

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenwood County

Honorable J. Mark Hayes, II, Circuit Court Judge
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EARNEST E. VAUGHN, SR

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000750
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JOHNSON PETITION FOR WRIT OF CERTIORARI
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S.C. SUPREME COURT

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ISSUE PRESENTED

Pursuant to the S.C. Supreme Court's opinion in the case of Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), counsel for the Petitioner submits that the issue before the court is the following:

1. Did the trial court commit reversible error in denying the Petitioner's Post-Conviction Relief petition, and are there any arguable or non-frivolous legal arguments to further in this Honorable Court based on the entire record of this case?

STATEMENT

Petitioner was indicted by a Greenwood County grand jury on or about May, 2016, for trafficking in methamphetamine (16-GS-24-0539), possession of marijuana with the intent to distribute (16-GS-24-0540), and unlawful neglect of a child (16-GS-24-0541). (Appendix Volume III, pp. 844-846.) On January 27, 2016, agents with the Greenwood County Sheriff's Office utilized the services of a confidential informant, Debbie Tucker, to arrange a controlled buy of methamphetamines. (Appendix Volume I, pp. 224-225; Volume II, p. 349.) Tucker made a phone call to Brandy Wilson and arranged to purchase a half ounce of methamphetamine from Petitioner and Ms. Wilson at a car wash in Greenwood that evening. (Appendix Volume I, p. 225; Volume II, pp. 366-367.) Police were told by Debbie Tucker that they should be looking for a dark colored Chevrolet Tahoe. (Appendix Volume I, p. 225; Volume II, p. 350.) Law enforcement arrived early to set up surveillance at the buy location. Before Debbie Tucker could arrive, a dark colored Chevy Tahoe arrived driven by Brandy Wilson. (Appendix Volume I, p. 225; Volume II, p. 351.) According to trial testimony, the Petitioner was in the passenger seat, and Petitioner's five (5) year-old grandchild was in the back. (Appendix Volume I, p. 225; Volume II, p. 488.) Law enforcement called off the controlled purchase and initiated a traffic stop on the Tahoe. (Appendix Volume I, p. 225; Volume II, p. 351, 370.) Petitioner was allegedly seen "fidgiting" by law enforcement and it appeared to Captain Jarvis Reeder that Petitioner was attempting to hide something. (Appendix Volume I, p. 225; Volume II, p. 487-488.) Petitioner was read his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and made a statement to law enforcement admitting that he did have drugs in his pants near his testicles. (Appendix Volume I, p. 225; Volume II, pp. 490-492.) Petitioner was then arrested. (Appendix Volume I, p. 225.)

On or about October 31, 2016, the Petitioner was tried before a jury in Greenwood County, the Honorable Donald B. Hocker, Presiding Judge. (Appendix Volume II, pp. 262-664.) At trial, the Petitioner was represented by Attorney Jane Merrill, Esquire, of the Greenwood County Bar. The state was represented by Elizabeth White, Esquire and Micah Black, Esquire, both of the Eighth Circuit Solicitor's Office. Following the jury trial, the jury convicted the Petitioner of trafficking methamphetamines and unlawful neglect of a child – however, the jury found the Petitioner not guilty of the charge of possession with intent to distribute marijuana. (Appendix Volume III, pp. 855-856.) Judge Hocker sentenced the Petitioner to consecutive terms of thirty (30) years of imprisonment for the trafficking charge, and ten (10) years of imprisonment for the unlawful neglect of a child charge. (Appendix Volume III, pp. 850-854.) The Petitioner directly appealed his conviction and sentence timely on November 3, 2016. (Appendix Volume II, pp. 253-254.) On November 7, 2018, the South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence in an unpublished opinion. (Appendix Volume II, pp. 694-695.) No appeal was taken to the South Carolina Supreme Court, and the remittitur was issued on November 27, 2018. (Appendix Volume II, p. 696.)

