

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

ANDRE T. BOONE,

RECEIVED

DEC 09 2019

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000943

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in finding that counsel was not ineffective for failing to move for a severance from the codefendant where counsel did not make a reasonable strategic decision to not file that motion where Petitioner and his codefendant were on opposite sides of a shootout and therefore, were not true codefendants?

STATEMENT

Petitioner was indicted in April 2007 by the Richland County grand jury for murder. App. 1877. On May 5, 2008, Petitioner was called to trial before the Honorable William P. Keesley and a jury. App. 1. Petitioner was represented by Camille Everhart [Guthrie], Danielle Payne, and Ashley Thomas. App. 1. The state was represented by Luck Campbell and Daniel Goldberg. App. 1. Petitioner was tried jointly with one of his two codefendants, Eugene Patterson. App. 1. Patterson was represented by Tivis Sutherland. App. 1.

Petitioner, Patterson, and a third codefendant named Oliver Feldman were all charged with murder after they allegedly engaged in a shootout in a Waffle House parking lot on Two Notch Road that resulted in the death of a bystander. Numerous eyewitnesses to the shooting testified that there was to be a planned fight between several teenagers at the Waffle House on the night of February 18, 2007. App. 499, l. 4 – 500, l. 23; app. 521, l. 23 – 525, l. 22; app. 586, l. 22 – 587, l. 5; app. 622, l. 11 – 623, l. 13; app. 631, l. 3 – 633, l. 8; app. 705, ll. 11 – 20; app. 737, l. 13 – 738, l. 4; app. 762, l. 2 – 764, l. 17; app. 795, l. 4 – 797, l. 5; app. 960, l. 8 – 962, l. 24. After the fight started at the Waffle House, a shooting broke out between two groups and a bystander was killed.

Patterson did not testify at the trial but three statements that he gave to law enforcement were all introduced into evidence. In his first statement, Patterson claimed he went to the Waffle House on Two Notch by himself and that he left when a fight broke out between some other individuals. In that statement, Patterson said that he heard gunshots as he was driving away. App. 879, l. 2 – 883, l. 15. In Patterson's second statement, he maintained that he was alone at the Waffle House but identified Feldman as one of the shooters. App. 891, l. 7 – 896, l. 10.

In his third statement, Patterson admitted that he did not go to the Waffle House alone but instead that he was with Feldman and another individual. In that statement, Patterson claimed that after the fight broke out, he saw “a guy” shoot once in the air and then two times at the crowd. Patterson then said that Feldman shot back directly at “the guy that was shooting.” App. 920, l. 6 – 923, l. 19. Several eyewitnesses who testified at trial, including Oliver Feldman, identified Patterson as having been shooting along with Feldman. App. 503, ll. 9 – 23; app. 543, l. 22 – 544, l. 7; app. 614, l. 22 – 615, l. 8; app. 711, l. 10 – 712, l. 15; app. 741, l. 20 – 742, l. 6; app. 804, l. 1 – 806, l. 15.

Petitioner testified in his own defense at trial. He recalled that, on the night of the shooting, he was driving his truck with several of his friends riding with him. App. 1378, l. 23 – 1379, l. 10. Petitioner went to the Waffle House to see his girlfriend and he parked his truck in the back of the parking lot.¹ App. 1381, ll. 7 – 20. While at the Waffle House, Petitioner witnessed a fight break out between several other people. App. 1382, ll. 13 – 25. Petitioner approached the fight planning to join in but was threatened by Feldman², who brandished a firearm and threatened to shoot Petitioner if he got involved. App. 1383, ll. 1 – 4.

After Petitioner was threatened by Feldman, he went back to his car and borrowed a gun from one of his friends and fired it two times in the air. Petitioner was hoping that firing the gun into the air would cause the crowd to disperse and diffuse the situation.³ App. 1383, ll. 5 – 18.

¹ Petitioner allegedly told an investigator in a written statement that he was at the Waffle House to fight another individual. However, Petitioner’s written statement also indicated that Petitioner believed the fight was over because the other group had not shown up and that he went to the Waffle House where the shooting happened to speak with his girlfriend. App. 1256, l. 5 – 1268, l. 15.

² Petitioner did not identify Feldman by name because they did not know each other at the time.

³ Petitioner was only sixteen-years-old at the time of this incident.

Instead of diffusing the situation, Feldman and Patterson⁴ both responded by shooting at Petitioner. Petitioner returned fire in the hope that Feldman and Patterson would stop shooting so that Petitioner could flee the scene in his car. App. 1383, l. 19 – 1384, l. 2.

Petitioner and Patterson were both found guilty of murder. The judge sentenced them both to forty-five years imprisonment. App. 1624, ll. 11 – 22; app. 1643, ll. 19 – 24.

