

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Edward W. Miller, Circuit Court Judge

CARL STANLEY AIKEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000712

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in finding trial counsel was not ineffective where counsel failed to move for a directed verdict on the basis that a future promise cannot form the basis for a conviction for obtaining goods under false pretenses which requires a false representation of a present or past fact?

STATEMENT

Petitioner was indicted in May of 2016 by the Greenville County grand jury for exploitation of a vulnerable adult. Petitioner was also indicted in July of 2016 by the Greenville County grand jury for unlawful practice of a regulated profession¹ and obtaining goods under false pretenses. App. 448 – 454. On April 3, 2017, Petitioner was called to trial before the Honorable R. Lawton McIntosh and a jury for the exploitation of a vulnerable adult and obtaining goods under false pretenses charges. App. 1. Petitioner was represented by Dorothy Manigault. The state was represented by Jonathan Gregory and Jena Hendricks. App. 1.

Petitioner was accused of receiving and cashing checks from Raymond Poore for a total amount of over \$14,000 for work Petitioner was performing on Poore's house. The state alleged that Petitioner did not perform the work he was paid to do and that Poore was suffering from dementia at the time Petitioner was being paid by Poore. App. 38, ll. 2 – 24. Poore did not testify at Petitioner's trial.

In support of its allegations against Petitioner, the state introduced thirteen checks written by Poore made out to Petitioner for various amounts from December of 2012 through February of 2013. Some, but not all, of the checks had writing in the memo line referring to work such as "painting," and "home repair." App. 57, l. 1 – 62, l. 21.

The state also called Poore's cousin, Terry Ford, who was frequently around Poore during this same time period. Ford recalled that she signed a durable power of attorney to act as Poore's agent and that she "took care of him." App. 72, l. 20 – 74, l. 7. Ford claimed that Poore was unable to "drive correctly" and that he frequently misplaced things and was forgetful. App. 74, l. 24 – 77, l. 24. Ultimately, Ford said that she had to hire helpers to take care of Poore.

¹ This charge was nol prossed. App. 449.

App. 78, ll. 1 – 10. Ford admitted that it was not until October of 2015 that Poore moved into an assisted living facility and all of the checks written to Petitioner were before that. App. 95, l. 19 – 96, l. 2.

Ford testified that she helped Poore manage his bank accounts and that is how she discovered the checks written to Petitioner. App. 82, l. 23 – 83, l. 11. Ford claimed that she spoke to Petitioner to ask what the checks were for and that what Petitioner told her “was not matching up to what was being done around the house.” App. 83, ll. 12 – 18. Ford claimed she asked Petitioner for work receipts and he failed to provide her with any. App. 86, ll. 17 – 25. Ford’s granddaughter also claimed that she never saw any work being done on the house during the time period Petitioner was being paid and that “[t]he house looked the same as it did since [she] was little.” App. 102, ll. 11 – 15.

The state also called Jerry Brown, who claimed to be a licensed contractor. Brown testified that he was contacted by Ford to look at Poore’s house to see if any work had been done on it. App. 143, l. 20 – 145, l. 16. Brown claimed that no new gutters had been installed and no recent foundation work had been done on the house. Brown further claimed that only a small area near the front door had been painted. App. 146, ll. 5 – 22. However, Brown admitted that he never went inside the home to see if any work had been done there. App. 151, ll. 14 – 15.

Petitioner testified that he met Poore while he was working on another house and Poore asked him to do some work on Poore’s house. App. 192, ll. 1 – 23. Petitioner recalled that he began working on Poore’s house after Thanksgiving of 2012. Poore had shown Petitioner what he wanted done, including what areas needed to be painted and Petitioner informed Poore that he would need to pressure clean before he could paint. App. 194, l. 17 – 195, l. 9.

