery and was "involved" in the robbery. App. 84 ll. 14 – 17.

Counsel moved pre-trial to suppress the statement. App. 740 l. 24 – App. 741 l. 1. Despite Petitioner's testimony, the trial judge ruled that the statement was admissible. App. 100 l. 21 – App. 102 l. 21. During trial, however, counsel did not object when the state moved

Petitioner's statement, State's Exhibit 1, into evidence. App. 381 ll. 16 – 20; App. 741 ll. 14 – 23.

When asked about the trial strategy behind not objecting, counsel plainly admitted "there [was not] one." App. 741 ll. 14 – 23. Further, counsel remarked that "in [Petitioner's] best interest, [the objection] should have been made." Id.

Trial counsel must provide reasonably effective assistance under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S.Ct. 2052. To receive relief, the applicant must show (1) counsel was deficient and (2) counsel's deficiency caused prejudice. Stalk v. State, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 693, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Id. at 700, 104 S.Ct. 2052.

Counsel failed to lodge a contemporaneous objection when the state introduced the statement trial. In order to introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). See also State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010). "Further, the confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence." State v. Rochester, 301 S.C. 196, 200,

391 S.E.2d 244, 246 (1990) (internal quotations omitted). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007).

The Order of Dismissal overlooked Petitioner's testimony regarding Isenhoward's promises. Isenhoward promised Petitioner that in exchange for a statement, Isenhoward would attend Petitioner's bond hearing and ensure that Petitioner received a low bond. App. 79 ll. 14 – 21. Furthermore, Isenhoward's promise to charge Petitioner with only one count induced Petitioner's statement. App. 79 l. 22 – App. 80 l. 14. Counsel failed to preserve this issue for appellate review.

The state did not prove that Petitioner's statement was voluntary in light of Isenhoward's promises. As a result, his statement should not have been admitted at trial. Counsel should have preserved this objection; he offered no strategic reason behind the failure to renew the objection. Therefore, Petitioner received ineffective assistance of counsel and was prejudiced. Had counsel objected, the Court of Appeals likely would have held that Petitioner's statement was involuntary made and therefore should have been suppressed.

II. The PCR court erred in denying relief, where trial counsel failed to obtain an eyewitness identification expert, where Petitioner was indigent and could not afford an expert, where the eyewitness who identified Petitioner saw only the eyes of the alleged robber and made the identification two weeks after the robbery, and where trial counsel failed to discuss with Petitioner the possibility of hiring an expert.

Counsel remarked that he "caught hell" by requesting funds for an investigator to be assigned Petitioner's case. App. 725 ll. 13 – 17. As a result, he did not pursue an expert in eyewitness identification. App. 727 ll. 12 – 14. Petitioner was indigent and could not afford an attorney; his direct appeal was handled by the South Carolina Commission on Indigent Defense. App. 690 – 691. Trial counsel was appointed by the trial court to represent Petitioner. App. 776 ll. 4 – 18.

At the outset of the evidentiary hearing, PCR counsel sought discovery as well as funding to retain the services of an eyewitness identification expert. App. 704 l. 24 – App. 705 l. 14. In response, the state remarked that Petitioner gave a statement that "implicated his involvement to an extent." App. 705 l. 21 – App. 706 l. 16. The PCR court denied the motion for discovery and seemingly never ruled on the funding request for an expert witness. App. 707 ll. 2 – 4.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (emphasis omitted) (citation omitted). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691, 104

S.Ct. 2052. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690–91, 104 S.Ct. 2052. "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions[.]" Id. at 691, 104 S.Ct. 2052.

"[T]he United States Supreme Court has held that the defendant must have 'a fair opportunity to present his defense,' thereby requiring the State to provide the 'basic tools' for an adequate defense to an indigent defendant." Bailey v. State, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (quoting Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)). "Thus, although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts necessary to a meaningful defense[.]" Id.

South Carolina Code section 17–3–50(B) provides in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.

An applicant is only entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony. Thames v. State, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996). The mere possibility the applicant could find a witness somewhere to support an allegation is insufficient to warrant authorization of funds. Id. Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective. Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998).

The petitioner in Thames, supra, sought authorization for the payment of expert witness fees in connection with her post-conviction relief action. Id. at 10, 478 S.E.2d at 682. Thames had already been examined by two psychiatrists prior to her guilty plea, one of whom was retained by her trial counsel. Id. at 11, 478 S.E.2d at 682. Both experts opined that she was competent at the time the crime was committed as well as the time of her plea. Id. The PCR judge ruled that since she had been examined by two experts at the time of her plea, there was no need to have a third examination. Id.

Unlike Thames, Petitioner has been unable to consult with an eyewitness identification expert. He has twice been denied that opportunity: once, through counsel's failure to seek funding based on perceived inconvenience, and second, following the PCR court's denial of funding to retain an expert. Counsel should have sought funding to retain an eyewitness identification expert or, at the minimum, speak with one in order to determine if further funding was warranted. Diaz-Garcia's identification was unreliable; even the trial court expressed concern with the two-week turnaround time. Had counsel sought funding, it likely would have been granted.

In Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015), the Court of Appeals held that trial counsel was deficient "because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial." In Reeves, trial counsel admitted he did not consult with an expert prior to trial even though he knew the state would attempt to admit evidence of a physical trauma. Citing Thames, the Reeves opinion noted that "[a]n applicant is only entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony." Id. at 377, 782 S.E.2d at 752.

Notably, as in the case at bar, "[t]rial counsel recalled he failed to meet with an expert witness because' there was a question about money,' but he also stated he could not recall whether he discussed this issue with Reeves at all." Id. at 377, 782 S.E.2d at 753. Therefore, he failed to even explore the possibility. PCR counsel expanded upon the need for expert testimony but was denied funding as will be discussed below.

At trial, the solicitor introduced State's Exhibit 3, the photographic lineup, without objection. App. 282 ll. 9 – 13. Counsel admitted he failed to preserve this objection. App. 735 l. 17 – App. 737 l. 4. Diaz-Garcia also identified Petitioner in the courtroom in front of the jury without objection. App. 280 l. 23 – App. 281 l. 4. Counsel suggested that he was concerned about "protesting a bit too much" in front of the jury. App. 738 l. 22 – App. 739 l. 24. Furthermore, counsel contended that "our testimony would [refute]" the in-court identification. App. 739 ll. 5 – 8.

Nonetheless, counsel candidly remarked that he should have objected, especially considering the unreliable nature of the witness's testimony. Id. He never believed the identification to be reliable, and in hindsight, admitted that the objection should have been lodged. Id.

III. The PCR court erred in denying Petitioner's request for funding for an eyewitness identification expert following both a written and oral motion, where the eyewitness's identification was unreliable, and where Petitioner requested funding to retain an expert witness in order to prove that he was prejudiced by trial counsel's errors.

PCR counsel filed a written motion on January 26, 2016, more than a week before the evidentiary hearing in this matter. Supplemental Appendix 1 – 4. It contained the following, a reasonable request for funding:

> The Applicant was arrested approximately two and a half weeks following the alleged incident. The incident occurred on May 23, 2010 and the Applicant was subsequently identified via one solitary lineup on June 9, 2010, seventeen days later. The assailant was identified as wearing a bandana on his face with only his eyes being visible to the victims. Furthermore, the assailant was armed and the robbery seemed to be a well planned and executed endeavor; taking only a matter of moments. In the time between the incident and the identification, the witness had conferred with her co-workers, reviewed surveillance videos, spoken with law enforcement, and the Applicant had been arrested, placing his picture on a public website of persons detained at the county detention center. There was no testimony at trial, other than Applicant's statement and testimony, regarding any planning or prior knowledge by the Applicant. There was no testimony by any co-defendants or witnesses who had an opportunity to view the assailants without the bandanas around their faces. Identification was made based upon a pair of eyes and became a deciding factor in the prosecution of Applicant.

Supp. App. 3. The certificate of service indicates that this motion was filed contemporaneously with Petitioner's written amendments to his PCR application. App. 698.

Under South Carolina's Uniform Post-Conviction Procedure Act:

> If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by the General Assembly.

S.C. Code Ann. § 17-27-60.

The United States Supreme Court has made clear that a defendant does not have the right to public funding for all possibly helpful avenues of investigation or all possibly useful expert services, but only to the level of support required by the Due Process Clause. Ross v. Moffitt, 417 U.S. 600, 616, 94 S.Ct. 2437, 2446, 41 L.Ed.2d 341 (1974).

The Court delineated the scope of an indigent defendant's due process right to public funds to help present a defense, stating that the government has no duty to "duplicate the legal arsenal that may be privately retained ... [but must] assure the indigent defendant an adequate opportunity to present his claims fairly." Id. Stated differently, a defendant who alleges

that a denial of funds has violated due process must demonstrate by clear and convincing evidence that the denial resulted in actual prejudice to the defense.

Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection. See Bailey v. State, 424 S.E.2d 503, 506 (S.C. 1992) (contrasting the resource constraints faced by defense counsel with those of the "publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement

Petitioner testified in his own defense. There existed no danger of losing the last closing argument, as often utilized as an alleged trial strategy. Trial counsel failed to secure funding; he did not appear to even request it in the first place.

The PCR court found Petitioner failed to prove prejudice regarding counsel's failure to retain the services of an eyewitness identification expert, "as Applicant wholly failed to provide any testimony from an identification expert and further failed to identify how the testimony from an expert would have been helpful." App. 805. To the contrary, PCR counsel remarked how "there are studies ... that in the presence of a gun, a person's focus goes all to the gun." App. 705.

PCR counsel articulated a valid reason for requesting funding. Petitioner needed the testimony of an expert witness in order to support a claim of ineffective assistance of counsel. The PCR court erred in denying the reasonable request for funding.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issues raised herein.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge

JEFF CHESTNUT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Jeff Chestnut, #304420, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of November, 2019.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 12th day of November, 2019.

ATTORNEY FOR PETITIONER

Mary Maguire (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027