STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Apr 30 2021

S.C. SUPREME COURT

Certiorari to Marion County

Honorable D. Craig Brown, Circuit Court Judge

MALCOLM A. WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001603

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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

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ISSUE PRESENTED

In this trial for burglary first degree based on the State's assertion that Petitioner was armed when he entered the house where he used to stay with his former girlfriend, did the PCR judge err in refusing to find trial counsel ineffective for advising Petitioner not to testify when Petitioner told the police he did not take a gun inside?

STATEMENT

In November of 2016, the Marion County Grand Jury indicted Petitioner, Malcolm A. Williams, for kidnapping, possession of a weapon during the commission of a violent crime, criminal sexual conduct first degree, burglary first degree, and resisting arrest, indictment #2016-GS-33-00457. (App. pp. 258-260). On May 8, 2017, Petitioner proceeded to jury trial before the Honorable Michael G. Nettles. Scott Floyd represented Petitioner at trial. John Holt and Patty Parker prosecuted the case. The jury found Petitioner not guilty of kidnapping and criminal sexual conduct first degree. (App. p. 248, lines 8-12). The jury found Petitioner guilty of burglary first degree, the weapon charge and resisting arrest. (App. p. 248, lines 13-19). Judge Nettles sentenced Petitioner to seventeen (17) years for burglary first degree, and time served for the weapon and resisting arrest charge. (App. p. 254, line 22 – p. 255, lines 1-10; pp. 261-263). A timely notice of intent to appeal was filed and the direct appeal perfected by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). (App. pp. 266-285). On February 20, 2019, the South Carolina Court of Appeals dismissed the appeal. State v. Williams, Op. No. 2019-UP-092 (S.C.Ct.App. filed February 20, 2019). (App. pp. 286-287).

On February 27, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 288-298). The State filed a return on May 28, 2019. (App. pp. 299-306). On December 19, 2019, an evidentiary hearing was held before the Honorable D. Craig Brown. (App. pp. 307-363). In a written order filed October 26, 2020, Judge Brown denied relief and dismissed the application. (App. pp. 364-392). A timely notice of intent to appeal was served on December 2, 2020. This petition for writ of certiorari follows.

ARGUMENT

In this trial for burglary first degree based on the State's assertion that Petitioner was armed when he entered the house where he used to stay with his former girlfriend, the PCR judge erred in refusing to find trial counsel ineffective for advising Petitioner not to testify when Petitioner told the police he did not take a gun inside.

The jury found Petitioner guilty of the burglary of the house where he used to stay with his former girlfriend. (App. p. 100, lines 2-9). The incident took place during the day and was charged as burglary first degree because the former girlfriend claimed Petitioner was armed when he entered the house. (App. p. 96, lines 3-18). Petitioner did not testify at trial. (App. p. 198, line 2 – p. 199, 200, lines 1-12). The jury found Petitioner not guilty of kidnapping and criminal sexual conduct, both involving the former girlfriend.

In the PCR application Petitioner alleged that, "Trial counsel failed to submit favorable evidence into evidence." (App. p. 291). During the PCR hearing trial counsel testified that the State did not introduce a video recorded statement Petitioner made to the police admitting that there was a gun in the trunk of the car but stating that he never took the gun inside the house. (App. p. 333, line 10 – p. 334, 335, lines 1-4; p. 340, lines 19-21). Petitioner testified that he wanted to testify at trial but was advised by trial counsel not to testify. (App. p. 317, lines 1-5; p. 322, lines 7-15). Petitioner testified that trial counsel advised against taking the stand because counsel wanted to have the last word and did not want Petitioner to "get caught up in word'" or say something "to contradict whatever I said." There was not a concern about a prior record because Petitioner did not have a criminal history in General Sessions Court and may have only had some minor traffic offenses that were tried in magistrate court. (App. p. 252, lines 24 – p. 253, lines 1-2).

Trial counsel testified he explained that if Petitioner took the stand and said something different, the State could use the prior statement for impeachment. (App. p. 334, lines 7-17).

The statement to the police, however, was favorable to Petitioner and it is unlikely Petitioner would have testified differently about this point. The statement and testimony that the gun remained in the trunk of the car and Petitioner did not take it into the house would have been evidence of the lesser included offense of burglary second degree, warranting a jury instruction on the lesser offense.

In another of the allegations made in the PCR application Petitioner alleged that, "Trial counsel failed to request taylored [sic] jury instructions to support defenses." (App. p. 291). Trial counsel admitted that he did not request a jury instruction on the lesser included offense of burglary second degree and testified that the only evidence of burglary first degree was the testimony of the former girlfriend. (App. p. 341, lines 14-23). With regard to this allegation the PCR judge wrote in the order of dismissal:

> Applicant alleges trial counsel was ineffective for failing to request tailored jury instructions to support defenses. Specifically, Applicant clarified at the PCR hearing that trial counsel should have requested a jury instruction for a lesser-included offense of first degree burglary. The Court disagrees.
>
> "If there is any evidence to support a charge, the trial court should grant the request." *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (2005).
>
> Here, the only evidence at trial was that Applicant unlawfully entered the house armed with a shotgun, and there was no evidence presented at trial to support a lesser included offense. Therefore, trial counsel reasonably did not request a lesser included offense be charged to the jury because there was no evidence to support the lesser included charge.

(App. p. 381). If Petitioner had testified that he did not take the gun inside the house, there would have been evidence to support the lesser included offense of burglary second degree.

In the order of dismissal the PCR judge wrote:

> Applicant asserts trial counsel was deficient for failing to submit favorable evidence at trial. However, Applicant failed to testify or specify what evidence trial counsel should have introduced at trial to aid the defense. Therefore, Applicant has failed to prove trial counsel was deficient.

