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MAY 13 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
WILLIAM H. SEALS, Jr, CIRCUIT COURT JUDGE

RICHARD B. NILES, Jr.

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2018-000396

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting when the State bolstered the testimony of a co-defendant of Petitioner testified in exchange to a plea to a lesser charge?

STATEMENT OF THE CASE

Petitioner was indicted at the August 2007 term of the Horry County Grand Jury for murder (2007-GS-26-03363). App. 1020. Petitioner was further indicted at the October 2008 term for possession of a weapon during the commission of a violent crime (2008-GS-26-41 16), and armed robbery (2008-GS-26-41 17). App. 1016 – 1019. On March 9, 2009, Petitioner and his co-defendant Mokeia Hammond proceeded to trial before the Honorable Benjamin II. Culbertson and a jury. Verdell Bar, Esquire appeared on behalf of Petitioner and Ron Hazzard, Esquire appeared on behalf of codefendant Hammond. The State of South Carolina was represented by Donna Elder, Esquire and Bradley C Richardson, Esquire each of the Fifteenth Circuit Solicitor's Office. App. 1. The jury found Applicant guilty as indicted on March 13, 2009. App. 741. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of 30 years for murder; 30 years for armed robbery; and, 5 years for possession of a weapon during the commission of a violent crime. App. 1022- 1024.

Direct Appeal

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esquire, who raised the following issue:

Whether the court erred by refusing to charge voluntary manslaughter based on evidence appellant was shot at and returned fire where the court incorrectly reasoned that Appellant was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive?

The parties proceeded to oral arguments on February 14, 2012. Mr. Dudek and Reid T. Sherard, Esquire, represented Petitioner. Brendan J. McDonald, of the South Carolina Attorney General's Office, appeared for the State. By opinion decided September 12,

2012, and substituted November 14, 2012, the South Carolina Court of Appeals reversed Petitioner's convictions, finding the circuit court erred in refusing to charge the jury on voluntary manslaughter. State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012). The State petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated February 6, 2014. The parties proceeded to oral arguments in the Supreme Court on June 25, 2014, with the same attorneys appearing. By opinion decided March 25, 2015, and substituted June 10, 2015, the Supreme Court reversed the Court of Appeals, finding the evidence did not warrant a voluntary manslaughter charge. State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015). The remittitur was issued on June 10, 2015.

Post-Conviction relief hearing

Petitioner filed a timely notice for post-conviction relief (PCR) in the Horry County Court of Common Pleas. Petitioner alleged ineffective assistance of both trial counsel and appellate counsel. Specifically Petitioner alleged that trial counsel provided ineffective assistance of counsel by: failing to object to the solicitor's improper closing; failing to object to the State's improper bolstering of its witnesses; failing to object the prosecution introducing void indictments to the trial court; failing to object to the trial court's inadequate response to the jury's question. Petitioner alleged that appellate counsel provided ineffective assistance by failing to raise on appeal whether the trial court erred in charging the jury that it could infer malice from the use of a deadly weapon; and, failing to raise on appeal whether the trial court erred in not properly answering the jury's question.

An evidentiary hearing on petitioner's PCR application was held before the Honorable William H. Seals, Jr on November 27, 2017 in the Horry County Courthouse. James Falk, Esquire

appeared on behalf of Petitioner and Johnny Ellis James, Jr, Esquire of the South Carolina Attorney General's office appeared on behalf of the State. Robert Dudek of the South Carolina Commission for Indigent Defense testified at the hearing via telephone. App 976 l. 9. Petitioner's trial counsel, Verdell Barr, was deceased and the State did not call a witness to testify in his stead. App. 973 l. 22 – 974 l. 8. The parties agreed that the State would not try and assert that any of trial counsel's decisions were supported by a viable trial strategy. App 974 ll. 9 – 12.

At the evidentiary hearing PCR counsel raised the following issues: 1.) Trial counsel was ineffective for failing to object to the State's use of the *golden rule* argument in its closing. App. 971 l. 23 – 972 l. 3; 2.) Trial counsel was ineffective for failing to object to the State's bolstering of its own witnesses. App. 972 ll. 4-9.; 3.) Trial counsel was ineffective for failing to object to the Court's inferred malice instruction. App. 992 l. 5-8; and, 4.) Appellate counsel was ineffective for failing to raise on appeal whether the trial court erred in charging the inferred malice instruction. App. 972 l. 22 – 973 l. 3.

Order denying relief

On February 5, 2018, Judge Seals signed an Order of Dismissal therein denying petitioner's claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel in the case.

Petitioner appealed, This Petition follows.

ARGUMENT

The PCR court err in failing to find trial counsel ineffective for not objecting when the State bolstered the testimony of a co-defendant of Petitioner testified in exchange to a plea to a lesser charge.

