

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Kershaw County

Honorable Diane Schafer Goodstein, Circuit Court Judge
—————

WILLIE THOMAS STARNES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000144
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
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Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request the trial judge advise Patricia Starnes, Petitioner’s wife, of the spousal privilege, and where Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of Petitioner’s trial would have been different if counsel had made such a request since Patricia would have refused to testify against Petitioner if she was aware of the privilege.6

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request the trial judge advise Patricia Starnes, Petitioner's wife, of the spousal privilege, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had made such a request since Patricia would have refused to testify against Petitioner if she was aware of the privilege?

STATEMENT OF THE CASE

During the early evening hours of August 24, 2013, Petitioner struck and fatally injured Alan Robinson while driving down a rural dirt road in Kershaw County. Robinson was riding a moped. Petitioner was driving his wife's Chevrolet Tahoe. Robinson was found by his nephew and his nephew's wife, William and Martha Pate, after Petitioner left the scene of the collision. App. 201, l. 15 – 204, l. 23; App. 228, l. 12 – 229, l. 21. Petitioner's defense was accident. App. 620, ll. 16-22. He told law enforcement that he was under the influence of alcohol and drugs as well as driving with a suspended license. App. 190, l. 16 – 191, l. 4; App. 622, ll. 1-3. Due to these circumstances, Petitioner panicked and left the scene without calling the police. App. 191, ll. 13-14.

Later that night, Petitioner woke up his sleeping wife, Patricia Starnes. App. 370, ll. 10-12; App. 375, ll. 3-24. Patricia testified that Petitioner "fell to his knees" and "just kept saying" he had done "something stupid." App. 370, ll. 9-25; App. 375, ll. 3-10. Petitioner did not tell Patricia right away what he had done. App. 375, ll. 3-8; App. 376, ll. 3-6. The next day, after Patricia got home from work, Petitioner admitted he had hit someone on a moped. He told Patricia he was "scared." App. 376, ll. 7-16.

The state alleged Petitioner intentionally struck Robinson in order to steal his moped. The state argued Petitioner initially bumped Robinson off the road to prevent damage to the moped. According to the state, Petitioner then loaded up Robinson's moped in his vehicle, did a three point turn, and purposefully ran over Robinson causing fatal injuries. App. 179, l. 3 – 181, l. 5. Over Petitioner's objection, Robinson's statements to William and Martha Pate after the couple found him injured on the side of the road were admitted into evidence pursuant to the

excited utterance and dying declaration exceptions to the hearsay rule. App. 205, l. 2 – 210, l. 25; App. 230, l. 2 – 233, l. 19.

A Kershaw County Grand Jury indicted Petitioner on December 9, 2013 for murder and armed robbery. App. 1009-1012. His case was called to trial on August 25, 2014 before the Honorable Deandra G. Benjamin, and a jury. App. 1. Deputy Solicitor Brett Perry and Assistant Solicitors Curtis Pauling and Curtis Hutchinson represented the state. App. 1. Jason Kirincich represented Petitioner. App. 1. On August 28, 2014, the jury found Petitioner guilty as indicted. App. 752, ll. 5-18. Petitioner was sentenced to life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 766, ll. 17-24.

The Court of Appeals affirmed Petitioner's convictions and sentence. App. 882-883. On January 24, 2017, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 884-902. The state filed a return to this petition dated July 21, 2017. App. 903-909. On June 3, 2019, with the assistance of counsel, Petitioner filed an amended application again raising the claim argued in this petition. App. 990. An evidentiary hearing was convened on June 18, 2019 before the Honorable Diane Goodstein. App. 910. Assistant Attorney General Lindsey McAllister represented the state. App. 910. Kristy Goldberg represented Petitioner. App. 910.

Petitioner testified at the evidentiary hearing that trial counsel should have objected to his wife's testimony. He asserted his wife should have been permitted to invoke the spousal privilege. App. 926, l. 7 – 927, l. 15.

Patricia Starnes, Petitioner's wife, explained that she was interviewed by law enforcement during the early stages of the investigation. Her statements to the police reflected conversations she had with Petitioner before his arrest. App. 937, ll. 2-12. She was later

subpoenaed by the state to testify against Petitioner at his trial. App. 937, ll. 23-24. Patricia testified at the evidentiary hearing that while she was legally married to Petitioner at the time of his trial, no one ever explained to her either before or during the trial the spousal privilege. App. 937, l. 25 – 938, l. 7. She did not know she could have chosen not to testify against Petitioner or reveal their private communications. App. 938, ll. 8-21. Patricia asserted that if she would have known about the spousal privilege, she would not have testified. App. 938, l. 22 – 939, l. 3.

