STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

QUASHON G. MIDDLETON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000063

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief 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

Whether the PCR court erred by finding defense counsel properly withdrew his Batson motion where the state struck an African-American juror simply because he was a friend of a state's witness, and he lived "a block from the incident location," since the crime occurred in a rural area where people knew each other, this was not a racially neutral reason to strike the juror, and withdrawing the Batson motion left it unpreserved for appellate review?

STATEMENT

The relevant facts are contained in the argument section below.

ARGUMENT

The PCR court erred by finding defense counsel properly withdrew his *Batson* motion where the state struck an African-American juror simply because he was a friend of a state's witness, and he lived "a block from the incident location," since the crime occurred in a rural area where people knew each other, this was not a racially neutral reason to strike the juror, and withdrawing the *Batson* motion left it unpreserved for appellate review.

Relevant Facts

Petitioner was indicted at the October 28, 2010, term of the Colleton County Grand Jury for the offenses of two counts of attempted murder, and possession of a weapon during a violent crime. App. 456 – 461. Petitioner's case was called to trial on July 25, 2011, before the Honorable Perry M. Buckner, III. David Matthews represented petitioner. Amanda Haselden was the assistant solicitor. App. 1.

After jury selection, defense counsel Matthews made a Batson[1] motion. It was agreed that the present jury was composed of ten whites and two black males. App. 41, ll. 2-23. Matthews challenged the striking of the two black males. App. 41, l. 24 – 42, l. 11.

Matthews pointed out there were only four black jurors in the venire, and two of them were struck by the solicitor. App. 42, l. 12 – 43, l. 9.

The assistant solicitor said as to juror 76 that she struck him because he had been arrested five times and he had "negative situations with law enforcement." Juror 76 also had a pending criminal sexual conduct charge from the Colleton County Solicitor's Office. App. 45, l. 4 – 46, l. 21. Matthews did not challenge that strike.

[1] Batson v. Kentucky, 476 U.S. 79 (1986).

As to black male juror number 4, the assistant solicitor said that potential juror lived within a block of the "incident location." He was a close friend of a witness for the state and possibly the defense. The assistant solicitor said she anticipated she was going to impeach the witness in this case. There is no information concerning what she meant as to impeaching him. She also claimed that juror number 4's father was previously a Colleton County Sherriff's Deputy, and that he was currently employed with the North Charleston Police Department. She said she did not "believe he left under very good circumstances." At this point, defense counsel Matthews withdrew his Batson motion at the prompting of the trial judge. App. 47, l. 1 – 48, l. 3.

The defense did not call any witnesses in this case. Defense counsel moved for a directed verdict, arguing the state had not produced any evidence petitioner had a specific intent to kill as mandated by the statute for attempted murder. App. 300, ll. 5-10. The assistant solicitor argued there was evidence petitioner "drove up on a crowded street, shot five to seven times into a car that had two occupants in it at a very close range . . . [and] it's generally in the past that the **general intent** to commit grievous bodily injury is required . . ." App. 300, l. 12 – 301, l. 17. (emphasis added).

The judge charged the jury on the law of attempted murder and assault and battery of a high and aggravated nature. The judge charged that "an attempt is an effort to accomplish a crime which does not succeed." However, the judge also charged the law of malice for murder, which could be "express or implied." App. 351, l. 14 – 355, l. 12.

After the jury was charged, defense counsel raised the matter of "specific intent, not being sufficiently charged." The judge responded, "I definitely charged that they had to have a specific intent for attempted murder. In fact, I charged it twice, Mr. Matthews, when I gave the

definition of it. I charged it right out of the statute. I decline to change my charge on attempted murder." App. 366, ll. 3-16.

The jury found petitioner guilty of two counts of attempted murder and two counts of possession of a weapon during a violent crime. App. 370, l. 15 – 371, l. 9. Defense counsel Matthews then told the judge that petitioner was only nineteen-years-old at the time of sentencing. Meaning, petitioner was seemingly only eighteen-years-old at the time of the September 28, 2010 alleged crime. App. 375, ll. 20-25; app. 460. Judge Buckner sentenced petitioner to thirty-year concurrent prison terms for attempted murder and he imposed five-year prison terms for possession of a weapon during the commission of a violent crime.[2] App. 379, ll. 2-20.

In State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014), the Supreme Court held that the trial court's error in failing to instruct the jury on first-degree assault and battery as a lesser included offense of attempted murder was harmless error. Justice Pleicones dissented, stating the refusal to give a jury instruction on a lesser included offense that is supported by the evidence is always reversible error, and not subject to a harmless error analysis. Appellate counsel Susan B. Hackett sought a petition for writ of certiorari from the United States Supreme Court. That Court denied certiorari in Middleton v. South Carolina, 135 S.Ct. 196 (2014).