Right to effective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Petitioner must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

The Sixth Amendment right to effective assistance of counsel extends to a criminal defendant’s right to effective appellate counsel. Evitts v Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). The two step Strickland test used to evaluate claims of ineffective assistance of trial counsel is also used to evaluate claims of ineffective assistance of appellate counsel. Anderson v State, 354 S.C. 431,434, 581 S.E.2d 834, 835 (1984). Where the result of an appeal would have been different had appellate counsel not been deficient, the appropriate remedy is to grant defendant a new trial. Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).

Witness Bolstering

PCR counsel argued that during the examination of Ervin Moore the State improperly bolstered the Mr. Moore’s credibility. Initially Ervin Moore was a co-defendant of Mokeia Hammond and petitioner. App. 391 l. 23 – 24. On the Monday of the week of petitioner’s trial, Moore plead guilty to “manslaughter and robbery and gun possession.” App. 391 ll. 17 - 22. In exchange for the State’s offer to allow Moore to plead to a lesser offense, Moore agreed to testify against petitioner. App 392 ll. 11 – 15. During its direct examination the State asked Moore: *Part of the agreement did that include you being here today to testify to the truth?* App. 392 ll 19 – 20. Then during the State’s redirect examination the following colloquy to place.

Q: ---you signed a written agreement with us about your deal here today; right?

A: Yes, ma’am.

Q: Part of that written agreement it deals with what happens if you get on the stand and lie; doesn’t it?

A: Yes, ma’am.

Q: And if you get up on the stand and you lie what happens to that agreement?

A: It ain't no good.

Q: It goes out the window?

A: Yes ma'am.

Q: And what are you facing?

A: Thirty

Q: Facing murder, aren't you?

A. Yes Ma'am.

App 465 l. 20 – 466 l. 9.

A similar colloquy took place in the capital murder case State v Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *reversed and remanded on other grounds*, Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002). At Kelly's trial the assistant solicitor asked a jailhouse informant: "*what did I tell you that I absolutely required regarding your testimony to this jury today? ...Did I tell you to tell the truth to the jury?*" Id 343 S.C. at 368. Defense counsel objected stating that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. Id. The court overruled the objection and Kelly raised this issue on appeal. In addressing this issue the Court in Kelly looked to the Third Circuit's opinion in United State v Walker, 155 F.3d 180 (3d Cir 1998). The Third Circuit in Walker stated:

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury.... A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. Id. 343 S.C. at 368.

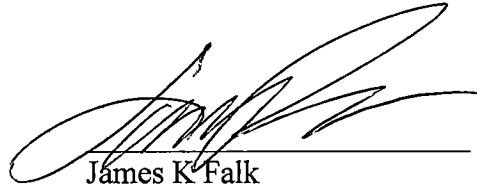
The South Carolina Supreme Court in Kelly held that the solicitor's questioning improperly bolstered the jailhouse informant's credibility. The Kelly Court noted that although the solicitor's questioning may not have been technically vouching, the solicitor's questioning raises the second concern outlined by the Walker Court: the jury could have perceived that the assistant solicitor held the opinion that [the jailhouse informant] was, in fact, telling the truth. Id at 369.

The testimony of Earvin Moore was highly prejudicial to Petitioner. The assistant solicitor's questioning of Mr. Moore regarding the potential consequences Moore would face if the State believed he was not being truthful was an impermissible attempt to bolster the credibility of Moore's testimony. Trial counsel provided ineffective assistance of counsel by failing to object to the State's line of questioning.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James K. Falk', written over a horizontal line.

James K Falk
Falk Law Firm

ATTORNEY FOR PETITIONER

This 12th day of May, 2019

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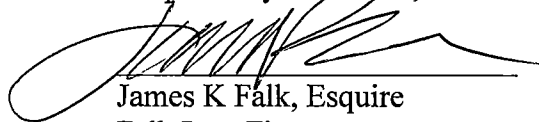
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard B Niles states:

1. He was appointed by order of The Supreme Court of South Carolina to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on November 27, 2017. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has pursuant to Johnson v State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel request that the Court relieve his as counsel for Richard B Niles., Jr.

Respectfully submitted,



James K Falk, Esquire

Falk Law Firm

ATTORNEY FOR PETITIONER

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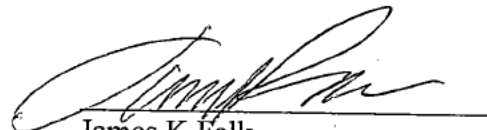
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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petitioner for writ of certiorari and a copy of the appendix in this case has been served on Johnny Ellis James Jr., Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Richard B Niles, Jr. 333708 at McDougal Correctional Institution this 13th day of May 2019.



James K Falk
Falk Law Firm

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
Of May, 2019

Eire Magua
Notary Public for South Carolina

My Commission Expires: 6.30.2020