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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Kristi F. Curtis, Circuit Court Judge

JUSTIN JERMAINE JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001991

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective where trial counsel failed to argue that Petitioner's statement to law enforcement was not a confession as the state argued, but rather was taken out of context?

STATEMENT

Procedural History

Petitioner was indicted in July of 2011 by the Clarendon County grand jury for two counts of murder, attempted murder, first-degree burglary, kidnapping, and possession of a weapon during the commission of a violent crime. App. 1398 – 1399. On March 6, 2014, a Jackson v. Denno[1] hearing was held before the Honorable W. Jeffrey Young. App. 25 – 98.

At the Denno hearing, Petitioner was represented by Scott Robinson and the state was represented by Ernest Finney and Christopher DuRant. App. 25. The judge ruled Petitioner's statement was admissible finding that even though it was an eleven-hour interrogation, Petitioner was advised of his Miranda[2] rights twice and was not subjected to "excessive . . . oppression." App. 87, ll. 10 – 21.

On March 10, 2014, Petitioner's case was called to trial before the Honorable W. Jeffrey Young and a jury. App. 99. Petitioner was represented by Scott Robinson. App. 99. The state was represented by Ernest Finney and Christopher DuRant. App. 99. The jury found Petitioner guilty on all charges except for attempted murder for which Petitioner was acquitted. App. 1057. The judge sentenced Petitioner to life imprisonment for both murders and the first-degree burglary, and thirty-years imprisonment for kidnapping, all sentences to run consecutively. The judge sentenced Petitioner to five-years imprisonment for the weapon charge to run concurrently. App. 1073, l. 2 – 1074, l. 17.

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1 Jackson v. Denno, 378 U.S. 368 (1964).

2 Miranda v. Arizona, 384 U.S. 436 (1966).

Relevant Facts

Charles Eaddy, with the Clarendon County Sheriff's Office, testified that on April 6, 2011, he was in his patrol vehicle and was approached by Petitioner. App. 248, l. 12 – 249, l. 21. Eaddy recalled:

> [Petitioner] told me someone just shot his girlfriend's grandmother. And I looked over at him and I said, "Where did this happen?" And then I noticed blood on his sleeve of his tee shirt. And then I told him, I said, "Well, you lead the way, and I'll follow."

App. 249, ll. 21 – 25. Eaddy stated that "[a] child and a female" were in the car with Petitioner at the time. App. 251, ll. 8 – 15. Eaddy followed Petitioner back to the incident location where Eaddy saw a person lying on the ground in a pool of blood, so he called for more officers to respond to the scene. App. 250, l. 19 – 251, l. 7.

The female passenger in Petitioner's vehicle was later identified as Kaisha Caraway. Caraway testified that she had two children with Petitioner, a two-year-old daughter and a nine-month old son. App. 282, l. 1 – 284, l. 22. However, Caraway and Petitioner did not live together. Caraway and the children lived with Caraway's grandparents. App. 285, l. 2 – 286, l. 6.

Caraway testified that Petitioner arrived at her grandparents' house on the morning of April 6, 2011 to take their children to the doctor. App. 292, l. 25 – 293, l. 13. Caraway claimed that Petitioner wanted her to accompany him and the children to the doctor, but she did not want to go. App. 296, ll. 14 – 22. Caraway maintained that Petitioner became angry because she did not want to go with him, and Petitioner threatened to "break into the house." App. 298, ll. 5 – 11.

Petitioner left with the children and returned approximately thirty minutes later. App. 300, l. 3 – 301, l. 8. Caraway asked Petitioner why he did not take the children to the doctor and he responded that they were not accepting "walk-ins." App. 301, ll. 9 – 18. Caraway then claimed that Petitioner got the children out of the car and took them on the porch. Caraway alleged that Petitioner forced his way into the house and began fighting her. App. 301, l. 19 – 303, l. 15.

