

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge
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DEMETRIUS D. HENDERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000443
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

Taylor D Gilliam
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South Carolina Commission on Indigent Defense
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Oct 30 2020

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

ISSUE PRESENTED

Whether trial counsel erred in failing to discuss the jury charges with Petitioner, where both members of Petitioner's defense team testified that they did not recall going over the charges with Petitioner, and where counsel should have discussed them with Petitioner and objected to one of the charges as burden shifting?

STATEMENT

In October 2014, Petitioner was indicted by a Richland County grand jury for grand larceny of between \$2,000 and \$10,000, burglary in the first degree, trafficking cocaine, and possession of marijuana with intent to distribute. App. 716 – 723. Petitioner proceeded to trial before the Honorable D. Craig Brown and a jury on May 6, 2015. Megan Eigenbrot and Constantine Pournaras represented Petitioner; Joseph Shenkar and Britton All appeared on behalf of the state. Petitioner was found guilty as indicted on all four charges. App. 562 l. 19 – 563 l. 10. Judge Brown sentenced Petitioner to ten years on the trafficking cocaine charge, one year on the possession with intent to distribute marijuana, three years on the grand larceny charge, and fifteen years on the burglary in the first degree charge. App. 583 ll. 7 – 22.

Petitioner's convictions were affirmed. State v. Henderson, Op. No. 2017-UP-231 (S.C. Ct. App. filed May 31, 2017). Petitioner filed an application for post-conviction relief on May 22, 2016. App. 601. It contained multiple allegations of ineffective assistance of counsel. The state made its Return on or about August 24, 2018. App. 623 – 627.

An evidentiary hearing was held before the Honorable J. Derham Cole on April 3, 2019. App. 628. Leah Moody represented Petitioner; Lindsey McCallister appeared on behalf of the state. Judge Cole heard testimony from both members of Petitioner's defense team, Megan Eigenbrot and Constantine Pournaras, as well as Petitioner. The matter was taken under advisement at the conclusion of the hearing. App. 690 ll. 20 – 21. An Order of Dismissal was filed on January 29, 2020. App. 692. The PCR court denied relief on all claims of ineffective assistance of counsel.

This petition follows.

ARGUMENT

Trial counsel erred in failing to discuss the jury charges with Petitioner, where both members of Petitioner’s defense team testified that they did not recall going over the charges with Petitioner, and where counsel should have discussed them with Petitioner and objected to the charges as burden shifting.

Relevant facts

In his application for post-conviction relief, Petitioner contended that many of the trial judge’s charges to the jury, including the instructions on criminal intent, constructive possession, and permissible inference of intent to distribute, were burden shifting and warranted an objection. App. 606 – 615. Both members of Petitioner’s defense team testified at his PCR that they never recalled going over the jury charges with Petitioner. He was therefore prevented from offering input or sharing with his attorneys how the charges sounded. Had counsel spoken with Petitioner about the trial judge’s jury instructions, an objection could have been lodged that the instructions were burden shifting or constituted a comment on the facts.

In addition to not discussing the jury charges with Petitioner, trial counsel failed to prepare Petitioner for trial. At the PCR evidentiary hearing, Petitioner testified that he and his legal team never prepared for trial. App. 638 ll. 16 – 18. They never discussed any of the evidence the state would present against him. App. 639 ll. 1 – 4. Besides not being told any of the witnesses who would testify against him, Petitioner was unaware that the state had as many witnesses as were presented during the prosecution’s case-in-chief. App. 639 ll. 13 – 20. He was completely caught off guard, even though he had always been pursuing a trial rather than a plea. App. 637 l. 21 – 638 l. 4. Petitioner indicated that his counsel repeatedly attempted to convince him to plead. App. 640 ll. 8 – 20.

Counsel Eigenbrot recalled that she met with Petitioner eight times before the week of trial. App. 659 ll. 13 – 18. She was appointed to represent him. App. 658 ll. 10 – 19. Regarding the facts giving rise to the charges Petitioner was facing at trial, Counsel Eigenbrot summarized them as follows:

Mr. Henderson was charged with a burglary in the first degree, trafficking cocaine, PWID marijuana first and grand larceny. Essentially, there was a shooting call at this apartment complex for shots fired. It was later discovered that Mr. Henderson had been shot several times. He was laying in a grassy area right by the parking lot.

