STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Horry County

Honorable George M. McFaddin, Circuit Court Judge

EBON ROBERTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-001180

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel for failing to call two witnesses to testify at Petitioner's trial to impeach the testimony of the alleged victims, where the alleged victims were the state's key witnesses in this case?

STATEMENT

During the May 2015 term, the Horry County Grand Jury indicted Petitioner for armed robbery, two counts of kidnapping, and unlawful possession of a pistol. App. 499 – 506.

On September 15-16, 2015, Petitioner proceeded to trial before the Honorable Larry B. Hyman, and a jury. App. 1. J.M. Buddy Long[1] represented Petitioner. Id. James Austin Thomas represented the state. Id.

Petitioner was convicted as indicted. App. 307, l. 2 – 308, l. 2. Pursuant to (LWOP statute), Judge Hyman sentenced Petitioner to life imprison without parole[2]. App. 318, l. 5 – 319, l. 19. Petitioner timely appealed his conviction. App. 467. On August 5, 2016, an appeal was filed pursuant to Anders v. California, 87 S.Ct. 1396 (1967). Id.; State v. Roberts, Op. No. 2017-UP-085 (Ct. App. 2017).

On November 9, 2017, Petitioner filed a post-conviction relief application (PCR) alleging trial counsel provided ineffective assistance of counsel for failing to call two witnesses to testify at trial. App. 324 – 331. The state filed its return on February 23, 2018. App. 332 – 338.

On November 14, 2019, Petitioner proceeded to his PCR hearing before the Honorable George M. McFaddin. App. 339. Matthew S. Swilley represented Petitioner. Id. Jacob A. Isenberg represented the state. Id.

On August 20, 2020, Judge McFaddin filed an order of dismissal denying Petitioner relief. App. 466 – 498.

This petition follows.

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[1] As far as counsel is aware, J.M. "Buddy" Long III, violated the South Carolina Rules for Lawyer Disciplinary Enforcement twice and this Court ordered a definite suspension in 2010 and was placed on interim suspension in 2016 where he is still not in good standing with the bar. In re Long, 387 S.C. 19, 690 S.E.2d 774 (2010); Matter of J.M., 418 S.C. 399, 793 S.E.2d 776 (2016).

[2] Petitioner had a prior conviction for kidnapping from 2007. App. 310, l. 18 – 315, l. 24.

ARGUMENT

Trial counsel provided ineffective assistance of counsel for failing to call two witnesses to testify at Petitioner's trial to impeach the testimony of the alleged victims, where the alleged victims were the state's key witnesses in this case.

Relevant Facts

On December 8, 2014, Petitioner allegedly robbed a Wendy's in Horry County with a firearm. App. 60, l. 11 – 68, l. 7. Employees at the Wendy's, Rebecca Kennedy and Shawn Cain, who knew Petitioner from buying drugs from him in the past, were working in the Wendy's at the time of the incident. App. 60, l. 11 – 68, l. 7; App. 86, l. 4 – 94, l. 5.

Cain and Kennedy testified at Petitioner's trial that at the end of their shift, as Cain was closing the store and Kennedy was waiting in their car, Petitioner approached them and forced them at gunpoint back into the Wendy's to effectuate the robbery. App. 60, l. 11 – 68, l. 7; App. 86, l. 4 – 94, l. 5. They also alleged Petitioner taped their hands together during the incident. App. 91, l. 21 – 92, l. 17.

A few minutes into the incident, the Wendy's security service called the store to inquire about the late entry. Id. Shawn Cain answered the call and said his name instead of the code word, which indicated to the security company that a robbery was taking place. Id.

While officer Michael Cavallini was not called to testify at trial, he testified at Petitioner's PCR hearing that he was on patrol in the area of the Wendy's at the time of the incident. App. 345, l. 13 – 350, l. 17. He happened to drive by and saw the incident in progress. Id. Cavallini called dispatch and waited a nearby gas station. Id. More law enforcement officers responded to the incident and Petitioner was arrested. App. 347, ll. 6 – 11.