Caraway stated that her grandmother was home when this was happening and she also got involved in the fight. App. 309, ll. 7 – 24. According to Caraway, Petitioner broke her grandmother's nose, so her grandmother was trying to get to the car to drive herself to the hospital. At the same time, Caraway claimed that Petitioner was dragging her off of the porch. App. 312, l. 3 – 314, l. 4. Caraway said that she was able to free herself from Petitioner's grip and run back into the house where their nine-month-old son was sitting in his highchair. Caraway's grandmother and the two-year-old daughter remained outside with Petitioner. App. 314, l. 17 – 316, l. 15.

Caraway stated that Petitioner came back into the house with a shotgun in his hand. App. 317, ll. 17 – 20. Caraway said Petitioner pointed the shotgun at her and said, "you made me do this." Caraway closed her eyes and heard a gunshot. When she opened her eyes again, she realized that Petitioner had shot their nine-month-old son and Caraway turned and ran to the bathroom and closed the door. App. 318, l. 1 – 319, l. 25. Caraway called 9-1-1 but Petitioner shot the bathroom door open and came into the bathroom with the gun pointed at her. App. 320, l. 3 – 321, l. 21. Caraway told Petitioner that she had called the police and he told her to call them back and tell them the shooter was someone named "Robert." App. 322, l. 2 – 323, l. 24.

Caraway and Petitioner walked outside, and Caraway saw her grandmother had been shot in the front yard. App. 324, ll. 5 – 12. According to Caraway, Petitioner told her to put a different shirt on and they would go to the police station to tell the police what happened: "Well, not what really happened, but the story about Robert." App. 332, l. 1 – 333, l. 7. Caraway convinced Petitioner to leave the shotgun in the front yard before they got into the car with their two-year-old daughter to drive to the police station. App. 334, l. 1 – 335, l. 21.

Ricky Richards, who was an investigator with the Clarendon County Sheriff's Office, testified that he was the third officer to arrive on the scene. App. 434, l. 3 – 436, l. 4. Richards spoke with Caraway who initially maintained that "it was a guy named Robert." App. 456, ll. 17 – 25. Richards said he separated Caraway from Petitioner and asked her again to tell him what happened at which point she told Richards that "[Petitioner] did it." App. 457, l. 1 – 458, l. 16. At that point, Richards placed Petitioner under arrest. App. 458, l. 17 – 459, l. 1.

Petitioner was interrogated by Mason Moore and Kippton Coker with the Clarendon County Sheriff's Office. App. 490, l. 18 – 491, l. 20. The interrogation was audio and video recorded. App. 496, ll. 11 – 18; State's Exhibits 56 – 64. Moore testified that he ended the interrogation right after Petitioner's "confession." App. 504, l. 20 – 505, l. 7. Defense counsel pointed out on cross-examination that Petitioner was interrogated for eleven hours and only the final thirty or forty-five minutes were what Moore deemed to be a confession. App. 506, ll. 8 – 20.

The state moved to introduce the video recording of Petitioner's interrogation through Kippton Coker. Defense counsel renewed his objection to Petitioner's statements: "I would renew my same objection that it wasn't freely and voluntarily made, et cetera, under Jackson v. Denno." App. 514, l. 16 – 516, l. 1. The court overruled counsel's objections and the entirety of

the eleven-hour interrogation was played for the jury. App. 526, l. 14 – 552, l. 12; State's Exhibits 56 – 64.

Petitioner's convictions and sentences were affirmed on direct appeal by the Court of Appeals. App. 1245; State v. Johnson, 422 S.C. 439, 812 S.E.2d 739 (Ct. App. 2018). This Court denied Petitioner's petition for a writ of certiorari. App. 1327.

Petitioner filed his PCR application on December 21, 2018. App. 1329 – 1337. The state filed its return and partial motion to dismiss on February 19, 2019. App. 1338 – 1350. An evidentiary hearing was held on March 27, 2019 before the Honorable Kristi F. Curtis. App. 1351. Petitioner was represented by Timothy Griffith and the state was represented by Janell Gregory. App. 1351. Testifying at the hearing were Petitioner and his trial counsel, Scott Robinson. App. 1352.