On direct appeal, Petitioner was represented by Robert Dudek of Appellate Defense. App. 1646. Petitioner raised the following issue in his appeal:

Whether the court erred by instructing the jury on “mutual combat” since that charge was burden shifting and inappropriate given the facts of this case since the prior agreement to fight on equal terms must be plain and not merely arise out of “fist fight or a scuffle,” and defense counsel correctly cited State v. Taylor when objecting to this proposed jury instruction?

App. 1649. The Court of Appeals affirmed. State v. Boone, No. 2013-UP-155 (Filed April 17, 2013). Appellate counsel Dudek filed a petition for rehearing which was denied on June 20, 2013. App. 1684 – 1689.

Petitioner filed his PCR application on November 1, 2013 and the state filed its Return on February 24, 2016. App. 1690 – 1718. An evidentiary hearing was held on August 28, 2017 before the Honorable Paul M. Burch. App. 1719. Petitioner was represented by Leah Moody and the state was represented by Jessica Kinard. App. 1719. Petitioner and his lead trial counsel, Camille Guthrie, testified at the hearing. App. 1720. The PCR judge denied Petitioner’s application for relief. App. 1873.

This petition for writ of certiorari follows.

⁴ Petitioner also did not identify Patterson by name because they also did not know each other.

ARGUMENT

The PCR judge erred in finding that counsel was not ineffective for failing to move for a severance from the codefendant because counsel did not make a reasonable strategic decision to not file that motion because Petitioner and his codefendant were on opposite sides of a shootout and therefore, were not true codefendants.

Relevant Facts

The PCR judge found that trial counsel made a “reasoned professional judgment that it was strategically in [Petitioner’s] best interest that [Petitioner] be tried with another co-defendant or co-defendants.” App. 1830. The judge further ruled that Petitioner was not entitled to a severance and that, even if severance had been granted, Petitioner failed to show that the result of his trial would have been different. App. 1831 – 1833.

Counsel testified at the PCR hearing that there was a discussion about severance between her, her co-counsel Payne, and Patterson’s attorney, Sutherland. App. 1771, ll. 3 – 10. Counsel referenced her notes regarding that meeting which stated: “We were all in agreement that the state is probably hoping . . . to get the three clients to duke it out in court, pointing the finger at each other. If that happens, I think we lose.” App. 1771, ll. 12 – 20. Counsel recalled that she also consulted with another public defender who held the opposite opinion, that Petitioner would be less likely to be convicted at a joint trial.⁵ App. 1771, l. 24 – 1772, l. 5. However, counsel’s notes that she made after the trial was over indicated that she was “concerned” about her failure to move for severance. App. 1772, ll. 6 – 10.

The assistant attorney general asked counsel whether the issue regarding whether to move for a severance was “well researched.” Counsel responded:

⁵ This other public defender was Lauren Mobley who was not involved in the representation of Petitioner at his trial. App. 1789, ll. 7 – 23.

We did discuss it. *I do not have the reasoning for why we did not do it. We discussed it; it sounds like we thought it was a good idea. We researched it. Lauren Mobley in our office thought maybe it would be better if there were multiple people on trial rather than one, and that I did note we didn't make the motion and I had a concern about that.*

App. 1772, ll. 11 – 19 (emphasis added). On cross-examination, counsel again said that she believed they would lose the trial if Petitioner and his codefendant were tried together because the defendants would be pointing the finger at each other. App. 1789, ll. 19 – 23. She could not remember why she did not make the motion to sever and did not know if she relied on Mobley's advice or not. App. 1791, ll. 11 – 20.

Discussion

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.

The PCR judge erred in finding that counsel was not ineffective for failing to move for a severance. At the outset it should be noted that trial counsel's testimony at the PCR hearing is inconsistent with the PCR judge's finding that she made a "reasoned professional judgment that it was strategically in [Petitioner's] best interest that [Petitioner] be tried with another co-defendant or co-defendants." App. 1830. Counsel did not testify that this was the case. In fact, her testimony was that she was concerned that she did not move to sever and that she wrote in her notes that she believed Petitioner would be convicted at a joint trial. Respectfully, nothing in counsel's testimony at the PCR hearing could reasonably be construed as demonstrating a belief that a joint trial was in Petitioner's best interest. The contrary conclusion, that it was not in Petitioner's best interest, is what appears to have been counsel's professional opinion. App. 1789, ll. 19 – 23.