During Petitioner's trial, both Cain and Kennedy testified that they did not know Petitioner and had never met him before the night of the incident. App. 120, l. 14 – 121, l. 12; App. 83, l. 22 – 84, l. 10. Despite the defense theory of the case being Petitioner and the alleged victims were co-conspirators in the robbery such that the incident did not constitute kidnapping or armed robbery, trial counsel prepared no evidence to impeach Cain and Kennedy's testimony about not knowing Petitioner before the incident.[3]

Petitioner testified in his own defense that Cain and Kennedy bought "marijuana and pills" from him on multiple occasions in the past, and that they were lying in their testimony when they denied they knew Petitioner prior to the incident. App. 238, l. 24 – 240, l. 15. Petitioner stated that on one occasion while Cain and Kennedy were buying drugs, they asked Petitioner if he wanted to rob the Wendy's with them. App. 240, l. 16 – 242, l. 10. The trio hatched a plan and decided they would split the proceeds, with one half going to Petitioner and the other half split between Cain and Kennedy. App. 242, l. 11 – 244, l. 5.

Petitioner also explained the sequence of events that took place on the night of the incident. App. 244, l. 8 – 251, l. 8. Petitioner denied forcibly robbing or kidnapping Cain and Kennedy. App. 251, ll. 4 – 8. He asserted Cain and Kennedy told Petitioner to duct tape them once they got into the Wendy's in order to throw suspicion off of them when the police inevitably investigate the incident. App. 246, l. 25 – 247, l. 13; App. 257, ll. 20 – 22.

However, Petitioner had a prior criminal record, which impacted the credibility of his testimony in front of the jury; and only he and the alleged victims knew of their plans to stage the armed robbery at the Wendy's. App. 251, ll. 5 – 8; App. 309, ll. 14 – 23; App. 420, ll. 20 – 24;

[3] By his own admission and the stipulations made in the present case Petitioner admitted he was guilty possession of a pistol by a person previously convicted of a crime of violence. App. 297, l. 16 – 298, l. 4.

App. 426, ll. 5 – 11. Accordingly, Petitioner was in dire need of witnesses to corroborate his testimony that Cain and Kennedy were lying when they denied knowing him. Had Petitioner been able to show that Cain and Kennedy knew him prior to the incident it would have supported his defense theory that the robbery was actually a conspiracy between Petitioner, Cain, and Kennedy such that incident did not meet the elements for kidnapping[4] or armed robbery[5].

If Cain and Kennedy were co-conspirators with Petitioner the incident would not constitute armed robbery because the person being stolen from, the Wendy's franchise owner, would not have been present for the theft and Cain and Kennedy would not have been "overcome by violence or prevented by fear" to keep possession of the stolen money because they were stealing it too. App. 299, l. 12 – 300, l. 5. As for kidnapping, Cain and Kennedy would not have been "seized" as required by the statute because they would have been at the Wendy's voluntarily to participate in the theft. Additionally, during the jury's ten-hour deliberations they wrote a question to the trial court inquiring as to whether the state had prior knowledge that the incident may have been an inside job, indicating that it was a difficult decision for the jury to convict Petitioner. App. 304, ll. 11 – 16; App. 303, ll. 13 – 17; App. 306, ll. 18 – 19; App. 441, l. 16 – 442, l. 12.

After Petitioner was convicted, he filed a post-conviction relief application alleging, inter alia, that his trial counsel provided ineffective assistance of counsel for failing to call two witnesses that would have corroborated Petitioner's defense theory that he and the two Wendy's

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[4] "A person who commits robbery while armed with a pistol,…, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which *a person present during the commission* of the robbery reasonably believed to be a deadly weapon, is guilty of a felony." S.C. Code Ann. § 16-3-910; App. 299, l. 12 – 300, l. 5. (emphasis added)

[5] "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law… is guilty of a felony." S.C. Code Ann. § 16-11-0330(A); App. 298, l. 5 – 299, l. 11.

employees knew each other before the night of the robbery and they all planned the robbery together such that Petitioner did not commit kidnapping or armed robbery during the incident. App. 324 – 331.

During Petitioner's PCR hearing, he called Monique Alston, his niece, and Latasha Aklin, a friend, to testify. App. 396, l. 5; App. 408, l. 13. Both Alson and Aklin testified were with Petitioner in the past when he sold "marijuana and pills" to Cain and Kennedy. App. 397, l. 5 – 399, l. 7; App. 409, l. 22 – 411, l. 5. Alston stated that she contacted trial counsel to tell him that she knew Cain and Kennedy knew Petitioner, but trial counsel never called her back. App. 400, l. 20 – 401, l. 5.

