

RECEIVED

May 06 2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

CHRISTOPHER BROADNAX,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001270

PETITION FOR WRIT OF CERTIORARI

VICTOR R SEEGER

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

Trial counsel provided ineffective assistance of counsel when he failed to object to the trial court’s ruling keeping Petitioner in leg shackles during his trial where the trial court failed to make the required finding that Petitioner’s case presented a special need to keep him shackled and where his shackles were visible to the jury when the jury sat behind him during voir dire and jury selection, as well as during breaks throughout the trial.....4

Relevant facts4

Discussion7

CONCLUSION.....14

ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed object to the trial court's ruling keeping Petitioner in leg shackles during his trial where the trial court failed to make the required finding that Petitioner's case presented a special need to keep him shackled and where his shackles were visible to the jury when the jury sat behind him during voir dire and jury selection, as well as during breaks throughout the trial?

STATEMENT

During the November 2009 term, the Richland County Grand Jury indicted Petitioner for three counts of kidnapping and one count of armed robbery. App. 1138 – 1146.

On June 10, 14 – 16, 2010, Petitioner proceeded to trial before the Honorable G. Thomas Cooper, and a jury. App. 1. James May and Charles Cochran represented Petitioner. Id. Kathryn Luck Campbell and Nichole Simpson represented the state. Id.

Petitioner was convicted as indicted and pursuant to S.C. Code Ann. § 17-25-45¹ he was sentenced to life imprisonment without the possibility of parole. App. 826, l. 20 – 827, l. 7; App. 840, ll. 7 – 14.

On August 30, 2011, Petitioner, represented by appellate counsel LaNelle Durant, appealed his conviction and sentence. App. 842 – 862. Petitioner alleged, inter alia, the trial court erred in admitting his three prior armed robbery convictions for impeachment purposes pursuant Rule 609(a)(2), SCRE, during his testimony when the admission was overly prejudicial under Rule 403, SCRE, and a violation of his due process right to a fair trial. Id. On January 9, 2013, the Court of Appeals reversed Petitioner's convictions on that issue² and remanded his case for a new trial. App. 881 – 890.

On March 25, 2013, the state filed a petition for writ of certiorari appealing the Court of Appeals decision. App. 891 – 923. This Court held that the trial court erred when it allowed Petitioner's prior conviction for armed robbery to be used to impeach his testimony under Rule 609(a)(2), SCRE, because the crime of armed robbery was not one of dishonesty. App. 991 –

¹ Petitioner had prior convictions from four prior armed robbery convictions. App. 834, l. 24 – 839, l. 12.

² The Court of Appeals reversed Petitioner's conviction on the aforementioned issue and declined to address the rest of the issues on appeal pursuant to Futch v. McCallister Towing of Georgetown, Inc., 335 S.C. 598, 613, 581 S.E.2d 591, 598 (1999).

1005. However, this Court reversed the Court of Appeals' decision because the error was harmless due to the overwhelming evidence against Petitioner. Id. Since the Court of Appeals granted relief on the above issue and declined to address Petitioner's remaining issues, this Court remanded Petitioner's case to the Court of Appeals to address his other issues on appeal. Id.

On June 8, 2016, the Court of Appeals affirmed Petitioner's convictions. App. 1006 – 1007. On January 5, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 1008 – 1022. The state filed its return on July 12, 2017. App. 1023 – 1029. Petitioner amended his PCR application on January 24, 2017; March 15, 2018; and March 16, 2018. App. 1030 – 1038. Petitioner alleged, inter alia, trial counsel provided ineffective assistance when he failed to object to the trial court's ruling keeping Petitioner shackled during his trial where the jury saw his shackles during voir dire, jury selection, and during breaks when Petitioner was allowed to walk away from the defense table. The state filed its Return on July 13, 2017. App. 975 – 981.

On December 4, 2018, Petitioner proceeded to his PCR hearing before the Honorable Jocelyn Newman. App. 1039. Jonathon Waller represented Petitioner. Id. Kelly Oppenheimer represented the state. Id.

On August 26, 2020, the PCR court filed an order of dismissal denying Petitioner relief. App. 1110 – 1137. The PCR court found the trial court made the required finding that there was a specific need to restrain Petitioner during his trial. App. 1128. The PCR court also determined there was no support for Petitioner's allegation because trial counsel could not recall a time when the jurors saw the shackles on Petitioner's ankles. Id. Moreover, the court stated Petitioner's testimony the jury saw his shackles during breaks was incredible as "such a scenario would be highly unusual," and "does not comport with typical courtroom procedure and logistics." Id.

