STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Clarendon County

Honorable Kristi F. Curtis, Circuit Court Judge

MICHAEL PEARSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000221

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

I.

Did the PCR court err in finding trial counsel effective where trial counsel failed to make a motion to sever Petitioner's trial from that of his co-defendant where evidence was entered at trial that would not have been entered if Petitioner had been tried alone and resulted in the jury being unable to make a reliable judgment about Petitioner's guilt separate from that of his co-defendant?

STATEMENT

Facts of the case

In the early morning hours of May 15, 2010 Edward "Slick" Gibbons was attacked in the garage attached to his house as he prepared to leave for work at the local auto parts store that he owned. Gibbons stated that three masked black males came out of a storage room in his garage, beat him and took his money. App. 90, ll. 1-90; App. 93, ll. 7-18; App. 112, ll. 10-15. During the assault the men attempted to restrain Gibbons by placing duct tape on his head and trying to place it around his feet. App. 42 l. 22-App. 43, l. 8.

The three men fled the scene in Gibbons' 1987 El Camino. Gibbons saw two of the men get in the "cab" of the El Camino while the third man sat in the bed of the El Camino. App. 105, ll. 19-21; App. 109, ll. 3-4. As the three men were leaving in the El Camino, the man in the back yelled that Gibbons was getting up. The man in the back of the El Camino jumped out of the vehicle, went back to Gibbons in the garage and struck him again causing Gibbons to lose consciousness. App. 102, ll. 12-24.

A local farmer, Cecil Eaddy, was driving to his farm that same morning when he found Gibbons' El Camino on the side of the road, about twenty minutes after the vehicle had been stolen. App, 169, ll. 3-4; App. 169, ll. 13-22. The vehicle was abandoned in the road with the keys in the ignition, the engine running and the passenger door ajar. App. 171, l. 20-App. 172, l. 9. Eaddy called Gibbons' auto parts store, learned of the incident and agreed to bring the keys to the store and bring an employee back to drive the El Camino to the store. App. 172-173.

Officer Ricky Richards with the Clarendon County Sheriff's Department processed the vehicle for fingerprints. App 122-124. Richards successfully lifted fingerprints from the door jamb of the driver's side and the rear quarter panel of the truck bed on the driver's side. App.

182, l. 19-App. 183, l. 6. No fingerprints were found inside of the car. Marie Hodge, a fingerprint examiner with the Sumter Police Department, ran the fingerprints through AFIS (Automated Fingerprint Identification System) but did not obtain a match. App. 215, ll. 3-10; App. 222, ll. 14-18. It was only through a visual comparison that the fingerprint from the rear quarter panel of the car was matched to Petitioner. App. 222-223; App. 226, ll. 12-15. Hodge conceded on cross-examination that there was no way to "date" or "age" the fingerprint and could not say when it was left on the car. App. 231, ll. 14-25.

According to Investigator Thomas Ham with the Clarendon County Sheriff's Department, Petitioner denied knowing Gibbons, or where he lived, and denied ever being at Gibbons' house or place of business. App. 206, ll. 5-17. However, Richard Gamble, a local landscaper who had employed Petitioner for a few jobs, testified that Petitioner helped him with landscaping work at both "Slick" Gibbons' house and his son's house next door. App. 324, ll. 1-21. Gamble was unsure what year Petitioner helped with the landscaping job at "Slick" Gibbons' house. App. 329, ll. 18-25.

Gibbons was taken to the hospital where Investigator Ham assisted a nurse in removing the duct tape from Gibbons' head. App. 197-198. The tape was submitted to the South Carolina Law Enforcement Division (SLED) for DNA testing. SLED agent Catherine Leisy reported that DNA from the tape matched the co-defendant, Weldon. App. 347, ll. 18-24. According to Investigator Clark with the Clarendon County Sheriff's Department, Petitioner and Weldon denied knowing one another. App. 278, ll. 8-10. Records from the South Carolina Vocational Rehabilitation Center show that from December 9-12, 2008, seventeen months before the incident in Gibbons' garage, Petitioner and Weldon were both assigned to the wood shop as part of a job readiness training

program. App. 336-337. No evidence was presented that Petitioner and Weldon were friends or even knew each other as a result of being assigned to the wood shop.