As the investigation progressed, a woman by the name of April Jenkins arrived home. It was believed at that point in time that her boyfriend ... may have been involved in the shooting. They spoke to her. She goes into her home and realizes that all of her things are missing. It was around Christmas time and she had lots of Christmas presents along with other valuable electronics that had been removed from the home.

On scene, the officers locate a vehicle that they determined to be Mr. Henderson[‘s]. In that vehicle are, essentially, the items that would have been in Ms. Jenkins’ home. So the theory then became that Mr. Henderson may have been involved in some type of burglary. I believe a back window had been opened up that was not normally opened.

App. 660 l. 3 – 661 l. 2. The drug charges stemmed from substances found on Petitioner as well as in his car. App. 661 ll. 3 – 8.

Regarding the jury charges, Counsel Eigenbrot recalled that there was a discussion with the trial judge regarding the proposed instructions. App. 664 l. 6 – 665 l. 13. Other than successfully lobbying for a lesser-included offense, Counsel Eigenbrot did not believe the jury instructions needed to be modified or objected to at the time. Id. She did not recall going over the permissive inference jury charge with Petitioner. App. 665 ll. 14 – 20. Similarly, she did not believe that she discussed mere presence or any of the other jury charges with Petitioner. App. 672 ll. 8 – 16. She recalled discussing the intricacies of the instructions with her co-counsel but

never went over specifics with Petitioner. Id. Counsel Pournaras also testified that Petitioner was never apprised of the trial judge's jury instructions. App. 685 ll. 17 – 25.

The PCR judge's Order of Dismissal referred to the jury instructions Petitioner alleged were objectionable. App. 703 – 704. In particular, Petitioner alleged that the charges regarding criminal intent, constructive possession, and permissible inference of intent to distribute based on weight of drugs were burden-shifting and should have been addressed by either member of his defense team. The PCR court ruled that the jury instructions were not burden-shifting and accurately summarized the law in the state:

After reviewing the specific instructions complained of by Applicant, and considering the instructions as a whole, this Court finds defense counsel were not deficient in failing to object. The instructions as given were not burden-shifting as they correctly state the law in South Carolina as to each of these issues, and therefore, counsel had no reason to object.

App. 705.

Discussion

In order to establish ineffective assistance of counsel, a PCR applicant must establish trial counsel's performance fell below an objective standard of reasonableness and, “the deficient performance prejudiced the [applicant] to the extent that ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different’.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989), quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Id.

The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not

uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed “in its entirety and not in isolation.” Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

Counsel failed to discuss with Petitioner the trial judge’s proposed instructions to the jury. Petitioner, a layman just like the jurors, heard the description of the law as spoken by the trial judge to the jury right before deliberations and realized how prejudicial some of the language was. It naturally follows that the jury similarly applied the charge and found Petitioner guilty as a result. Had counsel provided Petitioner with a draft of the proposed jury instructions, Petitioner could have offered his input or gained an understanding of what was going to be charged to the jury. A sidebar conversation occurred with counsel at trial. App. 496 l. 16 – 499 l. 7. As with most trials, counsel were aware of the proposed charges and suggested additions. Id. The failure to communicate with Petitioner constituted deficient performance.

In this case, there is a reasonable probability that, but for counsels' failures to object to the trial judge's improper instruction, the outcome of Petitioner's trial would have been different. See Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (where trial judge gave erroneous instruction on critical issue of intent, PCR applicant was prejudiced by counsel's failure to object); High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989) (same); see also Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991) (where jury asked for written instructions on self-defense, PCR applicant was prejudiced by inadequate instructions). Accordingly, Petitioner was prejudiced by the failure to communicate and failure to object.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2020.

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Counsel for Demetrius D. Henderson 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 J. Derham Cole, which was held on April 3, 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 Demetrius D. Henderson.

Respectfully Submitted,

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of October, 2020.

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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.”

s/Taylor D. Gilliam

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