

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

RECEIVED

APR 12 2013

S.C. Supreme Court

CHARLES PAGAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-154481

BRIEF OF PETITIONER

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX.....	1
TABLE OF AUTHORITIES	2
ISSUES PRESENTED	3
STATEMENT	4
ARGUMENT I	5
ARGUMENT II.....	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) 6, 9

Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)..... 4

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972)..... 8

Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000)..... 6, 9

Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995)..... 6

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) 5, 6

State v. James, 116 S.C. 243, 107 S.E. 907 (1921)..... 5

State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000) 8

State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (2004) 4

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 4

State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973) 5

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) 5

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)..... 9

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984) 6

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967),..... 8

ISSUES PRESENTED

1. Did the PCR judge err in finding trial counsel was not ineffective for failing to object when the trial judge visited the jury room?

2. Did the PCR judge err in finding trial counsel was not ineffective for failing to challenge the photographic lineups?

STATEMENT

Petitioner was convicted of murder after a jury trial held before the Honorable L. Casey Manning on February 12, 2001, in Florence County. A life sentence was imposed. Kernard Redmond, Esquire and James Cox, Jr., Esquire were the defense attorneys.

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on January 12, 2004. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (2004). A petition for writ of certiorari was filed with the South Carolina Supreme Court and this Court affirmed the conviction as modified, State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006).

Petitioner filed an application for post-conviction relief on January 16, 2007. An evidentiary hearing was held on January, 26, 2010 before the Honorable Thomas A. Russo. Petitioner was present and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Julie M. Thames, Assistant Attorney General. Both petitioner and the defense attorneys testified at the hearing.

On March 5, 2010, Judge Russo issued an order denying and dismissing petitioner's application for post-conviction relief.

Petitioner appealed and a petition pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) was submitted on June 21, 2011.

On October 3, 2012, this Court issued an order denying the petition to be relieved and directing the petitioner to address the five questions. A petition addressing those questions was submitted on November 2, 2012. On April 5, 2013, the Court issued an order granting the petition as to Questions 1 and 2 and denying the remaining questions.

This brief of petitioner follows.

ARGUMENT I

The PCR judge erred in finding trial counsel was not ineffective for failing to object when the trial judge visited the jury room.

The trial judge put on the record before witness Stephen Blathers took the stand that he stuck his head in the jury room and talked to the jury. He said he discussed mostly logistical matters about running of the case. He said that it was complicated. He mentioned that one female juror asked about taking notes and he said it would not be necessary in this case. It was not the type of case that notes would be required. Another juror asked him if he was the same man that played basketball and he said what was left of him. (App. p. 322, line 16 – p. 323, line 16).

Later in the trial the trial judge said that he again stuck his head into the jury room. He said it had to do with logistical matters and how long he thought it was going to take. He thanked them for their patience and explained that this was a long and complicated trial. (App. p. 696, line 20 – p. 697, line 4).

At no point did either defense counsel object to the trial judge's two visits to the jury room. This Court has previously held that persons accused of crimes are entitled to be present at every stage of the trial. State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973); State v. James, 116 S.C. 243, 107 S.E. 907 (1921). This Court has also held that it is reversible error when a trial judge enters the jury room even when there is no actual prejudice shown. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781, 784-785 (1983); reversed on other grounds in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Defense counsel Redmond's response, to whether he saw anything wrong with the trial judge visiting the jury room, was that he did not "recall seeing anything that really raised that kind of concern." (App. p. 1228, lines 10-20). Such a response is contrary to the law as stated above.

Counsel has, therefore, not articulated a valid reason to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). A presumption of prejudice is appropriate in this case. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); State v. Elmore, supra.

This Court has previously held that it will not uphold the findings of the PCR judge if there is no probative evidence to support those findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). The decision of the PCR judge in this case should not be upheld.

ARGUMENT II

The PCR judge erred in finding trial counsel was ineffective for failing to challenge the photographic lineups.