"There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case." State v. Avery, 374 S.C. 524, 533, 649 S.E.2d 102, 107 (Ct. App. 2007). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." Id. at 534, 649 S.E.2d at 107. However, a trial judge "must act cautiously in allowing a joint trial," and "must carefully consider problems that may arise from a joint trial." State v. Dennis, 337 S.C. 275, 281-282, 523 S.E.2d 173, 176 (1999).

There was no reasonable strategic basis to not move for severance. Petitioner and Patterson were on opposite sides of a shootout that stemmed from a fight that neither of them was initially involved in. App. 499, l. 4 – 500, l. 23; app. 586, l. 22 – 587, l. 5; app. 631, l. 3 –

633, l. 8; app. 762, l. 2 – 764, l. 17; app. 960, l. 8 – 962, l. 24. The trial judge even refused to instruct the jury on accomplice liability because he found that Petitioner and Patterson were not acting in concert with one another since they were on opposite sides of the shooting. App. 1453, l. 11 – 1459, l. 19. The judge reasoned:

I was having a lot of difficulty understanding accomplice liability because I was thinking of it in terms of [Petitioner] and Mr. Patterson. And they were not accomplices in any scenario that I could construe in the traditional meaning. They were participants in an activity that is arguably very unlawful, but they were not acting in concert except in some sort of strained way of saying that you couldn't have a gun fight without both of them being involved.

App. 1454, ll. 4 – 13. Because Petitioner and Patterson were on opposite sides, it was confusing to the jury for them to be referred to as codefendants throughout the trial.

By way of comparison, in State v. Halcomb, 382 S.C. 432, 437-438, 676 S.E.2d 149, 151-152 (Ct. App. 2009), the Court of Appeals held that severance was not required where murder defendants were tried jointly and convicted under the “hand of one is the hand of all” theory. However, the defendants Halcomb and Cottrell were close associates and therefore it made sense for them to be tried together. In fact, they had worked together in forcing the victim to dig his own grave before murdering him. Id. In this case, not only were Petitioner and Patterson not close associates, they did not even know each other.

During the charge conference, the trial judge expressed his concern that neither defendant had moved for a severance because it made instructing the jury more difficult.⁶ App. 1462, l. 21 – 1463, l. 6. The judge initially insinuated that Petitioner would not have been entitled to a self-defense instruction but that he would charge the jury as to self-defense for both Petitioner and

⁶ The trial judge also made comments expressing his discomfort with joint trials specifically because of the problems that stem from Bruton v. United States, 391 U.S. 123 (1968) issues. App. 262, l. 20 – 263, l. 3; app. 1448, l. 5 – 1451, l. 20.

Patterson to avoid confusing the jury since they were being tried jointly. However, the judge ultimately concluded that there was sufficient evidence on which to submit a self-defense instruction specifically regarding Petitioner. App. 1463, ll. 7 – 25. In other words, contrary to the PCR judge’s finding in his order of dismissal, Petitioner was not benefited by having a joint trial by receiving a self-defense instruction that he was not entitled to anyway.

Petitioner’s trial counsel was ineffective in failing to move for a severance because he and Patterson were on opposite sides of a shootout and should not have been considered codefendants. The fact that Petitioner and Patterson were tried together was likely to confuse the jury since they were not true codefendants. Furthermore, if Petitioner had been tried separately from Patterson, a jury would have been more likely to reject the state’s mutual combat⁷ argument that all of the shooters were responsible for the victim’s death even though the victim was only shot with a single bullet. The trial judge’s expressed concern with counsel’s failure to move for a severance also gave rise to a strong indication that the judge would have granted a motion to sever. App. 1462, l. 21 – 1463, l. 6.

The PCR judge cited numerous cases in support of his conclusion that “severance is not required when defendants present mutually antagonistic defenses.” However, the defendants in all but one of the cases cited by the PCR judge were on the same side of the alleged criminal act.

⁷ To undersigned counsel’s knowledge, the legal doctrine of “mutual combat” has been used in South Carolina exclusively for the purpose of negating self-defense, specifically as to the first element, i.e. that the defendant be without fault in bringing on the difficulty. See State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019) (discussing the history of the “antiquated doctrine” of mutual combat including this Court’s limitations on that doctrine in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003), and holding that it was error to instruct the jury on mutual combat because there was no pre-existing ill-will between the defendant and the victim and no evidence the victim knew defendant was armed, and furthermore that defendant was prejudiced because the mutual combat instruction negated his plea of self-defense); But see State v. Young, 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018) (cert. granted May 9, 2019) (holding that a defendant who in fact did not strike the fatal blow could still be found guilty of murder because the victim’s death was a natural consequence of his combat with a codefendant).