Subsequently, on or about February 14, 2019, the Petitioner filed an application for post-conviction relief (PCR) alleging that he was being held in the custody of the state unlawfully due to multiple grounds alleging errors and omissions by Honorable Judge Hocker, his trial counsel Jane H. Merrill, Esq, his appellate counsel Taylor D. Gilliam, Esq., Officers with the Greenwood County Sheriff's Department, and a Prosecutor on the case, Micah Black, Esq. (Appendix Volume I, pp. 1-14). Additionally, Judge Hayes found that the Petitioner had filed three (3) separate amendments to his original PCR petition, re-stating the allegations of his original petition. (Appendix Volume I, pp. 15-30). Lastly, on or about March 3, 2020, the Petitioner

filed an additional amended application alleging further claims against trial counsel Jane H. Merrill, Esq., appellate counsel Taylor D. Gilliam, Esq., as well as against Prosecutor Micah E. Black. (Appendix Volume I, pp. 73-78.). On or about March 12, 2020, a hearing pursuant to the Petitioner's application for PCR was heard by the Honorable J. Mark Hayes in the Laurens County Courthouse. (Appendix, Volume I, pp. 79-175.) Judge Hayes found in his order that none of the allegations by the Petitioner for PCR had merit, and dismissed the petitions, with prejudice. (Appendix Volume I, pp. 223-251.) Subsequently, the Petitioner through counsel timely appealed the PCR order of Judge Hayes. This petition follows pursuant to the appeal filed by trial counsel.

ARGUMENT

Pursuant to the procedures set forth in Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), which references the seminal case of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, undersigned counsel cannot identify any legally non-frivolous issues presented by the record of this matter.

Undersigned counsel cannot identify any legally non-frivolous issues presented by the record of this matter as contained the Appendix, attached by reference to this Petition. Counsel has carefully examined the facts and matters contained in the record of this case, has researched the law in connection therewith including the law relative to ineffective assistance of trial and appellate counsel, and has concluded that the appeal does not present a non-frivolous legal question upon which relief can be granted in favor of the Petitioner Earnest E. Vaughn, Sr. which would justify this Court granting to the Petitioner a new trial or other further relief. In reaching this conclusion, counsel has thoroughly reviewed the record of this case, including the transcript of the jury trial, reviewed the exhibits presented at the original jury trial, reviewed the documents filed with the Greenwood County Clerk of Court relative to both the original jury trial and the PCR hearing, reviewed the judgment and sentencing of Honorable Donald B. Hocker, the trial transcript of the PCR hearing including all filings with the Greenwood County Clerk of Court, the final PCR order of Honorable J. Mark Hayes, and other materials contained in the Appendix to this Petition. Specifically, counsel has reviewed the order of Judge Hayes and the basis for his rulings denying the Petitioner's PCR application. Counsel is unable to find any meritorious violations of the Constitution, state statutes, the S.C. Rules of Criminal Procedure, the S.C. Rules of Evidence, nor meritorious issues regarding the sentencing of the Petitioner.

Therefore, counsel finds no merit to this appeal, and respectfully requests permission to withdraw from representation of Mr. Earnest E. Vaughn, Sr.

Pursuant to the procedure outlined in *Johnson*, which references *Anders*, counsel is required to address any “arguable” issues raised by the record of this case, even if counsel determines that those issues are wholly frivolous. The applicable law that courts apply to address the issues of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct/brady violation, all issues raised by Petitioner, are addressed by Judge Hayes in his final order and incorporated herein. (Appendix Volume I, pp. 228-231.)

At trial, the Petitioner’s PCR counsel presented evidence on multiple issues which were raised in the Petitioner’s PCR applications as referenced above. Although undersigned counsel cannot identify any non-frivolous nor meritorious issues to present to this Court in brief, the “arguable” issues raised by this record of this case are the following:

1. That the trial court erred in finding that the Petitioner waived and abandoned his allegations of police misconduct and judicial error at the PCR trial. (Appendix Volume I, p. 228.) The Petitioner alleged in his initial application for PCR that there existed judicial misconduct, and police misconduct that affected the outcome of his case. (Appendix Volume I, p. 3.) Further, none of his applications for PCR were withdrawn by counsel at the inception of the hearing, and Judge Hayes recognized all grounds upon which the Petitioner sought to proceed at the PCR hearing in his order. (Appendix Volume I, p. 226.) Thus, Judge Hayes’ order is technically not correct. However, the testimony presented at trial did not address the issues of judicial error and police misconduct as raised by the Petitioner in his PCR application.

