

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post-Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Petitioner respectfully requests that this court consider this petition for writ of certiorari to the Court of Appeals pursuant to Rule 242, South Carolina Appellate Court Rules. Argument follows.

QUESTIONS PRESENTED

- I. Counsel was ineffective for his failure to object to Dario Teran’s statement being used read into the record by the solicitor.**
- II. Counsel was ineffective for failing to show the prejudice and bias of the lead investigator in the case who was in a relationship with another suspect’s mother.**
- III. Counsel was ineffective for his failure to adequately advise petitioner regarding testifying on his own behalf.**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Petitioner was indicted at the February 2013 term of the Charleston County Grand Jury for murder, attempted murder, and possession of a firearm during the commission of a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented Applicant. Applicant proceeded to trial before the Honorable Roger M. Young, Sr. and was prosecuted by Stephanie Linder and Jessica Baldwin, Esquires. Trial was conducted September 15-19, 2014 and resulted in Petitioner being found guilty on all counts. He was sentenced to fifty years for murder, thirty years for attempted murder, and five years for possession of a firearm during the commission of a violent crime with all sentences to be served concurrently.

Petitioner did not appeal his conviction or sentence at the time; however, he filed a post-conviction relief application on July 15, 2015 in which he alleged ineffective assistance of counsel and conflict of interest. This was amended on July 28, 2017 to include more detailed instances of ineffective assistance of counsel, including that defense counsel did not file an appeal despite stating that he would, and that the theory of transferred intent was improperly applied. A hearing was held regarding the post-conviction relief matter on August 3, 2017 at the Charleston County Courthouse. Petitioner was represented by Tommy A. Thomas, Esquire, and the State was represented by Assistant Attorney General Julie A. Coleman. An order was filed September 26, 2017 in which Judge Young dismissed all substantive post-conviction relief grounds but granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner proceeded with his White appeal, as well as an appeal of the other post-conviction relief issues. Petitioner's initial brief for the White appeal and petition of certiorari,

along with an appendix on November 30, 2018. The State filed a return to the petition for writ of certiorari and response to White brief on April 1, 2019. Petitioner filed a reply to the return to petition for writ of certiorari on April 19, 2019. The case was subsequently transferred to the Court of Appeals on April 19, 2019. It was submitted for consideration on September 1, 2020, and an unpublished, *per curiam* opinion issued without oral argument on October 7, 2020. Petitioner submitted a petition for rehearing on October 16, 2020, which was denied on November 24, 2020. This petition for certiorari follows.

ARGUMENT

Argument I

Counsel was ineffective for his failure to object to Dario Teran's statement being used read into the record by the solicitor.

During trial, the State called Dario Teran to testify regarding the events of the evening in question as he was a patron of the Waffle House when the shooting occurred. (App. p.255, lines 15-16) However, Mr. Teran suffered a head injury during a motorcycle accident that caused memory loss between the time of the incident and the time of trial. As such, Mr. Teran testified that he had trouble recalling details about the evening. (App. p.256, lines 11-22) Mr. Teran, along with others, provided written statements at the scene. (App. p. 256, line 23-25) Because Mr. Teran had difficulty recalling the evening in question, the solicitor asked if Mr. Teran would like to use his statement to refresh his recollection, as is allowed under Rule 612, South Carolina Rules of Evidence ("SCRE"). (App. p.258, lines 6-10) Mr. Teran stated that he would appreciate the refresher but, due to English being his second language and his having an accent, he asked if the solicitor could read the statement. (App. p.259, lines 20-25)

Upon initial discussion of allowing the statement before the jury in any form, trial counsel stated that he had no objection because he believed it met the hearsay exception under Rule 803(5), SCRE, which reads:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Under this analysis, trial counsel was correct as it is undisputed Mr. Teran did not have adequate recollection to testify and he had recorded his recollection via a statement to law enforcement. Similarly, due to lack of objection by trial counsel, the statement was admitted and read into the record, but the document itself was not made an exhibit.