Alkin stated that she could have also testified to contradict Cain and Kennedy's denial of knowing Petitioner because she saw him sell them drugs as well, but was never asked to testify. App. 410, l. 22 – 411, l. 5. Alkin explained she was unfamiliar with the procedure of trials and, while she was at Petitioner's trial, she did not volunteer to testify because she thought she had to be called up by trial counsel to be a witness. App. 411, l. 18 – 412, l. 14. Accordingly, trial counsel should have been on notice that Alston and Alkin were crucial witnesses who were available to impeach Cain and Kennedy's credibility at Petitioner's trial.

Trial counsel testified at Petitioner's PCR hearing that Petitioner never told him about any potential witnesses that could testify to the existence of a relationship between the alleged victims and Petitioner. App. 359, l. 20 – 360, l. 8. However, trial counsel admitted he never asked Petitioner about the alleged victims or their relationship to him. App. 393, ll. 15 – 18. Since the defense theory of the case was that Cain and Kennedy were co-conspirators with Petitioner, it was incumbent on trial counsel to ask Petitioner what evidence he could provide to show he had

a prior relationship with Cain and Kennedy to support the argument that the trio were working together.

Trial counsel admitted that the defense theory of the case was the alleged victims, Cain and Kennedy, were involved in the robbery such that elements of kidnapping and armed robbery were not met. App. 356, l. 18 – 361, l. 21. Trial counsel also recognized that the alleged victims' credibility was important to Petitioner's theory of the case. Id. Despite the importance of Cain and Kennedy's testimony, trial counsel also admitted that he never interviewed the alleged victims to impeach their testimony at trial. Id.

Petitioner testified at his PCR hearing that he informed trial counsel of Cain's past criminal record in Florida and both Cain and Kennedy's prior drug use. App. 418, l. 24 – 419, l. 4; App. 438, ll. 10 – 16. He explained that only he and the alleged victims knew of their scheme to steal money from the Wendy's so there were no other witnesses to corroborate the existence of the conspiracy such that impeaching the alleged victim's credibility was paramount. App. 426, ll. 5 – 11. Petitioner also stated that during the trial he told trial counsel that Cain and Kennedy were lying when they testified that they did not know him. App. 439, l. 22 – 440, l. 4.

Petitioner explained that he did not tell trial counsel of Alkin and Alston because trial counsel only asked if anyone else knew of the conspiracy to rob the Wendy's, but trial counsel failed to ask if there were witnesses who could testify to Petitioner and the alleged victims' prior relationship. App. 453, l. 21 – 455, l. 1. Petitioner, being unfamiliar with the law or the rules of evidence, did not know to bring Alkin and Alston to trial counsel's attention. App. 420, ll. 20 – 24; App. 438, l. 19 – 439, l. 21.

On cross-examination, Petitioner explained that he and the alleged victims planned the robbery together. App. 446, l. 14 – 453, l. 20. He further explained that the plan was to bring a

gun and tie Cain and Kennedy up to make the incident look like a real armed robbery and kidnapping. Id.

Trial counsel was recalled and testified he did not recall any witnesses approaching him to testify in Petitioner's defense at his trial. App. 462, ll. 10 – 15. He also could not recollect "ever being made aware" of the instances where Alston or Alkin accompanied Petitioner to drug deals with Cain and Kennedy. App. 462, ll. 18 – 23.

Judge McFaddin filed an order of dismissal denying Petitioner relief. App. 466 – 498. He found that trial counsel testified credibly and Petitioner, Alston, and Alkin testified incredibly. App. 486 – 87. Judge McFaddin determined that trial counsel did not provide ineffective assistance of counsel because Petitioner did not tell trial counsel about Alston and Alkin; therefore, trial counsel could not be expected to "clairvoyantly" investigate into that theory, but "only to act reasonably." Id.

Discussion

The failure by trial counsel to call a witness whose testimony, had it been presented, would have been reasonably likely to change the outcome of the case constitutes prejudicial ineffective assistance of counsel. See Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991).

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove trial counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 104 S.Ct. 2052 (1984). To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Id. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Id.

