

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County
Edward W. Miller, Circuit Court Judge

JAMES JERMAINE ABERCROMBIE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212149

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to determine if the house where Petitioner was arrested was vacant or if the other people in the house at the time of arrest had a right to be in the house?

STATEMENT

In October of 2006, the Greenville county Grand Jury indicted Petitioner for possession with intent to distribute crack cocaine, indictment #2006-GS-23-8683. On July 9, 2007, Petitioner proceeded to jury trial before the Honorable Larry R. Patterson. Attorney William Godfrey represented Petitioner at trial. Attorney Joyce Monts prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Patterson sentenced Petitioner to 18 years. A timely notice of intent to appeal was filed and the appeal perfected. Attorney Elizabeth A. Franklin-Best represented Petitioner for the direct appeal. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Abercrombie, Op.No. 2010-UP-280 (S.C.Ct.App. filed May 20, 2010).

On June 24, 2010, Petitioner filed an application for post conviction relief. The State filed a return on December 16, 2010. On April 4, 2012, an evidentiary hearing was held before the Honorable Edward W. Miller. In a written order filed April 17, 2012, Judge Miller denied relief and dismissed the application. A timely notice of intent of appeal was served on April 20, 2012. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to determine if the house where Petitioner was arrested was vacant or if the other people in the house at the time of arrest had a right to be in the house.

The jury found Petitioner guilty of possession with intent to distribute crack cocaine. At trial, Officer Timothy Fuller with the Greenville County Sheriff's Department testified that he was flagged down by a concerned citizen about suspicious activity at 212 Colonial Avenue. (App. p. 70, lines 18 – p. 71, lines 1-4). Officer Fuller believed the house was vacant. (App. p. 76, lines 5-7). The officer testified that he and Deputy Weiner went to the house to investigate. (App. p. 71, line 2 – p. 72, lines 1-19). Officer Fuller testified that he was at the back of the house looking in the window of a door when he observed Petitioner, inside of the house, pull his hand out of his coat pocket, kneel down and place something in a hole in a row of cabinets. (App. p. 72, lines 21 – p. 73, line 1- p. 74, line 1).

Deputy Weiner testified that he knew the house was vacant but could hear people's voices inside. (App. p. 102, lines 1-2). The deputy knocked on the front door and then announced, "Police, open the door." (App. p. 102, lines 1-10). According to Deputy Weiner, KK, a known prostitute, opened the door and stepped to the side. (App. p. 102, line 10 – p. 103, lines 1-4). The deputy interpreted KK's movement as an invitation to enter the house. (App. p. 103, lines 4-6). The deputy testified that he saw Petitioner and another man inside the house. (App. p. 103, line 6 – 25).

Officer Fuller testified that he went inside the house after Deputy Weiner went inside. (App. p. 75, lines 1-8). According to Officer Fuller, he went to the kitchen area where he saw Petitioner and found a white rock substance. (App. p. 76, line 8 – p. 77, lines 1-17). The substance was testified and found to be 1.83 grams of crack cocaine. (App. p. 125, lines 8-11).

During the PCR hearing Petitioner alleged that trial counsel was ineffective in failing to determine if the house was vacant, as testified to by the officers. (App. p. 223, lines 3-22). Trial counsel testified, “If I had known ahead of time they were going to say it was vacant, I would have probably looked into it to see who owned it.” (App. p. 234, lines 9 – 11). Trial counsel admitted that the characterization of the house as vacant made the house look like a drug house. (App. p. 234, lines 13-20).

In the order of dismissal the PCR judge wrote, “This court finds that, based upon the information known to trial counsel before trial, there was no reason for him to have investigated whether the house was vacant.” (App. p. 246). The PCR judge went on to write, “Regardless, this court finds the applicant failed to present any evidence that the house in question was actually vacant at the time of his arrest. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” (App. p. 246). The PCR judge erred.

Trial counsel was ineffective in failing to determine that the house was **not** vacant. Petitioner testified at trial that his friend John Hall called him and asked him to come to the house to fix a car. (App. pp. 137-139). Petitioner testified that John Hall had a key to the house. (App. p. 146, lines 2-10). Trial counsel was ineffective in failing to determine that the house was not vacant, as testified by the officers. There was no testimony at trial that the other two individuals inside the house did not have permission to be in the house. Trial counsel’s failure to determine the status of the house and the people inside the house prejudiced Applicant’s ability to challenge the search and seizure.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668,

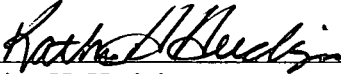
104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Id.* at 693, 104 S.Ct. at 2052.

Trial counsel was ineffective in failing to determine if the house where Petitioner was arrested was vacant or if the other people in the house at the time of his arrest had a right to be in the house. Petitioner was prejudiced by the deficient performance. The PCR judge erred in refusing to grant post conviction relief.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of March, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
EDWARD W. MILLER, CIRCUIT COURT JUDGE

JAMES JERMAINE ABERCROMBIE,

PETITIONER,

V.

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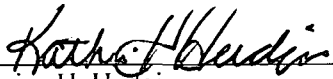
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Jermaine Abercrombie states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 4, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for James Jermaine Abercrombie.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of March, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

JAMES JERMAINE ABERCROMBIE,

PETITIONER,

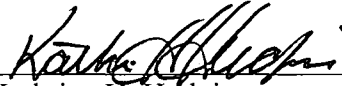
V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

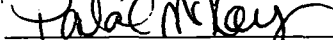
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Tyson Andrew Johnson, Sr., Esquire, and James Jermaine Abercrombie, # 236714, at Lieber Correctional Institution this 13th day of March, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of March, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.