However, trial counsel failed to object pursuant to Rule 612, SCRE, which delineates how statements used to refresh recollection should be handled:

If a witness uses a writing to refresh memory for the purpose of testifying, either -
(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

This error is particularly grievous and noticeable as the solicitor specifically uses the term “refresh recollection” during questioning.

During the post-conviction relief hearing, trial counsel was questioned about his recollection of Mr. Teran’s testimony, particularly if there was a reason to object to him reading the statement or using it to refresh his recollection. He replied, “Not to refreshing his recollection, but I would have had a problem, and I would have be [sic] surprised if I didn’t object to it being read to the jury.” (App. p.671, lines 22-24) Regardless, he did not object, thus allowing the entire statement into the record. It is unclear from the record whether trial counsel had been provided the statement in discovery but, judging by his reaction at trial and his testimony during the post-conviction relief hearing, he had not been provided the statement with the intent of it being used to refresh Mr. Teran’s recollection. Therefore, he had not been afforded the chance to review it, request omissions, or take any other action. The record does not reflect whether trial counsel was given a copy to review at the time of Mr. Teran’s testimony and the sidebar conference regarding the same. (App.258, line 14 – p.260, line 7) Similarly, he did not object on this ground in order to allow himself a chance to prepare for the entrance of the statement. Because of this, Mr. Teran’s entire statement came into the record, notably including that Petitioner was wearing a “red baseball jersey.” (App. p.261, lines 19-20) This was tied to other testimony that the shooter was wearing a distinctive red shirt.

Though trial counsel could and should have used this objection for every witness whose recollection was refreshed, Mr. Teran’s testimony is particularly damning. Initially, it is the only statement regarding the incident that was read into the record in its entirety. Further, Mr. Teran’s statement was the only testimony from the night of the incident stating Petitioner was wearing a red baseball jersey. This is one of the key facts that linked Petitioner to being the alleged shooter and

one of the reasons for the court to deny trial counsel's motion for directed verdict. (App. p.382, lines 1-12) Clearly, trial counsel's failure to object and his acquiescence to this statement coming in connected the dots of very circumstantial evidence for the trial court to deny Petitioner's motion for directed verdict and, ultimately, for the jury to convict. These actions meet the burden for ineffective assistance of counsel in that it is both deficient and prejudicial as contemplated in Strickland v. Washington, 466 U.S. 668 (1984) and Cherry v. State, 300 S.C. 115, 386, Se.E.2d 624 (1989) as it is both improper conduct and so prejudicial as to change the result of the trial. For these reasons, Petitioner's request for certiorari should be granted for further briefing.

ARGUMENT II

Trial counsel failed to present an effective defense by not showing prejudice and bias of the lead investigator in the case who was in a relationship with another suspect's mother or adequately advising Petitioner regarding testifying on his own behalf.

During the post-conviction relief hearing, evidence was presented that a gentleman referred to as Detective or Investigator Lawrence was engaged in a romantic relationship with the mother of a man named Derrick Brown (also known as "Scrappy") who was also a suspect in this matter. Because this officer, Investigator Lawrence, did not take the stand for the State, trial counsel could not cross-examine him on his involvement, relationships, or potential bias. The failure of the State to present Investigator Lawrence, despite his obvious involvement in the case, is suspicious. Lawrence is mentioned repeatedly at trial by other witnesses, yet he did not testify at trial to present any of his own observations.

During the post-conviction relief hearing, trial counsel testified that he wished he could have used this information about Lawrence's relationship but "maybe [he is] not smart enough." (App. 678, lines 18-19) Trial counsel went on to testify that he "could have put up a third-party guilt case," and he "would have tried to incorporate it." (App. 678, lines 21-22) He also admitted

that, “Certainly I could have called him, but I didn’t think it was in my client’s best interest to put up a detective that had been pretty slippery during a majority of his career and had a – I still think an interest to, I guess, protect Scrappy.” (App. 679, line 25 – p.680, line 4) His testimony, ultimately, was that he preferred his simple defense: “I don’t want to dirty up my trial. I had what I thought was a cogent defense, a simple defense, but fairly hard for the State to prove otherwise, so I was surprised by the verdict in the case.” (App.682, lines 17-21)

