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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

TASHON HURELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001172

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for waiving a mistrial motion when Petitioner's sister inadvertently testified before the jury that Petitioner had served time in prison?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to call Petitioner's mother, Janah Hurell, and brother, Tramaine Hurell, as alibi witnesses?

ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for waiving a mistrial motion when Petitioner's sister inadvertently testified before the jury that Petitioner had served time in prison.**

Trial counsel moved for a mistrial after Petitioner's sister, Tashima Jones, was called as a witness by the State and testified that Petitioner used her address prior to Petitioner getting out from serving some time in prison. (App. p. 217, line 18 – p. 218, lines 1-20). Trial counsel then told the judge:

> If Your Honor would indulge me, I have made this motion and before you rule on it or if you're going to study the matter for a moment, I would like to refer to my client. I know he's waited a long time. He's in jail. And I'd like to get his input in this and explain to him what it is I'm doing here. I haven't had the chance to confer with him and I think it's a pretty major point in our trial.

(App. p. 219, line 20 – p. 220, lines 1-2). The judge allowed trial counsel to discuss the mistrial motion with Petitioner. (App. p. 220, lines 3-24). After a break trial counsel withdrew the motion for a mistrial. (App. p. 221, lines 1-22). The judge allowed trial counsel to question Petitioner on the record in regard to withdrawing the mistrial motion. (App. p. 221, line 17 – p. 222, 223, lines 1-25). Trial counsel specifically stated, "And I told you in our conversations that really under the circumstances both [continuing with the mistrial motion or withdrawing the mistrial motion] were strategically defensible but ultimately it would be you who remained in jail waiting on your next trial at least, unless your bond situation changed dramatically. As well as other circumstances, other strategic things that we discussed as it related to your case." (App. p. 222, line 21 – p. 223, lines 1-2).

During the PCR hearing Petitioner testified that he felt pressure to agree to withdraw the mistrial motion because trial counsel told him that if the judge granted the mistrial he would go

back to jail and a bond was uncertain. (App. p. 508, line 1 – p. 509, lines 1-2). In reference to the withdrawal of the mistrial motion trial counsel testified at the PCR hearing that:

> We discussed it. His presentation is not inaccurate that I would've advised him, "I still don't; think you're getting a bond with the history that you've got. You'll be back in jail. We can get the mistrial, I think. It's up to you."
>
> And as he indicated, I would have told him, you know, but – "Your call. What are we going to do?" I would have given him my best insight.

(App. p. 565, lines 10-18). In advising Petitioner about the mistrial motion trial counsel was ineffective by placing undue emphasis on the additional pre-trial detention that might result from a grant of a mistrial and then advising Petitioner that the decision was his alone to make.

Respondent writes, "Probative evidence supports the denial of relief because trial counsel's testimony established a reasonable trial strategy. Trial counsel believed the prosecution's case was weaker than the past trial which resulted in a hung jury with more jurors voting to acquit than to convict. He therefore felt it was advantageous to go forward." (Return p. 12). First, as discussed in the petition for writ of certiorari, at the time the mistrial motion was made the State had not rested and there was nothing to prevent the State from introducing the same evidence admitted during the first trial.

Second, trial counsel did not, as a matter of trial strategy, withdraw the mistrial motion and then obtain Petitioner's consent. Trial counsel left the decision about the mistrial to Petitioner, placing undue emphasis on resulting additional pre-re-trial detention. Leaving the decision about withdrawing a mistrial motion solely in the hands of the client is not a valid trial strategy on behalf of trial counsel. Any purported consent or waiver of the mistrial motion was based on ineffective assistance of counsel. The present case is distinguished from Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995), where trial counsel reasonably pursued a GBMI verdict, as a matter of trial strategy, and the defendant consented to that trial strategy.

Petitioner was prejudiced by the ineffective assistance of counsel. Respondent's reliance on State v. Hurell, 424 S.C. 341, 818 S.E.2d 21 (Ct. App. 2018), the Court of Appeals decision on direct appeal in this case, is misplaced. The issue raised on direct appeal was, "Whether the court erred by refusing to declare a mistrial when it was clear the jury was discussing the fact that appellant's sister had inadvertently told the jury that appellant had been in prison as a result of a prior conviction, since appellant's prior record being the subject of jury deliberations constituted conclusive evidence the jury was impermissibly considering it as far as his guilt or innocence in this case?" (App. p. 382). The direct appeal involved a second mistrial motion that was made during jury deliberations after the jury sent a note asking about the sister's inadvertent statement about Petitioner serving time in prison. The jury then sent out a second note asking the judge to disregard the first note. The Court of Appeals found the trial judge did not abuse his discretion in refusing to grant the second mistrial motion and noted, "The trial court found the first note 'was a concern to the [c]ourt and had that been a question the [c]ourt was going to have to resolve, I would have reconsidered your motion for a mistrial. But since [the jury] immediately came back and said, please disregard it, I am taking the position that [it was] disregarding that question as well.... Based upon that interpretation of the questions by the jury, I am going to deny your motion for [a] mistrial.'" Hurell, 424 S.C. at 357, 818 S.E.2d at 29. (App. p. 456).