Petitioner thereafter filed an application for post-conviction relief, filed February 18, 2015. App. 381 – 388. The state filed a return and partial motion to dismiss dated August 3, 2017. App. 389 – 398.

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[2] Some petitioners have argued that separate "death penalty" model sentencing hearings should also be held for eighteen-year-old offenders pursuant to Aiken v. Byers, 410 S.C. 534, 765 S.E.2d 572 (2014) also, and that the cut off at eighteen does not conform to the brain development science underlying these Eighth Amendment juvenile cases.

An evidentiary hearing was convened on October 10, 2017, before the Honorable Thomas A. Russo. James K. Falk represented petitioner and assistant attorney general Ruston Neely represented the state. App. 399 – 400.

Petitioner testified that trial counsel did exercise his peremptory strikes in a proper manner. However, petitioner said the state was unfairly striking qualified jurors from the venire, that this "wasn't fair," and petitioner thought "that I was going down" because of the racially discriminatory challenges during jury selection. App. 411, l. 2 – 412, l. 2.

As to the Batson motion, PCR counsel Falk then called trial counsel David Matthews. Matthews testified that a typical jury in Colleton County would be about twenty-five percent African-American. This would mean that there would normally have been three or more African-American jurors on petitioner's jury, not just two.

Matthews testified "I really would have liked more African-Americans on there, and I hate that they used some -- two of their strikes to strike black jurors. Black male jurors particularly." App. 414, ll. 5-25.

The PCR judge noted that Matthews had withdrawn his Batson motion. Matthews admitted he "maybe should have let somebody else [be the] arbitrator of that, but my feeling is that probably they were good enough, but perhaps somebody else might have felt differently [on appeal]." App. 416, ll. 8-11.

The assistant attorney general argued that even if Matthews had not withdrawn his Batson motion, it would not have "been overturned on appeal." App. 435, l. 19 – 436, l. 6.

The PCR judge orally ruled that the state gave a racially neutral reason for their strike on juror number 4, and the judge said he found it "admirable" that trial counsel withdrew his Batson motion. App. 441, l. 8 – 442, l. 4.

A written order of dismissal was filed on January 10, 2018. App. 445 – 455. The written order stated that juror number 4 lived a block from the incident report and he was a friend of one of the witnesses. The order noted that counsel withdrew the Batson motion as to juror number 4, and the PCR judge found that withdrawal was reasonable and "expected of an officer of the court." App. 453 – 454.

This petition for writ of certiorari follows.

Discussion

A racially discriminatory peremptory challenge in violation of Batson cannot be saved because the solicitor also puts forth a reason that is not racially discriminatory. See Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998). If the solicitor's reason -- allegedly racially neutral reason -- is a subterfuge, then the defendant is entitled to a new trial. State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999). See also State v. Shuler, 344 S.C. 604, 620, 545 S.E.2d 805, 813 (2001).

In State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989), this Court found a Batson violation where the state struck three black women because they were patients of a doctor who was going to testify as a defense witness. Admittedly, a white woman who was a patient of the same doctor witness was not struck.

Here, however, the assistant solicitor admitted the witness in question as to juror number 4 was also a state's witness. It is therefore difficult to imagine why juror number 4, knowing a state's witness, would have been biased against the state.

Defense counsel Matthews admitted at PCR that he thought the state was using its peremptory challenges in a racially discriminatory manner. Defense counsel correctly reasoned he should not have withdrawn his Batson motion, and he should have left the propriety of raising that motion on appeal to appellate counsel.

The PCR judge's reasoning that defense counsel had a duty as a "officer of the court" to withdraw his Batson motion was an error of law. Petitioner was entitled to a jury of his peers, unaffected by improper removal based on their race. The assistant attorney general erred in urging the PCR court that petitioner would not have prevailed on this issue on appeal had trial counsel not withdrawn his Batson motion. The ruling of the PCR court should be reversed, especially given the PCR court's erroneous reasoning that trial counsel had a "duty" to withdraw his Batson motion.

CONCLUSION

By reason of the foregoing argument, the petition for writ of certiorari should be granted to allow full briefing on this issue.

Robert M. Dudek
By [signature] w/permission
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

QUASHON G. MIDDLETON,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Quashon G. Middleton states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Thomas A. Russo, which was held on October 10, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Quashon G. Middleton.

Respectfully Submitted,

Robert M. Dudek

BY: _____ w/permission

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of October, 2018.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Robert M. Dudek

by _____ w/permission

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Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Quashon G. Middleton, #347130, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 4th day of October, 2018.

Robert M. Dudek

by _____ w/permission

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of October, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.