Petitioner’s testimony regarding theory of defense was that “[trial counsel] was going to let me testify, and we was going to show how the second possible suspect, you know, who was involved in this case how this mother was in a sexual relationship with Detective Lawrence, who was investigating the case.” (App.597, lines 6-10) He further testified, “[trial counsel] was going to set that information about Detective Lawrence in a sidebar in case at any point of time in trial if it comes up that he would be able to use it, but he never testified and he never speak on nothing about that.” (App. p.624, lines 15-19) Petitioner testified one reason he did not accept the ten-year plea that was on the table throughout the trial is because he was still waiting on trial counsel to bring out this and other issues:

Petitioner:...based on the things that I was reading and from what counsel was telling me, you know, they didn’t have any evidence, you know, to say that I was the shooter.

Counsel: All right. Now, in making this decision, is it fair to say that you would also have taken into consideration the representation by counsel that he was going to use this information about Derrick – about Detective Lawrence?

Petitioner: Yes sir, because at that point in time, the trial wasn’t over yet.

...
And I didn’t want to take the plea at the time because I was saying if they’re willing to give me a ten-year plea and they’re saying that I shot these people, I’m telling [trial counsel] that I never even fired a weapon that night. I didn’t shoot anybody, so why should I take a plea for that amount? If anything, it should have been less. You know, I did start the fight, and in my statement in the interrogation room, I

admit to that. You know, since day one, I never denied that. I was the one who started the whole situation....

(App.626, line 20 – 627, line 19)

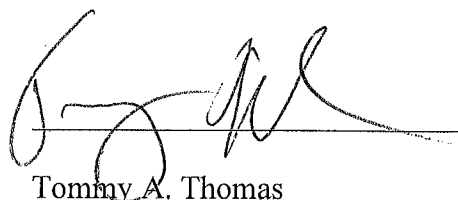
More specifically regarding Petitioner's decision to testify, he stated that he and trial counsel went back and forth as to whether he should testify. At first, he intended to testify because he knew specific evidence from the incident through firsthand knowledge. (App. p.630, lines 1-9) Trial counsel eventually advised him not to testify because he went off-camera during the surveillance video and it could be argued that he left to get a gun. (App. p.630, lines 11-19) However, Petitioner was still under the impression that he would get the last closing argument because he was not testifying. This changed, though, when trial counsel put up a witness to explain that the gunshot went from outside in, and another witness that did the gunshot residue analysis on Petitioner's clothing. (App. p.631, lines 1-16)

As discussed above, trial counsel stated many times throughout the post-conviction relief hearing that he could have done things differently but decided to keep his defense simple. Though he also testified that all involved seemed shocked by the guilty verdict, this does not absolve trial counsel of his duty to perform in line with the prevailing professional norms. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). In this case, presenting a third-party guilt defense would have been highly effective, considering that there was a second suspect whose involvement was obscured by questionable policework, witness statements and testimony were inconclusive, and forensics were not straightforward. This meets the idea that third-party guilt can be presented as a defense so long as it is not arbitrary or disproportionate. Holmes v. South Carolina, 547 US 319 (2006). These various elements that barely met the burden for a directed verdict should not have been left open-ended by a half-hearted defense presentation. Clearly, trial counsel's efforts

could have been directed toward a more cohesive, effective defense strategy that was better understood by Petitioner. These actions meet the burden for ineffective assistance of counsel in that it is both deficient and prejudicial as contemplated in Strickland v. Washington, 466 U.S. 668 (1984) and Cherry v. State, 300 S.C. 115, 386, Se.E.2d 624 (1989). For these reasons, Petitioner requests this court grant a writ of certiorari and further briefing.

CONCLUSION

This court should grant Petitioner's petition for writ of certiorari and allow further briefing.



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