> Further, Applicant cannot show prejudice resulted from trial counsel's alleged deficiency because the alleged "favorable evidence" was not introduced at the PCR hearing. This Court does not know what the alleged evidence is or how it would have changed the trial. Therefore, Applicant has failed to meet his burden of proof on this allegation. *See Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR Applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). Accordingly, this allegation is denied and dismissed with prejudice.

(App. pp. 383-384). The PCR judge erred. Trial counsel was deficient for failing to present the favorable statement Petitioner made to the police that he did not take the gun inside the house.

The PCR judge asked PCR counsel about the specific allegation, "Number 11, trial counsel failed to submit favorable evidence into evidence. I didn't hear any testimony, or what testimony if there was any, pertaining to that." (App. p. 359, lines 8-11). PCR counsel answered, "I don't recall any testimony, Your Honor." (App. p. 359, line 12). The record reflects, however, that there was testimony about Petitioner's favorable statement to the police that the gun remained in the trunk of the car and he did not take the gun inside the house. (App. p. 333, line 10 – p. 334, 335, lines 1-4; p. 340, lines 19-21). Petitioner needed to testify in order to admit the favorable evidence. Trial counsel was ineffective for advising Petitioner not to testify when Petitioner told the police he did not take a gun inside the house where he used to stay with his former girlfriend. Petitioner was prejudiced by the deficient performance. This statement could have made the difference between burglary first degree and burglary second degree, especially in light of the fact that the jury rejected the other claims made by the former girlfriend, finding Petitioner not guilty of kidnapping and criminal sexual conduct.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; <u>Strickland v.</u>

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Carter v. Lee, 283 F.3d 240, 248–49 (4th Cir. 2002), the Fourth Circuit Court of Appeals wrote:

> In considering a Sixth Amendment ineffectiveness claim, a reviewing court does not "grade" the lawyer's trial performance; it examines only whether his conduct was reasonable "under prevailing professional norms," and in light of the circumstances. Id. at 697, 688, 104 S.Ct. 2052. Because it may be tempting to find an unsuccessful trial strategy to be unreasonable, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689, 104 S.Ct. 2052. And as our Judge Murnaghan rightly recognized several years ago, the advice provided by a criminal defense lawyer on whether his client should testify is "a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance." Hutchins v. Garrison, 724 F.2d 1425, 1436 (4th Cir.1983), cert. denied, 464 U.S. 1065, 104 S.Ct. 750, 79 L.Ed.2d 207 (1984); see also Jones v. Murray, 947 F.2d 1106, 1116 n. 6 (4th Cir.1991) (reiterating principle that advice to testify is paradigmatic of strategic decision); Rogers–Bey v. Lane, 896 F.2d 279, 283 (7th Cir.1990) (concluding that counsel's advice not to testify, based in part on erroneous belief that defendant could be impeached by prior conviction, was not deficient

performance); Reyes–Vejerano v. United States, 117 F.Supp.2d 103, 108–09 (D.P.R.2000) ("Absent evidence of coercion, legal advice concerning the defendant's right to testify does not constitute [ineffective assistance of counsel].").

Advice from counsel about whether a defendant should or should not testify at trial must still be reasonable. In Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984), the Eighth Circuit Court of Appeals wrote, "We agree that the label 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." See also Quartararo v. Fogg, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). In Foye v. State, 335 S.C. 586, 592, 518 S.E.2d 265, 268 (1999), the South Carolina Supreme Court found that trial counsel was deficient in failing to reevaluate Foye's decision not to testify after his father implicated him, but found no prejudice. In contrast, in the present case Petitioner showed deficient performance and prejudice.

In Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990)(n. #3 omitted) (abrogation on other grounds recognized by Willis v. Aiken, 8 F.3d 556 (7th Cir. 1993), the Seventh Circuit Court of Appeals wrote:

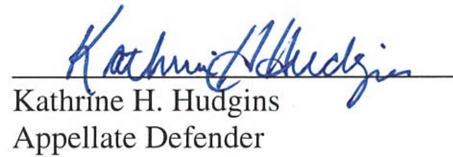
> To prove that his counsel was ineffective in violation of the sixth amendment, Rogers must show that his counsel's performance was below the norms of the profession and caused prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). No such showing has been made here. While counsel may have been in error concerning the use of the prior conviction for impeachment, he apparently had other grounds for advising Rogers not to testify. Rogers admits in his brief that "when Rogers asked his trial counsel if he could testify, counsel responded that there was no need to testify because the State had not 'proved anything beyond a reasonable doubt.' " Rogers had not testified in his first trial which resulted in a hung jury. In addition, a key prosecution witness was not available. On this basis, Rogers' counsel stated in the post-conviction hearing that he did not want to do anything that might disturb the almost-successful strategy of the first trial. We believe counsel's advice not to testify was a reasonable strategic decision and that counsel's performance did not

> fall below the standards of the profession. As counsel's performance was adequate, we need not reach whether the performance caused prejudice.

Unlike in Rogers-Bey v. Lane, in the present case there was not a reasonable strategic reason to advise Petitioner not to testify and lose the opportunity to present the favorable evidence that Petitioner told the police he did not take a gun inside the house. Trial counsel was ineffective in advising Petitioner not to testify at trial. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2021.

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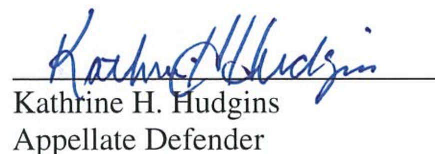
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Malcolm Antwon Williams states:

1. She is 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 before Judge D. Craig Brown, which was held on December 19, 2019, 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 Malcolm Antwon Williams.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2021.

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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."

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Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

This 30th day of April, 2021.