2. That trial counsel failed to adequately cross-examine and challenge the officer, Greg Allison, related to the tainted evidence that was seized by police. Petitioner alleged that trial counsel was ineffective due to the assertion that she did not vigorously cross-examine Officer Allison regarding his omission of two (2) different bags of drugs in his original inventory check. Although the intent of the Petitioner was to impeach the reliability of the testimony of Officer Allison, trial counsel made the tactical decision not to “harp” on the error due to the fact that she did not want the jury to be repeatedly reminded of the substantial quantity of drugs law enforcement found in the Petitioner’s possession. (Appendix Volume I, pp. 139-140.) However, trial counsel did cross-examine Officer Allison regarding the discrepancy. (Appendix Volume I, pp. 137-138.) Judge Hayes found that the original inventory report detailing the amount of drugs found in the possession of the Petitioner would have been sufficient to sustain the conviction, excluding the drug bags at issue with Officer Allison’s testimony. (Appendix Volume I, p. 232.) Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.
3. That trial counsel failed to recuse Honorable Judge Donald B. Hocker due to the allegation that the Judge ordered the Petitioner to take a drug test prior to trial and revoked his bond, which drug test allegedly negatively affected his sentence. Judge Hayes cited Canon 3(c)(1)(a) of the Code of Judicial Conduct, Rule 33 of the Rules of Practice of the Supreme Court and Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984) for the principle that there must exist some *extrajudicial* source of an alleged bias and result in a decision based on other than what the judge

learned from his participation in the case. (*emphasis added*) Further, pursuant to *Payne*, the Petitioner must show more than just adverse rulings by a judge against him to establish bias. There was no evidence presented of any extrajudicial bias on behalf of Judge Hocker in the record of this case. (Appendix Volume I, p. 134.) Additionally, trial counsel testified that she objected to Judge Hocker's order requiring the Petitioner to take a drug test, which was denied. (Appendix Volume I, p. 135.) Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.

4. That trial counsel was ineffective for failing to move for a mistrial after an incident with a juror, in which the Petitioner's granddaughter approached a juror in the restroom during the trial of Petitioner. As Judge Hayes cites in his final order, the power of a court to order a mistrial should be used with the greatest caution and for plain and obvious causes, pursuant to Earley v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232-33 (2016). Significantly, a mistrial should not be granted unless "absolutely necessary." State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627 (Ct. App. 2010). Trial counsel testified that she did not move for a mistrial and did not move to have the juror in question removed from the jury panel due to the questioning of Judge Hocker regarding the issue of whether or not the juror could be fair and impartial, and the juror's guarantees to the court that she could remain fair and impartial. (Appendix Volume I, pp. 136-137, 138.) However, trial counsel testified that due to the fact that the State had moved to exclude the juror, she determined that the issue of disqualification of the juror was sufficiently before the court. (Appendix Volume I,

- pp. 137-138.) Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.
5. That trial counsel was ineffective due to her alleged failure to object to the Petitioner's overturned conviction being mentioned during sentencing. However, the testimony established that trial counsel informed the trial court that the conviction was overturned due to the Petitioner being granted a petition for PCR, and that the conviction in question specifically was not used to enhance his drug charge in this case. (Appendix Volume I, pp. 143-144.) Further, the prosecutor informed the trial court, also, of the fact that the conviction was overturned. Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.
 6. That trial counsel was ineffective allegedly for her failure to challenge the chain of custody, due to the Petitioner's assertion that in a previous arrest of Petitioner two officers were caught fabricating evidence against him. As an initial matter, trial counsel testified that in her opinion there was no legal basis to challenge the chain of custody of the drugs, which testimony was accepted by Judge Hayes. Further, trial counsel *did* move to suppress the drugs at trial based on her theory that the stop was pretextual. Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.
 7. That trial counsel was ineffective for failing to move to suppress the drug evidence based on the alleged "sham" search warrant in this case. Applicant complained at the PCR hearing that law enforcement officers at trial testified that they had authority to pull his car over because they were told that there was a warrant out for him which