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel when he failed to object to the trial court's ruling keeping Petitioner in leg shackles during his trial where the trial court failed to make the required finding that Petitioner's case presented a special need to keep him shackled and where his shackles were visible to the jury when the jury sat behind him during voir dire and jury selection, as well as during breaks throughout the trial.

Relevant Facts

On May 24, 2009, a gunman entered the restaurant, Church's Fried Chicken at 2436 Taylor Street in Columbia, and held four employees at gunpoint. App. 181, l. 14 – 183, l. 18. The gunman ordered one of the employees to take money from the register and hand it over to him. Id.

Danny Weaver, an employee, took the money from the cash register and gave it to the gunman. App. 184, ll. 4 – 15. Arthur Haynes, another employee at the Church's Fried Chicken, followed the gunman from the restaurant as the gunman left. App. 184, l. 24 – 186, l. 23. Haynes saw an old Dodge Ram pick-up leave the scene with an older man driving. Id. No one else was seen in the truck. App. 193, l. 7 – 194, l. 10.

Employee Gracious Tucker called the police and gave a description of the gunman and of the Dodge pick-up. App. 344, ll. 5 – 10; App. 383, ll. 23 – 24. Officers Spires and Ridgeway responded to the call and drove towards to the scene. App. 123, l. 24 – 131, l. 8. While driving to the scene, the officers saw a pick-up truck matching the description given driving away from the scene on Two Notch Road. Id. The police followed the truck and stopped it at the intersection of Chestnut and Two Notch, which was minutes from the scene of the robbery. Id.

As the officers approached the truck, they apprehended the driver, Charles Green, and found Broadnax crouching down on the floorboard of the passenger's side along with a bag containing a

gun and money. Id.; App. 148, l. 14 – 149, l. 13. The police brought Arthur Haynes to where the truck was stopped to view the two men. App. 133, l. 21 – 134, l. 5; App. 181, l. 21 – 186, l. 21. Haynes identified the truck as the one that left the scene after the robbery and Broadnax as the robber. Id. Broadnax was arrested and charged with armed robbery. App. 444, l. 16 – 449, l. 15

During Petitioner’s trial, trial counsel May moved to have Petitioner’s restraints removed during his trial because keeping the restraints on in the presence of the jury would unfairly prejudice him. App. 34, l. 13 – 35, l. 22. Trial counsel argued “the jury draws naked inferences when they see a defendant dressed in prison garb, [and] the same inferences can be drawn from shackling either the hands and/or the feet.” Id. Trial counsel cited the U.S. Supreme Court case of Deck v. Missouri, 125 S.Ct. 2007, 2010 – 13 (2005), for that proposition. Id.

The trial court assured trial counsel that “the jury members will never know Petitioner is shackled.” Id. Trial counsel responded by asking that Petitioner’s shackles be removed if he chose to testify in his own defense. The trial court agreed and ordered that Petitioner’s shackles would be removed if he decided to testify. Id. The court then ruled that Petitioner’s handcuffs would be removed but his leg shackles would remain on. Id.

The trial court cautioned that his ruling could change if Petitioner presented “a danger to either the community or – to disrupt the trial.” Id. Which showed that at the time of the ruling Petitioner did not present a danger to either the community or the court. The court stated it “deferred” to keeping Petitioner shackled as a security issue and that the court “always [has], and always will” defer to security. Id. Accordingly, the trial court failed to find there was a special need to keep Petitioner shackled during his trial. Trial counsel provided ineffective assistance because he did not further object to the trial court’s ruling keeping Petitioner’s leg shackles attached despite the court not finding a special need to restrain Petitioner.

During Petitioner's lengthy trial, his leg shackles remained on for the duration, including during voir dire and jury selection where the jury sat behind Petitioner and were able to see the shackles on his legs. Moreover, there were many pauses in the trial where Petitioner was allowed to walk away from the defense table while the jury was coming into or leaving the courtroom. App. 113, l. 3; App. 329, l. 15; App. 386, l. 24; App. 451, l. 9; App. 510, l. 20; App. 590, l. 12; App. 590, l. 12; App. 633, l. 11; App. 690, l. 3; App. 711, l. 14; App. 735, l. 12; App. 759, l. 2; App. 818, l. 7. Accordingly, there were multiple opportunities for the jury to see Petitioner in shackles and wrongfully convict him on that basis.