A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id. However, "[a] 'reasonable probability' is less than a preponderance of the evidence but still a probability sufficient to undermine confidence in the outcome of the case. Weik v. State, 409 S.C. 214, 233 – 34, 761 S.E.2d 757, 767 (2014) (citing Strickland v. Washington, 104 S.Ct. 2052 (1984). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Bagwell v. State, 410 S.C. 259, 264–65, 763 S.E.2d 630, 633 (Ct. App. 2014)(quoting Harrington v. Richter, 131 S.Ct. 770, 792 (2011)).

The defense theory of the case was that since the alleged victims were actually co-conspirators, the incident at the Wendy's did not constitute armed robbery and kidnapping, but rather a lesser offense like "conspiracy to commit theft." App. 384, ll. 20 – 25. Moreover, Cain and Kennedy's story at trial that they did not know Petitioner and were not co-conspirators with him in the incident was the only direct evidence contradicting the defense theory of the case. App. 60, l. 11 – 68, l. 7; App. 86, l. 4 – 94, l. 5. App. 91, l. 21 – 92, l. 17. If Cain and Kennedy were co-conspirators the actions taken during the incident, specifically taping of Cain and Kennedy's hands and herding them into the Wendy's, were the theatrics of co-conspirators trying to make the crime look real for the employees' plausible deniability regarding their participation in the incident rather than an actual kidnapping and armed robbery. App. 83, l. 6 – 84, l. 10; App. 91, l. 21 – 92, l. 17; App. 244, l. 8 – 251, l. 8; App. 257, ll. 20 – 22.

Accordingly, the two missing witnesses Alkin and Alston, were crucial for Petitioner's defense because they were the only ones who could impeach the credibility of the alleged victims' testimony that they did not know Petitioner prior to the incident. App. 397, l. 5 – 399, l.

7; App. 409, l. 22 – 411, l. 5. Had Petitioner been able to impeach Cain and Kennedy's testimony with Alston and Alkin as defense witnesses, he could have raised a reasonable doubt that Cain and Kennedy were actually co-conspirators in the incident and the state would not have been able to prove the elements of kidnapping and armed robbery.

In Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), Pauling was convicted of first-degree burglary and first-degree criminal sexual conduct. Id., at 607, 503 S.E.2d at 469. Pauling filed a PCR application where he alleged that trial counsel provided ineffective assistance of counsel when he failed to call the triage nurse to testify about the patient report she prepared in which the victim stated she was not raped in the incident. Pauling, at 608 – 09, 503 S.E.2d at 469.

In that case the only direct evidence of rape was the victim's testimony at trial. Id., at 610, 503 S.E.2d at 470 – 71. Prior to trial, a triage nurse wrote a patient report, while the victim was at the hospital, where the victim denied being raped. Id. Accordingly, because defense counsel failed to call the triage nurse, Pauling had no ability to impeach the victim's rape allegation. Pauling, at 610, 503 S.E.2d at 470. Accordingly, this Court held in Pauling there was a reasonable probability that defense counsel's failure to call the triage nurse affected the outcome of Pauling's trial and granted him a new trial. Pauling, at 611, 503 S.E.2d at 471.

Similarities can be drawn from Pauling to the present case. Much like in Pauling, where the only direct evidence of rape was the victim's testimony, here the only direct evidence of kidnapping was Cain and Kennedy's testimony. Id., at 610, 503 S.E.2d at 470 – 71; App. 83, l. 6 – 84, l. 10; App. 91, l. 21 – 92, l. 17; App. 244, l. 8 – 251, l. 8; App. 257, ll. 20 – 22. Also akin to Pauling, trial counsel's failure to call witnesses in the present case left Petitioner unable to impeach the victims' testimony. Pauling, at 610, 503 S.E.2d at 470.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) Lounds was convicted of kidnapping and sentenced to a life imprisonment without the possibility of parole. Lounds, at 457, 670 S.E.2d at 647. The complaining witness, Todd Garrett, testified at Lounds' trial that Lounds robbed Garrett at gunpoint in Garrett's warehouse. Id. Garrett only had "a few dollars" on his person so Lounds allegedly then took him to his parent's house to get more money. Id. at 457, 670 S.E.2d at 647 – 48. According to Garret, once at his parent's home, Garrett punched Lounds and fled. Id. at 457, 670 S.E.2d at 648.