See State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) (severance not required where defendants were both accused of picking up a hitch-hiker, sexually assaulting and then killing her, even though one defendant testified in an attempt to minimize his role and shift blame to the other); State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976) (severance not required where murder defendants were hunting and killed a game warden but defendants disputed who started the altercation and who fired the fatal shot); State v. Britt, 235 S.C. 395, 406-408, 111 S.E.2d 669, 674-675 (1959) (severance not required where defendants were charged with committing robberies together culminating in the shooting death of a highway patrolman where the defendants disputed who fired the fatal shot); State v. Atkins, 205 S.C. 450, 32 S.E.2d 372 (1944) (severance not required where defendants charged with larceny of a vehicle); State v. Rook; 174 S.C. 225, 177 S.E. 143, 145-146 (1934) (severance not required where murder defendants all testified they went to the victim's home for the purpose of beating him up because of his failure to provide them with blackberry wine, but that only one of them struck the fatal blow); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) (severance not required where defendants charged with murder when one defendant admitted to being the shooter and jury was instructed on accomplice liability); State v. Francis, 152 S.C. 17, 149 S.E. 348, 350-351 (1929) (severance not required where one defendant pleaded self-defense and two others pleaded defense of others); State v. Jeffords, 121 S.C. 443, 114 S.E. 415, 415 (1922) (no abuse of discretion shown in denying motion to sever where defendant admitted to participating in the killing).

State v. Brown, 108 S.C. 490, 95 S.E. 61, 62 (1918), was the only case cited in which there were defendants tried jointly who were on opposite sides of a fight. Specifically, Brown dealt with a labor union brawl that spontaneously erupted during a strike. The fight was between

strikers and non-strikers. Id. Only the non-strikers appealed the case arguing their motions for severance should have been granted. The extent of the Court's analysis on this issue was as follows: "It is only necessary to cite the case of State v. Wade, 95 S.C. 387, 79 S.E. 106 [(1913)], to show that the exception raising this question cannot be sustained." Id.

Wade is inapposite as it is an antiquated case regarding two defendants who were convicted of fornication. Specifically, in Wade, the defendants were a man and his adult daughter-in-law who were accused of having sexual intercourse with each other. In Wade, this Court found that the nature of fornication, i.e. that it takes two individuals to commit the criminal act, did not "*forbid* a severance either in the trial of the parties charged, or in the verdict, when they are jointly tried." Id. at 107 (emphasis added) This Court reversed both of the defendants' convictions for reasons other than their having been tried jointly.⁸

In relying on the cases above, the PCR judge improperly analogized those cases to the case at bar. The difference between Petitioner and Patterson was more than a dispute about who fired the fatal shot. Petitioner and Patterson were in fact *shooting at each other* and were therefore on completely opposite sides and thus not true codefendants. In other words, unlike the cases relied on by the PCR judge where the Supreme Court found antagonistic defenses did not require severance, here the nature of the defenses were antagonistic to a much greater degree.

Petitioner was prejudiced by counsel's failure to move for a severance. Because Petitioner and Patterson were tried together, the state was able to argue to the jury that the shootout caused the death of the victim as opposed to arguing that any particular defendant caused the death of the victim.

⁸ The male defendant's fornication conviction was reversed by this Court because "there was no competent evidence to support [his] conviction." This Court reversed the female defendant's conviction because the trial judge erred in instructing the jury that "one of the defendants could not be acquitted and the other convicted." Wade, at 107.

The state had little choice in arguing this because it was unable to prove which of the shooters fired the fatal shot. This impermissibly diluted the state's burden of proving Petitioner's guilt beyond a reasonable doubt, which prejudiced Petitioner. Had the charges been severed, the jury would have been much less receptive to the state's argument that the "shootout" itself caused the death of the victim rather than a particular shooter. Had Petitioner been tried separately, the state would have been required to prove that Petitioner caused the death of the victim. The state was unable to prove this. Had Petitioner been tried separately, the jury also would have been much more receptive to Petitioner's claim of self-defense. The PCR judge erred in finding that trial counsel was not ineffective for failing to move for a severance.

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 9th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

ANDRE T. BOONE,

PETITIONER

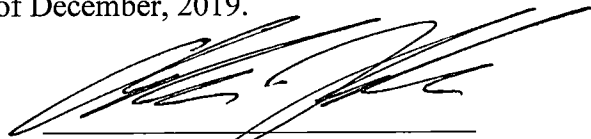
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STATE OF SOUTH CAROLINA,

RESPONDENT

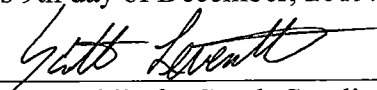
CERTIFICATE OF SERVICE

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 Andre Tayson Boone, #328364, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of December, 2019.



Adam Sinclair Ruffin
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 9th day of December, 2019.

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