STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Apr 30 2020

S.C. SUPREME COURT

Certiorari to Beaufort County

Honorable William H. Seals, Circuit Court Judge

JAMES TYTIL WRIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-001663

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
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 in denying petitioner a new trial because counsel's inadequate cross-examination of a co-defendant who had an expectation of a reduced sentence amounted to constitutionally ineffective assistance of counsel?

STATEMENT

A Beaufort County grand jury indicted petitioner for armed robbery and kidnapping and on August 25, 2014, petitioner was tried *in absentia* before the Honorable Carmen T. Mullen and a jury. App. 1. Carra Henderson and Julie Kate Keeney represented the State. App. 2. Scott W. Lee represented petitioner. App. 2. The jury convicted petitioner. App. 350, l. 1 – 17. Judge Mullen gave petitioner concurrent twenty-year sentences. App. 503-04. On July 27, 2016, the Court of Appeals affirmed petitioner's convictions. App. 402-03.

On June 19, 2017, petitioner filed a PCR application. App. 404. On April 2, 2019, a hearing was held before the Honorable William H. Seals. App. 435. Ashley A. McMahan represented petitioner. App. 435. Benjamin Limbaugh represented the State. App. 435. On September 19, 2019, Judge Seals denied petitioner's application. App. 480. This petition follows.

STANDARD OF REVIEW

A PCR court's findings of fact are entitled to deference on appeal and will be upheld if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in denying petitioner a new trial because counsel's inadequate cross-examination of a co-defendant who had an expectation of a reduced sentence amounted to constitutionally ineffective assistance of counsel.

Only two pieces of evidence connected petitioner to the robbery of Chavis Moving and Storage in Beaufort County. The first piece of evidence was a fingerprint. On the way to work that morning, Nancy Hill, an employee of Chavis Moving stopped off for a carton of cigarettes. App. 140, l. 1 – 5. She opened the carton and put a new pack in her purse. App. 140, l. 6 – 15. Hill did not pull the pack out of her purse before the robbery. App. 140, l. 13 – 15.

Hill was working the front office when a young black male entered and asked her for a job application. App. 141, l. 2 – 18. She got the application and when she turned around, the man was pointing a pistol at her. App. 141, l. 2 – 18. He told all of the employees to get down on the floor. App. 141, l. 2 – 18. Another robber came into the store. App. 141, l. 2 – 18. Hill did not see the robbers' faces. App. 141, l. 2 – 18.

The robbers made the employees go into the storage room. App. 141, l. 15 – 142, l. 3. One of the robbers went through Hill's purse and asked her for the PIN for her debit card. App. 141, l. 15 – 142, l. 3. They threatened to shoot Hill if she gave them a phony number. App. 141, l. 15 – 142, l. 3. She gave them the number. App. 141, l. 15 – 142, l. 3. Eventually the men left and the employees called the police. App. 141, l. 15 – 142, l. 3.

The items from Hill's purse were strewn across a counter. App. 142, l. 22 – 143, l. 13. The police lifted a fingerprint from the pack of cigarettes and the State's expert testified that it belonged to petitioner. App. 273, l. 18 – 22. However, the expert did not receive elimination

prints for Hill. App. 282, l. 19 – 283, l. 6. She had "no idea" whether Hill's prints were on the pack of Marlboro Lights. App. 282, l. 19 – 283, l. 6.

The second piece of evidence was the testimony of petitioner's co-defendant, Tyshon Barnes. Barnes arrived to the witness stand in his prison jumpsuit, serving his sentence for the robbery in this case which would end only two years later (petitioner got a twenty-year sentence). App. 215, l. 10 – 23. Barnes testified that he and petitioner robbed Chavis moving together. App. 217, l. 6 – 12. Barnes pulled the pistol on Hill, not petitioner. App. 220, l.6 – 8. Petitioner stood next to Barnes wearing a ski mask. App. 220, l. 9 – 13.

Barnes claimed petitioner went through Hill's purse. App. 223, l. 2 – 8. Barnes said he never had the debit card taken from Hill's purse even though it was used minutes later at a grocery store. App. 223, l. 7 – 12. Barnes denied going to the grocery store, even though he claimed he and petitioner stayed together after the robbery. App. 224, l. 8 – 225, l. 8. App. 236, l. 2 – 237, l. 15.