Lounds testified in his own defense that Garrett had bought crack cocaine from him on several occasions from 1999 to 2000, and Garrett owed Lounds about five hundred and fifty dollars in connection with the drug deals. Lounds, at 458, 670 S.E.2d at 648. Lounds testified that he went to Garrett's place of business on February 18, 2000 and asked for the money Garret owed him. Id. Lounds stated he did not have a gun, he did not threaten Garrett in any way, and he was not looking for any trouble. Id.

Lounds further explained that Garrett volunteered to go to his parents' home to get the money he owed. Id. According to Lounds, it was Garrett who drove the truck, and when he stopped it, he "got out and took off running." Id. On reply, the stated called Garrett who denied buying crack cocaine from Lounds or ever using crack cocaine in his life. Id.

Lounds filed a PCR application where he alleged trial counsel Newell provided ineffective assistance of counsel when he failed to call two key witnesses at Lounds' trial. Id. at 459, 670 S.E.2d at 648. The first witness, Lounds' brother, George Lounds would have testified that Garret and Lounds bought and used drugs together. Id. at 461, 670 S.E.2d at 650. George testified at the PCR hearing that he reached out to trial counsel before trial, but trial counsel never got back to him. Id.

The second witness, Lounds' nephew, Preston Lounds would have testified he saw Garrett purchase drugs from Lounds. Id. at 461 – 62, 670 S.E.2d at 650. Preston stated that he was present for Lounds' trial but trial counsel never spoke to him and, presumably, he did not know he could volunteer to testify. Id.

Importantly, at Lounds' PCR hearing both George and Preston were called to testify. Id. However, trial counsel was unavailable to testify at Lounds' PCR hearing. Id. at 462, 670 S.E.2d at 650. The PCR court found that "trial counsel adequately conferred with [petitioner], conducted a proper investigation, and was competent in his representation." The PCR court suggested that because Newell told the trial court the missing witnesses would not "add anything to the defense case," it was a strategic reason to not call the witnesses. Moreover, the PCR court found it unlikely that George and Preston's testimony "would have overcome the victim's testimony at trial." Lounds, at 462, 670 S.E.2d at 650.

This Court reversed the decision of the PCR court and held that Lounds' trial counsel provided ineffective assistance of counsel for failing to call George Lounds and Preston Lounds as witnesses at trial because Lounds "clearly was prejudiced by Newell's failure to subpoena and call witnesses who would have supported petitioner's own testimony." Lounds, at 463, 670 S.E.2d at 650.

Similarities between Lounds and the present case can be drawn as well. Both Lounds and Petitioner had two missing witnesses that could have testified in support of their own testimony. Id.; App. 396, l. 5; App. 408, l. 13. The missing witnesses would have testified at trial in Lounds and the present case about the prior drug association of the victim(s) and Petitioner. Lounds, at 461 – 62, 670 S.E.2d at 650; App. 397, l. 5 – 399, l. 7; App. 409, l. 22 – 411, l. 5.

In this case, both Alston and Alkin testified at the PCR hearing such that Petitioner was able to show what they would have testified to had trial counsel called them as witnesses at trial. App. 396, l. 5; App. 408, l. 13. Accordingly, we do not have to speculate as to what they would have testified to if they had been called to testify during Petitioner's trial. See Buckson v. State, 423 S.C. 313, 815 S.E.2d 436 (2018) (holding Buckson's failure to call the missing trial witnesses at PCR was fatal to his ineffective assistance of counsel claim) (see also State v. Smith, 404 S.C. 493, 745 S.E.2d 378 (2012)).

Moreover, Petitioner presented evidence at his PCR hearing that Alston and Alkin's missing testimony was material to his case, and not cumulative to any other evidence already presented at trial, because had their testimony been presented it would have been the only evidence corroborating Petitioner's testimony that the alleged victims were actually co-conspirators in the incident. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (denying Cherry's ineffective assistance of counsel allegation because the missing witness' testimony at trial would have been cumulative to other evidence already presented).

Accordingly, trial counsel provided ineffective assistance of counsel for failing to call Alston and Alkin to testify at Petitioner's trial to impeach the state's two key witnesses, Cain and Kennedy; and that ineffective assistance of counsel prejudiced Petitioner because there was a reasonable probability that the outcome of his trial would have been different had trial counsel provided effective assistance. ." Lounds, at 463, 670 S.E.2d at 650.

Conclusion

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.

s/ Victor R. Seeger
Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2021.