At the PCR hearing, Petitioner testified that defense counsel told Petitioner that he believed he could get Petitioner's statement "thrown out." App. 1357, ll. 9 – 14. However, Petitioner maintained, regardless, that his statement was not a confession, but his lawyer wanted to argue that the police forced the statement from Petitioner. App. 1357, ll. 15 – 24. Petitioner recalled telling defense counsel, "fine, we'll go your way with it." App. 1357, ll. 24 – 25. Petitioner acknowledged that counsel did object to the admissibility of his statement but complained that counsel failed to argue to the jury that the statement was not a confession. App. 1359, l. 5 – 1360, l. 6.

Robinson testified at the PCR hearing and was asked what his "trial theory" was. Robinson recalled:

> [T]he only thing that we really had any type of evidence to go on or any type of defense to assert was that it was, in fact, this Robert person. That there was some third party there who had actually committed this crime and that the story that [Caraway] had

> originally come up with was the truth and that when she later told investigators that [Petitioner] had done it, that that was the lie.

App. 1366, ll. 2 – 11. Robinson also testified regarding his recollection of the statement which was introduced against Petitioner:

> [M]y recollection is that toward the end of the first day of the statement of the interrogation that [Petitioner] did, in fact, confess pretty clearly. Not if I had done it or how could I do this if I had done it, but there was a point in time if I recall where he broke down and started crying and more or less said I did it, I did it, I did it...

App. 1366, l. 17 – 1367, l. 3. Counsel admitted that he thought Petitioner's statement to law enforcement was a confession. App. 1367, ll. 4 – 21. Counsel argued in his closing argument to the jury that Petitioner's statements to law enforcement were involuntary. App. 1005, ll. 1 – 19. Counsel never argued that Petitioner did not actually confess to the crimes. App. 1014, l. 24 – 1017, l. 11.

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective because trial counsel failed to argue that Petitioner's statement to law enforcement was not a confession as the state argued, but rather was taken out of context.

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. Furthermore, criminal defense attorneys have a duty to conduct a reasonable independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2007).

In Council v. State, 380 S.C. 159, 170, 670 S.E.2d 356, 361 (2008) this Court found that trial counsel was ineffective because he failed to adequately investigate the defendant's background and present mitigating evidence in the penalty phase of the defendant's death

penalty trial. Trial counsel explained that his failure to present the substantial mitigation evidence from his client's background was because he wanted to be consistent in arguing to the jury that Council was merely present at the scene and did not commit the alleged crimes. Id. at 167, 670 S.E.2d at 360.

The Council Court found that counsel should have known that his mere presence defense was weak because the defendant had given inculpatory statements to law enforcement and his DNA was found at the crime scene. Id. at 172, 670 S.E.2d at 363. This Court also rejected the state's argument that trial counsel made a strategic decision in failing to present mitigation evidence: "[C]ounsel's decision was not reasonable and any strategic reason asserted would not excuse the deficient conduct." Id. at 175, 670 S.E.2d at 364. See also Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014) (holding that trial counsel's failure to present social history mitigation evidence was ineffective assistance of counsel which resulted in prejudice to defendant in his death penalty trial).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), this Court found that trial counsel was ineffective for failing to properly challenge the state's gunshot residue evidence. Specifically, the state's expert at trial testified that there was no gunshot residue on the victim's hands. Id. at 322-323, 642 S.E.2d at 592. The state used this evidence to argue that the victim was not handling the gun which undermined Ard's accident defense. Id. at 325, 642 S.E.2d at 593.