Procedural History

Petitioner, along with his co-defendant Weldon, was indicted by a Clarendon County Grand Jury on January 28, 2011 for burglary, first degree, attempted murder, armed robbery, grand larceny, kidnapping and possession of a weapon during the commission of a violent crime. App. 564-565. On May 14, 2012 the state, represented by Ernest Finney and Jason Corbett, called the cases to trial in front of the Honorable Ralph F. Cothran and a jury. App. 1. Petitioner was represented by Harry Devoe. App. 1. Weldon was represented by John and Laura Knobeloch. App. 1.

After a four-day trial the jury found both Petitioner and Weldon guilty as charged.[1] App. 466-67. Judge Cothran sentence Petitioner to imprisonment for 30 years on the burglary, first degree, 30 years consecutive on the armed robbery, 5 years concurrent on the grand larceny, 20 years concurrent on the kidnapping and 5 years concurrent on the weapon charge. App. 472-476.

Petitioner's direct appeal was perfected by Katherine Hudgins. On July 30, 2014, the Court of Appeals, in a published opinion, reversed Petitioner's convictions holding that the circumstantial evidence presented by the State did not rise to the level of substantial circumstantial evidence necessary to submit the case to the jury. State v. Pearson, Op. No. 5251 (S.C. Ct. App filed July 30, 2014). The state filed a petition for rehearing and on October 8, 2014, the Court of Appeals issued a substituted opinion, still reversing Petitioner's convictions. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (Ct. App. 2014). The state filed a petition for writ of certiorari which was granted. Subsequently, the South Carolina Supreme Court reversed the decision of the Court of Appeals and

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[1] The attempted murder charge was dismissed prior to the case being submitted to the jury. App. 388-389.

affirmed Petitioner's convictions and sentences. State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016).

Petitioner filed an application for post-conviction relief on May 27, 2016. App. 478-485. The state filed a return and motion to make a more definite and certain statement on June 6, 2017. App. 487-492. An evidentiary hearing was held on July 24, 2018, before the Honorable Kristi F. Curtis. App. 493. Petitioner was represented by Timothy L. Griffith. App. 493. The state was represented by Julie Coleman. App. 493.

Prior to the start of the hearing, PCR Counsel Griffith moved to orally amend Petitioner's PCR application. App. 499-500. Petitioner, through Counsel Griffith, alleged, inter alia, that trial counsel was ineffective for failing to move to sever Petitioner's trial from that of his co-defendant. App. 500-501. Petitioner and Harry Devoe testified at the PCR hearing. App. 494.

An order of dismissal was filed on November 20, 2018. The PCR court ruled that Petitioner had failed to meet his burden of proving any of the allegations and that trial counsel was not ineffective. Specifically, the court ruled that as there was no legal basis for the motion to sever, trial counsel was not ineffective for failing to file a motion to sever. App. 541-558.

This petition follows.

ARGUMENT

The PCR court erred in finding trial counsel effective where trial counsel failed to make a motion to sever Petitioner's trial from that of his co-defendant where evidence was entered at trial that would not have been entered if Petitioner had been tried alone and resulted in the jury being unable to make a reliable judgment about Petitioner's guilt separate from that of his co-defendant.

Relevant Facts

Petitioner testified that he met with trial counsel two to three times before trial counsel became ill, disappearing until the weekend before trial. App. 502, l. 20-App. 503, l. 12. Petitioner and trial counsel did not discuss the case in detail until the weekend before the trial. Petitioner maintained that he did not know Weldon and did not want to be tried with him. App. 506, ll. 6-21. Petitioner testified that trial counsel only said "they", seemingly meaning the state, wanted to try the cases together but never clarified who "they" were. App. 506, ll. 22-25.

Trial counsel testified that he was ill prior to trial and was only appointed to the case a week before trial started.[2] App. 523, ll. 9-12. He stated he discussed a motion to sever with Petitioner but decided not to file one. App. 528, ll. 17-20. His reason for not filing a motion to sever was that "one charge would build off another." App. 528, ll. 21-22. Trial counsel testified that he did not know if there was a legal basis for a motion to sever because he did not make one but that looking back, he should have asked to sever the trial. App. 529, ll. 1-5.