Petitioner asserted was not true. Of note is that Petitioner admitted that trial counsel raised this issue in her pre-trial motion to suppress the drugs, and trial counsel testified that there were, in fact, outstanding warrants for the Petitioner at the time of the traffic stop. (Appendix Volume I, p. 130, 132.) Trial counsel's motion to suppress was denied by the trial court. Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.

8. That trial counsel was ineffective for failing to adequately cross-examine the confidential informant about a deal made with the prosecutors. However, the evidence presented at trial established that the trial counsel did, in fact, question the confidential informant regarding her agreement with the state, so that the jury could assess her credibility accordingly. (Appendix Volume I, p. 141.) Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.
9. That trial counsel was ineffective for failing to adequately challenge his statement recorded on a dashcam due to the fact that portions of the audio were missing from the recording, wherein the Petitioner alleged that he invoked his Sixth Amendment right to counsel. However, trial counsel testified that she did, in fact, move to suppress his statements in a Jackson v. Denno, 378 U.S. 368 (1964) hearing, which was undisputed by Petitioner. (Appendix Volume I, pp. 141-143.) Lastly, there was no showing of any prejudice to the Petitioner such that this alleged error would have changed the outcome of his case.

10. That appellate counsel was ineffective for failing to raise a Fourth Amendment issue on Appeal, and failing to file a Petition for a Writ of Certiorari in the United States Supreme Court. The alleged deficiency in failing to raise the Fourth Amendment issue was related to the “sham” arrest warrant, however in appellate counsel’s legal judgment the issue was not meritorious and he would not brief an issue simply because the issue may have been preserved for appeal. Additionally, as Judge Hayes points out in his order, appellate counsel has no duty to request further review with the United States Supreme Court. Douglas v. State 369 S.C. 213, 631 S.E. 2d 542 (2006).
11. That the prosecutor Micah Black committed a Brady violation in withholding the criminal record of the confidential informant’s supplemental report, and field drug tests allegedly performed at the scene. Trial counsel testified that she was provided a copy of the supplemental criminal record of the confidential informant prior to trial thus being able to use the report to cross-examine the witness. (Appendix Volume I, p. 126, 127.) However, trial counsel testified that she did not recall whether a field test was done on the drugs at the scene and did not recall that being an issue in the case. Thus, there was no prejudice to the Petitioner based on this allegation.

Although counsel has presented to this Honorable Court “arguable” points of law as applied to the facts of this case, it is the opinion of counsel that none of the points would prevail on appeal and would be frivolous.

CONCLUSION

Pursuant to *State v. Johnson*, as the case references *Anders v. California*, as both cases are cited supra, undersigned counsel has examined the record of this case and has not identified any legally non-frivolous issues to brief on appeal. Therefore, counsel respectfully moves to withdraw from this case, in accordance with *Johnson*, and requests that this Honorable Court rule on the appeal of Petitioner Earnest Vaughn accordingly.

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RESPONDENT

APPELLATE CASE NO 2020-000750

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Earnest Vaughn states:

1. Undersigned counsel was appointed to represent petitioner in his appeal of the denial of his Post-Conviction Relief Petition.
2. Undersigned counsel has reviewed the record of petitioner's post-conviction relief hearing before Judge J. Mark Hayes, which was held on March 12, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. That pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), counsel requests that the Court relieve her as counsel for Earnest E. Vaughn.

Respectfully Submitted,

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This 21st Day of January, 2021

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her 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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This 21st Day of January, 2021