Jason Kirincich, Petitioner’s trial counsel, admitted that he never spoke to Patricia Starnes prior to trial even though he knew she was going to be a witness. App. 948, ll. 11-7. Based on the statements she gave to law enforcement during the investigation, Kirincich knew generally what Patricia would testify about. App. 949, ll. 14-17. She ultimately testified about incriminating statements Petitioner made to her in the days after the accident. App. 961, ll. 7-10. Kirincich admitted her testimony was damaging to the defense. App. 961, ll. 22-24.

Kirincich testified that he did not advise Patricia of the spousal privilege because, in his opinion, such advice “borders on witness tampering.” App. 962, ll. 3-11. However, he admitted he could have asked the trial judge to advise Patricia of the privilege. He had no explanation for why he failed to do so. App. 962, l. 12 – 963, l. 5.

By order filed January 24, 2020, the PCR judge denied Petitioner relief. App. 983-1008. The judge concluded trial counsel was not deficient for failing to advise Patricia Starnes of her right to assert the spousal privilege. App. 998. The judge found trial counsel’s testimony that he believed advising Patricia of the privilege was unethical to be “credible and reasonable.” App. 998. The judge further found Patricia had arguably already waived the privilege by sharing her conversation with Petitioner with a coworker and law enforcement. App. 998. Lastly, the judge determined Petitioner failed to prove prejudice. App. 999. Even though trial counsel testified

Patricia's testimony was "damaging" to the defense, the judge emphasized counsel's later concession that Patricia's testimony that Petitioner had "done something stupid" and "hit someone on a moped" was consistent with his defense of accident. App. 999. Moreover, the judge concluded Patricia's testimony was cumulative to Petitioner's statements to law enforcement, which were published to the jury, where Petitioner admitted to hitting the decedent. App. 999.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to advise Patricia Starnes of her right to assert the spousal privilege or request the trial judge advise her of the privilege, and since Petitioner was prejudiced by counsel's deficient performance, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request the trial judge advise Patricia Starnes, Petitioner's wife, of the spousal privilege, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had made such a request since Patricia would have refused to testify against Petitioner if she was aware of the privilege.

Trial counsel rendered ineffective assistance of counsel by failing to advise Patricia Starnes, Petitioner's wife, of her right to assert the spousal privilege. At a minimum, counsel should have requested the trial judge advise Patricia of the privilege. Petitioner was prejudiced by counsel's deficient performance because if counsel had ensured Patricia was aware of the right, she would have refused to testify against Petitioner at trial. Counsel admitted Patricia's testimony was "damaging" to the defense and Petitioner's statements to her shortly after the accident amounted to a confession.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove 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.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and 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).

“The spousal privilege provides that in criminal cases married persons cannot be compelled to testify against their spouses concerning any communication made between them during their marriage.” State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (citing S.C. Code Ann. § 19-11-30). Section 19-11-30 states in relevant part:

In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, *no husband or wife may be required to disclose any confidential or, **in a criminal proceeding, any communication** made by one to the other during their marriage.*

S.C. Code Ann. § 19-11-30 (emphasis added).

The right to exercise the privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought. Copeland, 321 S.C. at 324, 468 S.E.2d at 624 (citing State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975)).

In this case, trial counsel was ineffective for failing to advise Patricia Starnes, Petitioner’s wife, of the spousal privilege. Counsel maintained he was uncomfortable with advising Patricia of the privilege because, in his opinion, he believed such advice amounted to “witness tampering.” See App. 962, ll. 3-11. The PCR judge found this testimony “credible and reasonable.” App. 998. Since counsel believed such advice was unethical then he should have, at a minimum, requested the trial judge advise Patricia of her right to assert the privilege. His failure to do so constitutes deficient performance as any reasonably competent criminal defense attorney would have ensured Patricia was aware of the right.

Petitioner was prejudiced by counsel's deficient performance because Patricia's testimony was "damaging" to the defense and, as counsel admitted at the evidentiary hearing, included Petitioner's confession to his wife that he struck the decedent. Patricia asserted at the evidentiary hearing that if she had been aware of the spousal privilege before she testified, she would have chosen not to testify against Petitioner and reveal their private marital communications.

Because there is no evidence to support the PCR judge's finding that counsel rendered effective assistance of counsel, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2021.

STATE OF SOUTH CAROLINA
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Counsel for Willie Thomas Starnes 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 record of Petitioner's post-conviction relief hearing, which was held on June 19, 2019 before the Honorable Diane Schafer Goodstein, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Willie Thomas Starnes.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2021.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

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.”

s/ Lara M. Caudy _____
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This 27th day of January, 2021.