Petitioner maintained that he pressure cleaned the storm windows, removed the covers from Poore's gutters, replaced and painted the fascia board, painted the windows, replaced and painted gables above the windows, put two columns in the carport, and replaced the air vents in Poore's house. App. 195, l. 1 – 197, l. 12. Petitioner further testified that he removed a tree from Poore's yard, painted two bedrooms and a kitchen, and installed a ceiling in the shower. App. 197, l. 23 – 198, l. 8. Petitioner testified that he had completed all the work at the time Poore gave him the last check which was February of 2013. App. 203, ll. 15 – 18.

Petitioner was found not guilty of exploitation of a vulnerable adult and guilty of obtaining goods under false pretenses. App. 291, ll. 10 – 23. The judge sentenced Petitioner to ten-years imprisonment suspended upon the service of four-years imprisonment followed by five years of probation. The judge further ordered restitution in the amount of \$14,250. App. 298, l. 15 – 299, l. 5.

Appellate Defender Robert Pachak filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 326 – 339. The Court of Appeals dismissed Petitioner's direct appeal. State v. Aiken, No. 2018-UP-375 (Filed October 10, 2018).

Petitioner filed his PCR application on February 1, 2019. App. 351 – 375. The state filed its return on March 19, 2019. App. 376 – 383. An evidentiary hearing was held on October 23, 2019 before the Honorable Edward W. Miller. Petitioner was represented by Susannah Ross and the state was represented by Lillian Meadows. App. 392. Testifying at the hearing were Petitioner and his trial counsel, Dorothy Manigault. App. 393. The PCR judge denied Petitioner's application for relief. App. 429.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding trial counsel was not ineffective because counsel failed to move for a directed verdict on the basis that a future promise cannot form the basis for a conviction for obtaining goods under false pretenses which requires a false representation of a present or past fact.

Relevant Facts

At the close of the state's evidence, trial counsel moved for a directed verdict on several different grounds. First, counsel argued that the judge should grant a directed verdict "on the grounds that there has been no finding by the Court in the state's case regarding the unavailability or the availability of the victim under Rule 804[, SCRE]." App. 177, ll. 16 – 24. Counsel invoked this exception to the rule against hearsay in her directed verdict motion even though the state never attempted to introduce any hearsay statements made by the victim. The assistant solicitor argued that Rule 804, SCRE was not applicable to a directed verdict motion. App. 180, ll. 16 – 25. The trial judge agreed with the state and denied counsel's motion. App. 181, ll. 1 – 2.

The second basis for counsel's directed verdict motion was that she had no ability to cross-examine the alleged victim which counsel claimed violated Petitioner's right to confront his accusers. App. 181, ll. 3 – 12. The assistant solicitor pointed out that no statements made by the victim were ever introduced in the trial and therefore the confrontation clause did not apply. Again, the judge agreed and denied counsel's motion. App. 181, ll. 14 – 25.

The final reason that trial counsel gave for her directed verdict motion was that the state violated Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83 (1963) by failing to inform counsel that the victim would not be present and testifying at the trial. Counsel was not informed

of this fact until the solicitor gave his opening statement. App. 182, l. 14 – 183, l. 15. The trial judge stated that he did not believe that was a Brady violation, but asked the solicitor the following question: “[H]ow can the state go forward without the original terms of the agreement being before the jury because there’s certainly zero evidence of that.” App. 185, ll. 3 – 22. The solicitor responded that the memo lines on some of the checks were substantial circumstantial evidence of the agreement between Petitioner and the victim. App. 186, ll. 1 – 22. The judge took this issue under advisement but never ruled on the record. App. 239, ll. 14 – 25.

Petitioner’s PCR counsel argued at the PCR hearing that trial counsel had failed to argue in her directed verdict motion that a promise to do something in the future cannot form the basis for a charge of obtaining goods under false pretenses. Specifically, trial counsel had failed to cite to State v. McCutcheon, 284 S.C. 524, 327 S.E.2d 372 (Ct. App. 1985) and State v. Dickinson, 339 S.C. 194, 528 S.E.2d 675 (Ct. App. 2000). App. 397, ll. 7 – 16.