As to prejudice, the Court of Appeals wrote, "Further, we find Hurell has not shown prejudice. See State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."); State v. Manning, 400 S.C. 257, 270, 734 S.E.2d 314, 320 (Ct. App. 2012)

(holding a single reference to a severed charge did not constitute sufficient prejudice to warrant a mistrial)." Hurell, 424 S.C. at 358, 818 S.E.2d at 29. (App. p. 456).

Unlike the direct appeal, the ineffective assistance of counsel claim involved the first mistrial motion that trial counsel should not have waived. If the first mistrial motion had not been waived, the trial judge would have abused his discretion in refusing to grant a mistrial. The sister's comment that Petitioner had served time in prison was far more prejudicial than the single reference to outstanding warrants discussed in State v. Thompson, 352 S.C. 552 575 S.E.2d 77 (Ct. App. 2003) and the single reference to a drug charge in State v. Manning, 400 S.C. 257, 270, 734 S.E.2d 314, 320 (Ct. App. 2012).

The PCR judge erred in refusing to find trial counsel ineffective for advising Petitioner to waive the mistrial motion. The advice Petitioner received in agreeing to the waiver of the first mistrial motion was constitutionally defective. Counsel's advice regarding the mistrial motion focused on the fact that if granted, Petitioner would face additional pre-trial detention. Additionally, the decision to waive the mistrial motion was not a valid trial strategy on the part of trial counsel when trial counsel placed the decision solely in the hands of Petitioner. Petitioner is entitled to relief.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to call Petitioner's mother, Janah Hurell, and brother, Tramaine Hurell, as alibi witnesses.

The decision not to call Petitioner's mother and brother as alibi witnesses was not a valid trial strategy. While trial counsel may have told Petitioner and the witnesses that the judge and jury would not believe them, trial counsel did not testify at the PCR hearing that the witnesses

were not credible. Instead, trial counsel testified that he did not find their testimony "compelling." (App. p. 574, lines 16-18).

Respondent's reliance on Romero v. Tansy, 46 F.3d 1024 (10th Cir. 1995), as even persuasive authority, is misplaced because the defendant in that case implied to his lawyer that he was at the scene of the crime and did not tell the lawyer about the purported alibi witnesses. The Tenth Circuit Court of Appeals wrote, "Importantly, James [trial counsel] further testified that appellant told him that Ms. Montoya [store clerk who was robbed] could not identify him because he was wearing a hat and sunglasses and because she could not see very well. James inferred from this statement that appellant was at the crime scene and probably committed the robbery. Finally, contrary to appellant's testimony, Mr. James testified that he did not remember appellant ever providing him the names of potential witnesses." Romero v. Tansy, 46 F.3d 1024, 1029 (10th Cir. 1995). In contrast, in the present case Petitioner never implied that he was at the crime scene and told his lawyer about the alibi witnesses.

In Maxwell v. Gilmore, 37 F. Supp. 2d 1078, 1089 (N.D. Ill. 1999), also cited by Respondent, the trial lawyer chose to call just one alibi witness, a girlfriend's mother, and not call defendant's mother and girlfriend. In the present case the only alibi witnesses available were family members and trial counsel chose not to call either of them. In Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995), cited by Respondent, the Seventh Circuit Court of Appeals wrote:

> Bergmann's counsel testified that he decided not to call William Scott to testify about the guns because William Scott failed to mention the guns at a preliminary hearing. William Scott had further testified at the preliminary hearing that Bergmann left the house at a time which was consistent with Trawitzki's version of events. Counsel decided that in light of the preliminary hearing, William Scott could be a "dangerous" witness for Bergmann, and he therefore declined to call him. Such a considered decision is also well within the realm of sound trial strategy.

In the Seventh Circuit case trial counsel had other valid reasons not to call the witness, other than simply being a family member. In the present case trial counsel testified that the brother was angry and uncooperative when he met with him and at that point in time he did not believe the brother was going to be helpful. (App. p. 574, lines 23-25). There is no indication, however, of whether trial counsel attempted to speak with the brother at a later time. The brother was not angry or uncooperative at the PCR hearing. There were certainly no other valid reasons not to call the mother. In the present case the PCR judge erred in finding that trial counsel made a reasonable strategic decision not to call the alibi witnesses. The ability to present final closing argument is not a valid or reasonable reason not to call alibi witnesses. This is especially true in the present case where there was no showing, other than the fact that the alibi witnesses were close family members, that the alibi testimony was non-credible or non-compelling. Counsel's reason for not presenting the alibi witnesses is not valid or reasonable. Petitioner is entitled to relief.

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of June, 2021.