Petitioner was tried for the beating death of Gloria Cummings. It occurred in the middle of the night on December 11, 1997, at a vacant lot across the street from the home of Stephen Blathers. Semen found on the victim's body and pants belonged to Blathers. When confronted with the evidence, Blathers admitted having sex with the victim on that night, but he denied killing her. The State only had one alleged eyewitness, Monique Cooks, and no forensics to convict petitioner.

Petitioner alleged in his application for post-conviction relief, trial counsel provided ineffective assistance in failing to challenge an unconstitutional lineup and the in court identification of him. (App. p. 1151). Petitioner testified at the evidentiary hearing that there were three different photographic lineups in his case. Each lineup consisted of six photos. The police were looking for a Hispanic male and petitioner was the only Hispanic in the lineups. This was unduly suggestive. (App. p. 1170, line 21 – p. 1171, line 7). Defense counsel never raised an objection to the lineups or was there a motion to exclude the lineup. (App. p. 1172, line 11 – p. 1173, line 1).

Petitioner also testified that Ms. Cooks' in-court identification was tainted because she never picked him out of the photo lineups. The witness was drinking beer, downing a shooter, and smoking marijuana on the evening she claimed to have seen the incident. (App. p. 497, line 6). According to petitioner, it was the police who suggested to her that it was a Hispanic who was the suspect. (App. p. 1190, line 18 – p. 1191, line 6). Later, Cooks did identify that it was petitioner who was the person with the victim on the night of the murder. She indicated that she had recognized petitioner the first time she looked at the lineup, but she was too scared to point him out.

In United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967), the United States

Supreme Court wrote:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972), the Court set forth five factors to determine whether an identification is reliable. Those factors that are to be considered are:

1. the opportunity of the witness to view the accused;
2. the witness' degree of attention;
3. the accuracy of the witness' prior description;
4. the level of the certainty demonstrated by the witness at the confrontation; and
5. the length of time between the crime and the confrontation.¹

The witness in petitioner's case utterly failed the out of court identification factors set forth above. Trial counsel should have objected. Furthermore, trial counsel was remiss in failing to adequately cross-examine the witness about this and argue to the jury over her weakness in identification.

The Court has previously held that a defendant is deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). Putting petitioner in the photo lineup as the only Hispanic was unduly suggestive.² Ms. Cooks confirmed this with her testimony:

Q. Okay. Now, in State's Exhibit Number 32, you ask to pick out the person you saw standing on the street?

A. Right.

¹ Cited in State v. Lewis, 363 S.C. 37, 609 S.E.2d 515 (2005).

² The photo lineups have been put in a supplemental appendix.

Q. Okay. The Puerto Rican?

A. Right.

Q. And which picture in one through six to you look like a Puerto Rican?

A. And I say Number 5.

Q. Number 5. And does anybody else in one through six look like a Puerto Rican to you?

A. No.

(App. p. 529, lines 5 – 15).

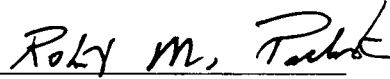
Petitioner's defense in this case was alibi. Petitioner's wife, Leroy Jones and Darren Burgess corroborated petitioner's alibi defense. Identity was a critical issue in this case. With the sole eyewitness' ID subtracted from the evidence, there is a reasonable probability the outcome of the trial would be different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

This Court has previously held that it will not uphold the findings of a PCR judge if there is no probative evidence to support those findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). The decision of the PCR judge in this case should not be upheld as trial counsel was ineffective in failing to challenge the photographic line-ups.

CONCLUSION

Petitioner's conviction should be reversed and he should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 12th day of April, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

CHARLES PAGAN,

PETITIONER,

V.

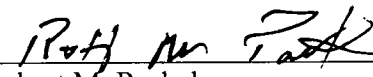
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-154481

CERTIFICATE OF SERVICE


I certify that a true copy of the brief of petitioner, in this case has been served on Tyson Andrew Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of April, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of April, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022