During Petitioner's PCR hearing, Petitioner testified that he sat in shackles in front of the jury during voir dire and jury selection such that they could see the shackles on his legs. App. 1078, l. 19 – 1079, l. 16. Petitioner also explained that he got up from the defense table and moved around the courtroom during breaks while still in his shackles and in the presence of the jury. Id.

Trial counsel May testified that he could not recall a time where the jury saw Petitioner's shackles. App. 1051, l. 15 – 1052, l. 13. However, he admitted that Petitioner *would have always been in shackles while the jury was in the courtroom.* Id. Accordingly, trial counsel's PCR testimony lent corroboration to Petitioner's testimony that he was wearing shackles in front of the jury and that they had the opportunity his shackles during the trial. Trial counsel simply could not remember specific instances given the trial was nearly ten years' old at the time of the PCR hearing. App. 1056, ll. 10 – 16.

Trial counsel May also testified that he fought the trial judge's ruling keeping Petitioner in his leg shackles "every time." App. 1061, ll. 7 – 23. However, the trial transcript showed that neither of Petitioner's trial counsels objected to the court's ruling that his handcuffs would be removed but his legs would remain shackled. App. 28, l. 13 – 29, l. 25. Moreover, trial counsels

May and Cochran did not object to the lower court's ruling on the grounds that the trial court failed to make the required finding that there was a special need for Petitioner to remain shackled during his trial as required under Deck v. Missouri, *supra*.

Discussion

Trial counsel provided ineffective assistance for counsel when he failed to object to the trial court's ruling that Petitioner's leg shackles would stay on during his trial where the trial court failed to make the required finding that there was a special need to restrain Petitioner. App. 28, l. 13 – 29, l. 25. Instead, the trial court "deferred" to keeping his leg shackles on because that is what the court "always did," and "always will." *Id.* As will be discussed more fully *infra*, the lower court's deference to shackling defendants ran in direct contravention of the U.S. Supreme Court's decision Deck v. Missouri, 544 U.S. 622 (2005). That error prejudiced Petitioner because the jury had the ability to see his shackles during voir dire and jury selection, as well as during breaks as his trial proceeded, and likely convicted Petitioner on that impermissible basis.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The

defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 104 S.Ct. at 2064.

The United States Supreme Court has held that the criminal process presumes a criminal defendant is innocent until proved guilty. See Taylor v. Kentucky, 98 S.Ct. 1930, 1933 – 34 (1978) (citing Coffin v. United States, 156 U.S. 432 (1895)). In Illinois v. Allen, 90 S.Ct. 1057 (1970), the United States Supreme Court examined the right of a criminal defendant to be present throughout his trial. The Allen Court noted, “[N]o person should be tried while shackled and gagged except as a last resort.” Id. at 1061 (emphasis added). The Allen Court explained that the sight of the shackles and gags would likely have a significant effect on the jury’s feelings about the defendant and the use of the restraints represented “an affront to the very dignity and decorum of judicial proceedings.” Id. The Allen Court further noted that shackles greatly reduce a defendant’s ability to communicate with counsel. Id.

In Deck v. Missouri, 125 S.Ct. 2007, 2010 (2005), the United States Supreme Court stated, “The law has long forbidden the *routine* use of visible shackles during the guilt phase [of a criminal trial]; [however,] it permits a State to shackle a criminal defendant *only in the presence of special need.*” Id. (emphasis added). The Deck Court found that “a basic element of the ‘due process of law’ protected by . . . the Fifth and Fourteenth Amendments to the Constitution prohibit[s] the use of physical restraints visible to the jury *absent a trial court determination, in the exercise of its discretion, that [the restraints] are justified by a state interest specific to a particular trial.*” Id. at 2012 (emphasis added). The state interests for keeping a defendant shackled listed by the Court in

Deck were physical security, escape prevention, or courtroom decorum. Id. The Deck Court also noted:

[J]udges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, *which includes the respectful treatment of defendants*, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty or criminal punishment.

Id. at 2013 (emphasis added).