Trial counsel testified at the PCR hearing that she did not argue McCutcheon and Dickinson because “the monies were received on an ongoing basis as the work was being completed according to [Petitioner].” App. 414, l. 19 – 415, l. 4. Trial counsel maintained that her trial strategy was that Petitioner performed all the work that he was paid to do and therefore she did not argue that a future promise cannot constitute a basis for obtaining goods under false pretenses. App. 417, ll. 10 – 14.

The PCR judge ruled that trial counsel’s failure to argue the correct and applicable legal provisions in her directed verdict motion was excusable because it was consistent with counsel’s trial strategy. App. 440. Specifically, the judge found that because trial counsel’s strategy was that Petitioner had performed all of the work he was paid to do, no “future promise” existed and therefore counsel was not ineffective in her failure to make that argument. App. 441 – 443.

Discussion

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.

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” Id. “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” Id. at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” Id. at 139, 708 S.E.2d at 777; see also State v.

Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. Hepburn, 406 S.C. at 429, 753 S.E.2d at 409.

Under South Carolina law, “[a] person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty [of obtaining goods under false pretenses].” S.C. Code Ann. § 16-13-240. In State v. McCutcheon, 284 S.C. 524, 525, 327 S.E.2d 372, 372 (Ct. App. 1985), the Court of Appeals held that “[a] promise to do something in the future cannot constitute the basis of a prosecution for obtaining goods under false pretenses.” This is because “[a] promise to do an act in the future is not a representation of a *present* or *past* fact.” Id. at 526, 327 S.E.2d at 373.

One hundred years prior to the decision in McCutcheon, this Court defined “false pretense” in the following way:

A false pretence is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. *A mere promise to do something in the future, as, for example, to pay for goods at a future time, even if false, is not such a pretence as would come within the terms of the statute.*

State v. Haines, 23 S.C. 170 (1885) (emphasis added).

At the close of the state’s evidence in Petitioner’s case, viewing the evidence in the light most favorable to the state, the state had shown that Petitioner received and cashed thirteen checks from Poore and that little to no work had been done on Poore’s house. As the trial judge acknowledged, there was “zero evidence” presented in the state’s case-in-chief that there was an agreement between Petitioner and Poore for Petitioner to do work on Poore’s house. App. 185,

ll. 3 – 22. The few checks which had work written on the memo line did not constitute “substantial circumstantial evidence” of an agreement. However, and much more importantly, the state never presented *any* evidence that Petitioner ever made a false pretense, i.e. “a fraudulent representation of an *existing* or *past* fact, by one who knows it not to be true,” as is required under Haines, and McCutcheon. Therefore, Petitioner was entitled to a directed verdict due to the state’s total failure to prove this essential element of the offense.

Trial counsel also failed in her directed verdict motion to argue anything remotely close to the correct applicable law. Instead trial counsel strangely argued hearsay, confrontation clause and Rule 5, SCRE issues, which had no application to a directed verdict motion. Counsel’s failure to argue that a directed verdict should have been granted due to the state’s failure to prove the element of false pretense, including the fact that a future promise cannot form the basis for a false pretense, was ineffective assistance of counsel.

In State v. Holcomb, 426 S.C. 557, 564, 827 S.E.2d 367, 371 (Ct. App. 2019) the Court of Appeals held that the defendant was entitled to a directed verdict where the state failed to prove that the defendant made a false statement. The defendant in Holcomb was accused of entering a contract with the victim to replace the roof on the victim’s house. Id. at 561, 827 S.E.2d at 369. The contract provided that the victim was to make a partial payment up front and pay the remainder upon completion of the work. Id. The victim made the initial payment, but the defendant never replaced the roof. Id. This Court found that the defendant’s representation that he would replace the victim’s roof was not proved by the state to be “irrefutably false at the time [it was] made” and therefore, the defendant was entitled to a directed verdict. Id. at 565, 827 S.E.2d at 371.