Four days after the Chavis Moving robbery, Barnes very likely robbed a post office with his younger brother. App. 232, l. 9 – 236, l. 6. Barnes' brother, Kenneth, received a firearm charge in state court, but Barnes was charged in federal court. App. 233, l. 16 – 235, l. 12. Barnes was charged with fleeing and when he was pulled over, Kenneth was in the car. App. 233, l. 16 – 235, l. 12. Kenneth told the police he knew nothing about the robbery and Barnes backed up his little brother's story. App. 233, l. 16 – 235, l. 12. Barnes said, "I took the hit on the armed robbery." App. 233, l. 16 – 235, l. 12.

On direct, Barnes testified that he had a thirty-nine-year federal sentence for the post office robbery following his sentence for the Chavis Moving robbery. App. 215, l. 21 – 216, l. 12. The solicitor led Barnes to agree that she would let the United States Attorney's Office know

that Barnes cooperated in petitioner's case, but there were no guarantees. App. 216, l. 22 – 217, l. 5. On cross-examination, trial counsel was able to get Barnes to admit that he "could use help" on his federal charge and he hoped to reduce his sentence by getting a "downward departure." App. 241, l. 1 – 11. App. 244, l. 2 – 13. Trial counsel did not conduct further cross-examination about the amount of the expected reduction or explain what a "downward departure" is to the jury.

Trial counsel was ineffective for not eliciting the amount of sentence reduction Barnes could receive for cooperating and the PCR court erred by denying relief on this claim. The PCR court's Order lacks any substantive reason for denying relief. App. 495 – 97. The court stated the ground, then gave a paragraph of boiler-plate law on the deference afforded trial counsel, then, with no analysis wrote, "Based on these reasons, this Court finds plea counsel [sic] was not ineffective on this ground and this allegation is denied and dismissed with prejudice." App. 495-97.

"Evidence of a witness's bias can be compelling impeachment evidence, and for that reason considerable latitude is allowed to defense counsel in criminal cases in the cross-examination of an adverse witness for the purpose of testing bias. Smalls v. State, 422 S.C. 174, 182, 810 S.E.2d 836, 840 (2018). In Smalls, trial counsel failed to cross-examine a witness about the dismissal of a carjacking charge. Id. This failure to cross-examine about a pending charge and the sentence the witness avoided was one of the reasons the Court granted post-conviction relief in Smalls. Id.

Defendants are allowed to cross-examine witnesses about the severity of the sentences they avoid by giving testimony favorable to the State. See State v. Sims, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002). See also State v. Mizzell, 349 S.C. 326, 330-32, 563 S.E.2d 315, 317-18

(2002) (holding trial court erred in refusing to allow defendant to cross-examine a witness about possible sentencing exposure); State v. Jones, 343 S.C. 562, 568-71, 541 S.E.2d 813, 816-18 (2001) (holding the trial court erred in refusing to allow the defendant to cross-examine a State's witness about prior deals with the solicitor to show bias); State v. Pradubsri, 403 S.C. 270, 278-80, 743 S.E.2d 98, 103-04 (Ct. App. 2013) (holding trial judge erred in refusing to allow cross-examination of State's witness's possible sentencing exposure to show bias).

These cases show how vital it is for defense counsel to inform the jury about the specific nature of the sentence the biased witness avoided. In petitioner's case, the jury only heard vague references to informing the federal prosecutor of cooperation and a hoped-for sentence reduction. Exacerbating the problem was the use of jargon from the federal sentencing guidelines: "downward departure." Most attorneys who do not practice federal criminal law probably have no idea what a "downward departure" is. This Beaufort County jury certainly could not tell what a "downward departure" was from the cross-examination or even if that meant Barnes would receive any reduction at all.

Downward departures from the sentencing guidelines are available if a federal prosecutor makes a motion based on the defendant's substantial assistance in the prosecution of another person. See U.S.S.G. 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). Departures for substantial assistance even allow reductions below a statutory minimum. See 18 U.S.C.A. § 3553(e) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.").

Trial counsel failed to make the jury aware of the potentially large reduction Barnes could receive and this was deficient performance.

Failing to fully impeach Barnes prejudiced petitioner. Without Barnes' testimony, the only evidence the State had against petitioner was a single fingerprint. Barnes committed another robbery four days later with his brother. Barnes had great motivation to protect his brother from being a suspect in this robbery. Petitioner has shown Sixth Amendment prejudice and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's convictions.

This 30th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Tytil Wright states:

1. He is 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 William H. Seals, which was held on April 2, 2019, 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 James Tytil Wright.

Respectfully Submitted,

This 30th day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

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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."

This 30th day of April, 2020.

s/David Alexander
Appellate Defender

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