Additionally, the Deck Court emphasized that “[t]he appearance of the offender during the penalty phase in shackles . . . *almost inevitably implies to the jury, as a matter of common sense, that court authorities consider the offender a danger to the community*” and that shackling “*almost inevitably affects adversely the jury's perception of the character of the defendant.*” Id. at 2014 (emphasis added). The Deck Court ultimately determined the visible shackling of Deck was unconstitutional because the record contained no “formal or informal findings” from the trial court as to why Deck was shackled. Id. at 2015. Because there was no on the record finding by the trial court, the Deck Court held that “the defendant need not demonstrate actual prejudice to make out a due process violation.” Id. Rather, “[t]he State must prove ‘beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.’” Id. (citing Chapman v. California, 87 S.Ct. 824, 828 (1967)).

In Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), this Court addressed an issue similar to the issue presented in the instant case. In Humbert, the defendant wore a prison jumpsuit, shackles, and a prison identification bracelet with his mugshot during his trial. Id. at 334, 548 S.E.2d at 863. The only issue before the Humbert Court was whether trial counsel rendered deficient performance in permitting the defendant to proceed to trial in the prison jumpsuit because the shackling and identification bracelet issues were not preserved for appellate review of his PCR

issues. Id. at 337, 548 S.E.2d at 865. The Humbert Court determined that trial counsel was deficient in allowing the defendant to proceed to trial dressed in prison clothing, but held that the defendant was not prejudiced by trial counsel's deficient performance based upon the "overwhelming evidence" against him. Id. at 338, 548 S.E.2d at 865 – 66.

In State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (1995), a capital direct appeal, Tucker alleged his shackling throughout his trial violated his due process and equal protection rights and prejudiced him in both the guilt and sentencing phases. This Court noted that "[w]hether a defendant is restrained during trial is within the trial judge's discretion and *"the trial judge is to balance the prejudicial effect of shackling with the considerations of courtroom decorum and security."* Tucker, at 209, 464 S.E.2d at 107 (citing Illinois v. Allen, 397 U.S. 337 (1970)). (emphasis added) The Court explained that "[t]he trial judge is the best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and prevention of other crimes." Id.

Tucker had two prior convictions for escape and attempted escape. Id. Tucker also fled the state following his arrest and, at the time of his arrest, resisted and assaulted the arresting officers. Id. Additionally, the trial judge insured that Tucker's shackles were not visible to the jury and provided a curative instruction to the jury to explain Tucker's failure to stand when the judge entered and exited the courtroom. Id. Thus, this Court found the "[b]alancing the effect of the restraints and the need for security, the trial judge did not err in restraining [Tucker] *based upon [his] prior history of escapes and his resistance to arrest.*" Id. at 209-10, 464 S.E.2d at 107. (emphasis added).

The issue before this Court is whether trial counsel's failure to object to the trial court's ruling keeping Petitioner Broadnax's leg shackles on during his trial, that could be seen by the jury,

prejudiced Petitioner's right to a fair trial. Here, unlike in Tucker, the judge did not make the required, specific finding of a special need to keep Petitioner shackled during trial. App. 34, l. 13 – 35, l. 22.

Generally, the trial court has the discretion to determine if shackling is proper. Tucker, at 209, 464 S.E.2d at 107. In the present case however, the trial court's statement that it "always" deferred to shackling a defendant as a security issue showed that its ruling keeping Petitioner shackled was a blanket decision that applied to all defendants that came before the court. App. 34, l. 13 – 35, l. 22. Furthermore, the trial court's deference to shackling a defendant ran counter to the clear sentiment promulgated in Illinois v. Allen, 90 S.Ct. 1057, 1061 (1970), that restraining a defendant during his trial should be a "last resort." Id. Accordingly, under the facts of this case, trial counsel rendered deficient performance when he failed to object to the trial court's ruling keeping Petitioner shackled because the trial court did not make requisite finding of a special need to keep Petitioner shackled in this case. App. 34, l. 13 – 35, l. 22; Deck, at 1012.

The PCR court determined that Petitioner suffered no prejudice from wearing shackles during his trial because Petitioner testified "incredibly." App. 1128. However, when determining the prejudicial effect of trial counsel's error in this case, it is important to examine the number of inaccuracies³ contained in the order of dismissal that led to the PCR court's erroneous conclusion that Petitioner suffered no unfair prejudice. When those errors are corrected, the record showed that Petitioner suffered unfair prejudice from trial counsel's failure to object to the trial court's unsubstantiated ruling that Petitioner must remain shackled for the entirety of his trial.