As in Holcomb, here, Petitioner was entitled to a directed verdict because the state produced no evidence that Petitioner made a false statement to obtain the checks from Poore. Petitioner's directed verdict motion should have been granted on this basis and had it not been, Petitioner would have prevailed on direct appeal. Because trial counsel failed to raise this issue in her directed verdict motion, Petitioner was precluded from making this argument in his appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding that "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal").

The PCR judge's order finding that trial counsel's failure to argue the applicable law at the directed verdict stage constituted a reasonable trial strategy is untenable. The Supreme Court has "recognized that when counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" Id. quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Failing to move for a directed verdict on the correct legal basis cannot be excused as a valid trial strategy. Trial counsel's given strategy was to argue to the jury that Petitioner completed the work he was paid for.² That was a perfectly reasonable strategy *when arguing to the jury*. However, that was wholly independent from the threshold legal questions presented at directed verdict, i.e. whether the jury should even be deciding the case at all. There is nothing that ties counsel's strategy in front of the jury to her argument at the directed verdict stage. Had counsel argued the correct and applicable law at the directed verdict stage and lost, she still would have been able to argue to the jury that Petitioner completed the work he was paid for.

² It is important to note that this trial strategy was exclusively based on Petitioner's own testimony at his trial which took place after the directed verdict stage.

The point of arguing McCutcheon and Dickinson at the directed verdict stage was that the state failed to show that Petitioner made a false statement about an *existing* or *past* fact. Because the state failed to prove this element, directed verdict should have been granted. Furthermore, counsel arguing this at directed verdict would have in no way inhibited her ability to argue in closing argument that Petitioner did in fact complete the work.

In Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) this Court found that trial counsel was ineffective for failing to move to suppress drugs that were obtained in violation of the Fourth Amendment to the United States Constitution. In Sikes, the defendant was the passenger in a vehicle that was stopped by police because it had a paper tag. Id. The defendant was removed from the car and detained for twenty minutes while officers conducted their investigation into whether the car was stolen. Id. at 30-31, 448 S.E.2d at 562-563. During their investigation, officers discovered that the defendant had an outstanding warrant for which he was arrested. A bag of crack cocaine was then discovered in the officer's patrol car where the defendant had been sitting. Id.

The Sikes Court concluded that the defendant's detention and arrest were illegal and therefore the drugs were inadmissible. Id. at 32, 448 S.E.2d at 563. In finding that the PCR judge erred, this Court stated: "The post conviction relief court found that trial counsel's decision was a matter of proper trial strategy; however, this cannot be correct in the face of such a blatant violation of [the defendant's] Fourth Amendment rights." Id. Like a motion to suppress drugs for a Fourth Amendment violation, a directed verdict motion is independent from a trial strategy before a jury. Trial counsel may well argue a Fourth Amendment issue at a motion to suppress, but not to a jury. It does not follow, however, that the failure to make the Fourth Amendment argument at a motion to suppress can be excused as a valid trial strategy. Likewise, here,

counsel should have argued that the state failed to meet its burden of proof as to the false pretense element in her directed verdict motion even if she was not going to make that same argument to the jury.

The problem with the PCR judge's finding that counsel's failure to move for a directed verdict because counsel's trial strategy did not involve arguing that a future promise was made is that had counsel made the correct argument at the directed verdict stage, she would not have had to argue anything to the jury because the judge most likely would have granted the directed verdict motion. Trial counsel's failure to argue in her directed verdict motion that a future promise cannot form the basis for a false pretense was inexcusable and constituted ineffective assistance of counsel. The PCR judge erred in holding otherwise. See State v. McCutcheon, 284 S.C. 524, 327 S.E.2d 372 (Ct. App. 1985); State v. Haines, 23 S.C. 170 (1885).

CONCLUSION

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

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of November, 2020.