At the PCR hearing in Ard, the gunshot residue expert who had testified at trial stated that had defense counsel cross-examined him regarding the particles that were found on the victim's hands, he would have acknowledged that the particles were associated with gunshot residue while not "technically" meeting the SLED threshold for calling it a positive

identification. Id. at 328, 642 S.E.2d at 595. The expert also admitted at PCR that the particles found on the victim's hands had two of the three required elements for gunshot residue which could indicate that she had handled the firearm. Id. This Court affirmed the PCR judge's grant of relief because trial counsel's failure to adequately challenge the gunshot residue resulted in significant prejudice to the defendant in the guilt phase of his trial. Id. at 332, 642 S.E.2d at 597.

In this case, defense counsel was ineffective in failing to frame Petitioner's statements that he made to law enforcement as not being a confession. Contrary to what counsel testified at the PCR hearing, Petitioner never "pretty clearly" confessed. App. 1366, l. 17 – 1367, l. 3. The closest thing to a confession that Appellant gave was that he was holding the gun and it "just went off." See State's Ex. 64 at 54:30 – 54:45. Counsel was ineffective for simply accepting the state's interpretation of Petitioner's statements as being a "confession" when in reality, Petitioner did not confess. Counsel, therefore, effectively undermined Petitioner's trial defense of third-party guilt.

In McKnight v. State, 378 S.C. 33, 39, 661 S.E.2d 354, 356-357 (2008), the defendant was convicted of homicide by child abuse after giving birth to a still-born baby that allegedly died from her cocaine use while pregnant. At McKnight's first trial, which resulted in a hung jury, both the state and the defense called two competing experts regarding the cause of death. One of the defense experts, Dr. Conradi, had testified at the first trial that she "had eliminated all potential natural causes of death" but that "she could not rule out cocaine as a cause of death." Id. at 40-42, 661 S.E.2d at 357-358. The defense's other expert at the first trial testified that he could not rule out syphilis as a cause of death. Id.

At McKnight's second jury trial, defense counsel only called Dr. Conradi as a defense witness who again testified that she could not rule out cocaine as being the cause of death.

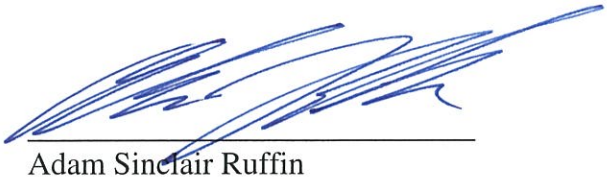
Defense counsel did not call the other expert that was more favorable to the defense. Id. at 42-43, 661 S.E.2d at 358-359. This Court found that defense counsel was ineffective in eliciting expert testimony that undermined the defense that the child's death was unrelated to the mother's cocaine use. Id. at 43-44, 661 S.E.2d at 359-360.

In this case, counsel knew before trial that Petitioner wanted counsel to argue that his statements were not a confession. However, counsel insisted on arguing that Petitioner did in fact give a confession but only after it was "forced out of him" by law enforcement. App. 1357, ll. 15 – 24. This constituted ineffective assistance of counsel as there was no valid trial strategy articulated by counsel for his failure to point out to the jury that Petitioner never actually confessed to the crimes. By arguing that Petitioner's "confession" was forced out of him by law enforcement counsel was conceding before the jury that Petitioner had admitted guilt. This effectively undermined the defense of third-party guilt.

Furthermore, Petitioner's statements to law enforcement were critical to the state's case because there was no physical evidence linking Petitioner to the crime other than Caraway's grandmother's blood being found on his tee shirt. App. 822, l. 1 – 823, l. 22. Petitioner was excluded as being a contributor to DNA found on the murder weapon. App. 817, l. 3 – 821, l. 23. Because there was so little physical evidence against Petitioner, it was ineffective assistance of counsel for defense counsel to concede that Petitioner had given a confession to the crimes. Therefore, the PCR judge erred in finding that counsel was not ineffective. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on this issue.



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Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Justin Jermaine Johnson 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 Kristi F. Curtis, which was held on March 27, 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 Justin Jermaine Johnson.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of July, 2020.

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."

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