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[2] As noted in the order of dismissal, trial counsel's advancing age and health problems in recent years impacted his ability to present accurate and reliable testimony at the hearing. The PCR court stated that "at times during his testimony, trial counsel appeared to be confused and non-responsive to certain questions. His ability to recall details of the case wavered throughout his testimony, leading to some inconsistent and contradictory statements." However, the PCR court found that trial counsel's current conditions had no impact on his performance at Petitioner's trial some six years previous. App. 544.

Discussion

Trial counsel was ineffective for failing to move to sever Petitioner's trial from that of his co-defendant. Evidence admitted at the joint trial would not have been admissible against Petitioner in a separate trial. This evidence, discussed below, was highly prejudicial and prevented the jury from making a reliable judgment about Petitioner's guilt separate from that of Weldon. Further, failure to make the motion to sever precluded the appellate courts from reviewing the matter and considering the impact either a grant or denial of severance would have had on Petitioner's trial.

While criminal defendants who are jointly tried are not entitled to separate trials as a matter of right a criminal defendant is *entitled to a trial free from bias and confusion.* Hughes v. State, 346 S.C. 554, 558–59, 552 S.E.2d 315, 317 (2001) (Moore, J., dissenting) (emphasis added). A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or *prevent the jury from making a reliable judgment about a co-defendant's guilt.* Id. citing State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (emphasis added). "Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant." Zafiro v. U.S., 506 U.S. 534, 539 (1993) (holding that co-defendants do not suffer *per se* prejudice when presenting mutually antagonistic defenses such that severance would be mandatory, that the risk of prejudice will vary with the facts of each case and setting out examples of possible risks that could warrant severance).

In the present action, the evidence against Petitioner was highly circumstantial. While there was admittedly a forensic link between Petitioner and the stolen vehicle, *there was absolutely no evidence that placed Petitioner at the scene of the crime.* The state presented

evidence that Petitioner had been around the El Camino while working at Gibbons home prior to the incident. Further, it was argued by trial counsel, although not entered as evidence, that Petitioner lived no more than two blocks from the auto parts store that Gibbons owned and would regularly pass where the El Camino was parked six days a week. Notably, the testimony was that there was no way to determine *when* the fingerprint was left on the El Camino and that fingerprints can stay on an object or surface for an extended period, anywhere from "two years on up to two days." App. 231, l. 18.

Based on the state's own evidence it was plausible that Petitioner's fingerprint could have come to be on the El Camino at a time prior to the crime. Petitioner's DNA was not found at the scene, in the garage, inside the El Camino, on Gibbons, or on the duct tape from Gibbons' head. In contrast, the evidence against Weldon placed him *directly at the scene of the crime* and marked him as an active participant in the assault of Gibbons. Weldon's DNA was recovered from the duct tape that was taken from Gibbons' head. The only plausible explanation for Weldon's DNA being there was that Weldon had left the DNA behind while he struggled to restrain Gibbons with duct tape during the crime.

The situation contemplated in Zafiro, *supra*, of evidence that is admissible in a joint trial that would not be admissible in separate trials, is brought to realization in Petitioner's case. Had Petitioner had a separate trial, the DNA evidence against Weldon would not have been provided to the jury. Further, the state would not have been able to present the evidence that Petitioner had worked at the vocational rehabilitation center during the same one-week period as Weldon, seventeen months prior to the incident, as the relationship between the alleged co-defendants would not be relevant to a trial concerning Petitioner's alleged participation in this incident. Had there been a separate trial, the state would have only been able to assert that Petitioner's

fingerprint was found on the El Camino, which the state conceded Petitioner had previous access to, and that Petitioner denied knowing Gibbons despite performing landscaping at Gibbons' home some time prior to the incident.

In State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011), the Court of Appeals held that there was no prejudice in a joint trial where the evidence against both defendants was interconnected. Unlike the parties in Spears, the evidence in the case at bar is not interconnected. As stated above the evidence is specifically related to *either Petitioner or Weldon.* The only evidence that could be considered "interconnected" would be the time both spent at the vocational rehabilitation center, which would not be admissible in a separate trial.

In Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001), this Court held that the petitioner had not demonstrated how he was prejudiced, nor had he shown a reasonable probability that the outcome would have been different had he been separately tried. This Court based its holding in large part on the fact that it did not find any evidence presented at the joint trial which would not have been presented at an independent trial of Hughes. The same cannot be said of the case at bar. As noted above, the evidence directly linking Weldon to the crime and the fact that Weldon and Petitioner crossed paths at the vocational rehabilitation center would not have been admissible in a trial solely against Petitioner. The allegations made by the state might well be the same, but that is true of any multiple defendant crime. While those facts were the same, the evidence as to guilt was vastly different.

In trying Petitioner and Weldon together the state was linking Petitioner to the crime scene through Weldon because there was *no way for the state to independently link Petitioner to the crime scene.* Weldon's DNA tied him to the crime and the scene, Weldon and Petitioner working at the vocational rehabilitation center indicated some sort of nexus, albeit a weak one,

between the co-defendants, and thus a jury was more prone to convict Petitioner, whose fingerprint was found on the car, because of the link to the likely guilty Weldon. However, that was a spurious basis on which to convict Petitioner and the very real problem with this case.

Importantly, the standard in Strickland v. Washington, 466 U.S. 668, 686 (1984), is not only that the outcome would have been different but that *the errors are such that they undermine the proper functioning of the adversarial process such that the trial cannot be relied upon as having a just result.* Here, the error of counsel in failing to move to sever Petitioner's trial from Weldon's completely undermined the functioning of the trial process. A jury would be less likely to return a guilty verdict when the only evidence that existed was a sole fingerprint on a moveable object that the alleged guilty party had prior access to and a judge would be more inclined to grant a directed verdict in the same circumstance.

While failure to object or make a motion always precludes the appellate courts from reviewing an issue, the failure of trial counsel was particularly troublesome in Petitioner's case. The Court of Appeals initially reversed Petitioner's conviction for insubstantial circumstantial evidence. This Court reversed the Court of Appeals largely because of the evidence presented at trial that linked Weldon to the crime scene and Petitioner to Weldon. Pearson, 415 S.C. at 473-474, 783 S.E.2d at 807. Had a motion to sever been granted, this evidence would not have been admissible, and the directed verdict would have been proper. Had a motion to sever been denied, it would further support the Court of Appeals position that Petitioner was entitled to a new trial.

In the order of dismissal, the PCR court incorrectly stated that the only basis for a motion to sever is when there is the possibility of a Bruton[3] violation. This reasoning would ignore the precedent established in the courts of this state that not only considers any constitutional

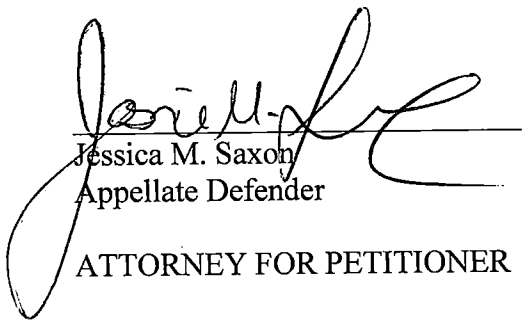
[3] Bruton v. United States, 391 U.S. 123 (1968).

violation but questions whether the joint trial would allow a jury to make a reasonable determination of guilt separate of that from a co-defendant. See e.g. State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991); State v. Dennis, 337, S.C. 275, 523 S.E.2d 173 (1999); State v. Walker, 336 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). The PCR court failed to consider that the jury would not have been able to make a reliable determination about Petitioner's guilt with the evidence admitted against Weldon biasing their judgment.

Joint trials play an important role in the criminal justice system, promoting efficiency and serving the interest of justice when co-defendants are properly tried together. Zafrio, *supra,* citing Richardson v. Marsh, 481 U.S. 200, 209-210 (1987). However, they do not exist for the solicitor to bootstrap evidence of the guilt of one defendant onto a co-defendant to strengthen a weak case. Petitioner should not have been tried with Weldon. Trial counsel's failure to make a motion to sever was ineffective assistance of counsel that resulted in prejudice to Petitioner as he was unfairly painted with the broad brush of guilt that was used to convict the very likely guilty Weldon, since Weldon's DNA was found on the duct tape removed from the victim. At a separate trial the state would have been unable to prove more than a mere suspicion of Petitioner's guilt in this crime.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th 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 Megan Harrigan Jameson, 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 Michael Wilson Pearson, #238921, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of November, 2019.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of November, 2019.

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