STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Mar 15 2021

S.C. SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

DEMETRISS GLENN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-001032

JOHNSON PETITION FOR WRIT OF CERTIORARI

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective for failing to object to the trial judge's improper comments to the jury that a trial was a "search for the truth" because such language has repeatedly been held to be improper by this Court and such language unconstitutionally shifted the burden of proof to Petitioner 4

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

ISSUE PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective for failing to object to the trial judge's improper comments to the jury that a trial was a "search for the truth" where such language has repeatedly been held to be improper by this Court and such language unconstitutionally shifted the burden of proof to Petitioner?

STATEMENT

Petitioner was indicted in October of 2013 by the Lexington County grand jury for murder, first-degree burglary, and armed robbery. App. 761 – 769. Appellant's trial was held before the Honorable Thomas Russo and a jury from November 4 – 7, 2013. App. 1. Petitioner was represented by Casey Cornwell and Andrew Radeker. App. 1. The state was represented by Shawn Graham and Rick Hubbard. App. 1.

Petitioner was found guilty as charged. App. 547, ll. 7 – 23. Petitioner was sentenced to life imprisonment for murder and burglary and thirty-years imprisonment for armed robbery. All sentences were to run concurrently. App. 563, ll. 10 – 22.

On direct appeal, Petitioner was represented by David Proffitt and Robert Dudek. Petitioner raised the following issues in his appeal:

> I. Did the trial judge err in refusing to instruct the jury on involuntary manslaughter where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?
>
> II. Did the trial judge err in refusing to instruct the jury on defense of others and the right to act on appearances where the evidence showed that Appellant did not intend to participate in a robbery planned by others, was suddenly awakened while sleeping or passed out drunk in a car during a robbery by others, and was called inside a house to defend a friend who was being attacked?

App. 565 – 568. The Court of Appeals affirmed Petitioner's convictions. State v. Glenn, 2016-UP-048 (S.C. Ct. App. Filed on Jan. 27, 2016).

Petitioner filed his PCR application on July 22, 2016 and the state filed its Return on September 29, 2017. App. 614 – 636. An evidentiary hearing was held on February 20, 2018, before the Honorable J. Derham Cole. App. 637. Petitioner was represented by Arthur Aiken and the state was represented by Caroline Scrantom. App. 637. Petitioner, his trial counsel, and

both prosecutors all testified at the hearing. App. 638. The PCR judge denied Petitioner's application for relief. App. 724 – 759.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective for failing to object to the trial judge's improper comments to the jury that a trial was a "search for the truth" because such language has repeatedly been held to be improper by this Court and such language unconstitutionally shifted the burden of proof to Petitioner.

Relevant Facts

In his opening comments to the jury, the trial judge stated: "This trial is a fundamental part of our democracy. It is a search for the truth and making every effort that justice be done between the parties that are before the Court." App. 105, ll. 11 – 18. The judge continued: "Searching for the truth and making sure that justice is done oftentimes is slow, deliberate, sometimes repetitive – in other words, very different from what you've seen in movies or read in books or seen on television." App. 105, ll. 19 – 23. Trial counsel did not object to these statements by the trial judge.

PCR counsel argued to the PCR judge that trial counsel's failure to object to this language was in error because the "search for the truth" language given by the trial judge violated State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). The PCR judge found that the trial judge's comments did not warrant an objection from trial counsel because "[t]he cited instructions were issued by the trial court in introduction and explanation of courtroom procedure, not as a means of explaining the burden of proof by which [the jury] must decide the case." App. 733. Accordingly, the PCR judge denied Petitioner's request for relief.

Discussion

More than two decades ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), this Court strongly urged trial judges to avoid using any "seek" language in their charges to the jury.

The Court noted that such "in search of the truth" language was unnecessary and ran the risk of unconstitutionally shifting the burden of proof to the defendant. 333 S.C. at 151-56, 508 S.E.2d at 865-68.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), this Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the Aleksey Court noted that in that case the "seek" language was used in the instruction on witness credibility. 343 S.C. at 27, 538 S.E.2d at 251-52. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. Thus, the Aleksey Court found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id. at 28-29, 538 S.E.2d at 252-53.

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), this Court considered a jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, this Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." 401 S.C. at 256, 737 S.E.2d at 475.

Despite this Court's repeated admonitions regarding the dangers of "seek the truth" language in the court's jury charge, trial judges have continued to employ new derivatives of this burden shifting language. Recently, in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) this Court reviewed the trial court's preliminary remarks to the jury, which included use of the terms "search[ing] for the truth," "true facts," and "just verdict." The Court ruled:

> [W]e agree with appellant that a trial court should refrain from informing the jury, *whether through comments or through a charge on the law*, that its role is to search for the truth, or to find the true facts, or to render a just verdict. *These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice*. We instruct trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.

Beaty, 423 S.C. at 34, 813 S.E.2d at 506 (emphasis added). Even so, the Beaty Court found no prejudice sufficient to warrant reversal from the comments in light of its review of the entirety of the opening comments and the trial record. Id.

Here, while the judge's improper comments about searching for the truth appeared in his opening remarks rather than his definition of reasonable doubt, these opening remarks set the tone for the remainder of the trial. Including the "searching for the truth" language in the opening remarks was more prejudicial to Petitioner than putting this same language in the charge on the law at the end of the trial. This is because the jurors spent the duration of the trial believing their job was something that it was not. In other words, the jurors spent the entire trial under the false and incorrect impression that their role was to determine "the truth." This is especially problematic in light of the judge's juxtaposition of a fictional television drama with Petitioner's trial, which the judge incorrectly described as a search for the truth. "An instruction is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." State v. Manning, 305 S.C. 413, 416, 409 S.E.2d 372, 374 (1991).

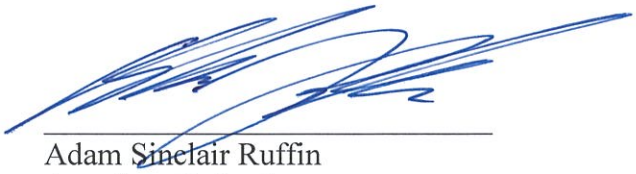
The PCR judge erred in finding that trial counsel was not ineffective because counsel failed to object to this improper statement by the trial judge and therefore failed to preserve the issue for Petitioner's direct appeal. The trial judge unconstitutionally shifted the burden of proof to Petitioner by telling the jurors that a trial was a search for the truth and to make sure that

justice was done between the parties. The job of a criminal jury is not to search for the truth. Their job is solely to determine whether the state has proven its case beyond a reasonable doubt. "[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979).

The trial judge erred in this case by informing the jury at the outset of Petitioner's trial that their role was to search for the truth. This was an incorrect statement of the law and of the actual role a criminal jury has. This improperly invited the jury to choose between the state's version of events and Petitioner's. This resulted in an unconstitutional shifting of the burden of proof to Petitioner by implicitly requiring him to prove his innocence. Trial counsel was ineffective in failing to object to this language and the PCR judge erred in finding otherwise. See State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018); State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991).

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.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of March, 2021.

RECEIVED
Mar 15 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

DEMETRISS GLENN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demetriss Glenn states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge J. Derham Cole, which was held on February 20, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Demetriss Glenn.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of March, 2021.

RECEIVED

Mar 15 2021

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 15th day of March, 2021.