³ "It is common practice for judges to ask a party to draft a proposed order before adopting it" in non-death penalty PCR cases. Hall v. Catoe, 360, S.C. 353, 364, 601 S.E.2d 335, 341 (2004). Since relief was denied in this case, the state wrote the proposed order. App. 1110 – 1137; Pruitt v. State, 310 S.C. 254, 255 – 56, 423 S.E.2d 127, 128 (1992).

The order of dismissal incorrectly stated that the trial court made the requisite finding that a special need was present to justify keeping Petitioner shackled. Id. As previously discussed, the trial court simply “deferred” to security and failed to find there was a special need in this particular case to justify shackling Petitioner during his trial. App. 34, l. 13 – 35, l. 22; Deck, at 2012.

Moreover, the order solely focused on Petitioner’s claim that the jurors saw his shackles during breaks when he was allowed to walk around the courtroom. App. 1128. The order of dismissal stated Petitioner testified “incredibly” because a defendant being allowed to walk around the courtroom during breaks in shackles did not comport with the typical manner in which a trial is held. Id. However, the order failed to address Petitioner’s allegation that the jury saw his shackles when they were seated behind him during voir dire and jury selection. Id. The jury being seated behind Petitioner during voir dire and jury selection comported with typical courtroom procedures and, thus, illustrated Petitioner’s credibility.

The order also mischaracterized trial counsel May’s PCR testimony as refuting Petitioner’s PCR allegation. App. 1128. The order of dismissal found trial counsel May’s PCR testimony that he could not recollect an instance where the jury saw Petitioner in his shackles contradicted Petitioner’s testimony. Id. However, trial counsel did not refute Petitioner’s allegation that the jury saw him in leg shackles, he merely stated he could not remember if it happened. App. 34, l. 13 – 35, l. 22.


Petitioner’s trial happened nearly ten years before the PCR hearing was held and May’s testimony should be viewed in that light. Although trial counsel testified at PCR that he had a good recollection of the case, he could not recollect many of the details of the case and his failure to recollect a time when the jurors saw Petitioner in shackles was no exception. During his direct testimony at the PCR hearing, trial counsel complained that it was difficult to remember details of the case because “this [was] almost ten years ago.” App. 156, ll. 5 – 18.

Trial counsel could not recall how long had passed between Petitioner's arrest and his trial. App. 1048, ll. 18 – 21. Trial counsel did not remember if more than one victim identified Petitioner. App. 1051, ll. 7 – 14. Trial counsel could not remember who the trial judge was in this case as well. App. 1051, ll. 15 – 24. He also could not recall if there was any evidence presented at trial that was not given in discovery. App. 1055, l. 23 – 1056, l. 4. Moreover, May's testimony corroborated Petitioner's allegation in part because May admitted that Petitioner was "always in shackles" when in the presence of the jury. App. 1052, ll. 9 – 13. Accordingly, the record showed May's testimony did not refute Petitioner's allegation that he was shackled in the presence of the jury such that Petitioner's testimony the jury could see him wearing his shackles was credible.

Since the trial court did not make the required finding that a special need existed to shackle Petitioner during his trial, trial counsel provided ineffective assistance of counsel when he failed to object to the court's ruling. Deck, at 2010 – 12. While Petitioner's allegation that the jurors saw him shackled during breaks in the trial may have ran counter to the typical manner in which trials are conducted, his PCR testimony that the jurors seated behind him during voir dire and jury selection could see his shackles did comport with the typical trial process. App. 1128. Petitioner showed in his uncontradicted PCR testimony that trial counsel's error prejudiced him because the jurors were able to see his shackles during voir dire and jury selection. App. 1078, l. 19 – 1079, l. 16. Accordingly, because the sight of Petitioner's shackles likely had a "significant effect on the jury's feelings" about him there was a reasonable likelihood that the outcome of Petitioner's trial would have been different had trial counsel properly objected to the trial court's ruling that Petitioner remain shackled during his trial. Allen, at 1061; Strickland, 104 S.Ct. at 2064.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

CHRISTOPHER BROADNAX,

PETITIONER

V.

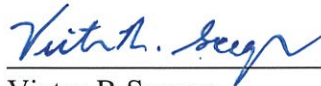
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001270

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Michael D. Davidson, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Christopher Broadnax, #099356, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 6th day of May, 2021.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER