

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

ROBERT T. GENTRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000761

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
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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Feb 24 2022

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to convey
Petitioner's clean criminal record to the jury?

STATEMENT

On May 3, 2019, a Spartanburg County grand jury indicted Petitioner for sexual exploitation of a minor in the third degree. App. 274. He proceeded to a three-day jury trial before the Honorable J. Derham Cole and a jury on January 13, 2020. James Zachary Farr represented Petitioner; Jennifer E. Wells appeared on behalf of the state.

The jury found Petitioner guilty as indicted. App. 195 ll. 13 – 17. Judge Cole sentenced Petitioner to ten years, suspended upon the service of three years, followed by three years of probation. App. 203 ll. 9 – 21. Petitioner was also placed on the sex offender registry. App. 204 ll. 19 – 21.

On September 28, 2020, Petitioner filed an application for post-conviction relief. App. 206. It contained allegations of ineffective assistance of counsel. App. 208 – 209. The state filed its Return and Motion for a More Definite Statement on or about December 29, 2020. App. 214.

An evidentiary hearing was held before the Honorable Brian M. Gibbons on June 1, 2021. App. 223. Rodney Richey represented Petitioner; William Ray appeared on behalf of the state. Petitioner and counsel testified at the hearing. At the conclusion of the hearing, Judge Gibbons denied relief. App. 256 ll. 19 – 24.

An Order of Dismissal was signed on July 6, 2021 and filed on July 12, 2021. App. 259. This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to convey Petitioner's clean criminal record to the jury.

Relevant facts

Law enforcement was conducting an investigation in Spartanburg County. As part of that investigation, officers requested Petitioner's iPhone 7 cell phone. App. 229 l. 22 – App. 230 l. 22. The contents of the phone were copied, and the original phone was returned to Petitioner. Id. Contained within the files of the cell phone was a single video depicting child pornography. Id. The video had been sent to him through a text message. App. 235 ll. 15 – 24.

Petitioner hired trial counsel after learning of him through other inmates. App. 234 ll. 16 – 21. The two met multiple times prior to trial. App. 234 ll. 22 – 24. They discussed some possible defenses to the charge. App. 235 ll. 5 – 7. Petitioner told counsel he never watched the video. App. 235 ll. 12 – 14.

At the PCR evidentiary hearing, Petitioner contended that the exploitation charge was brought against him because he would not agree to cooperate in an unrelated case. App. 231 ll. 16 – 24. As a result, Petitioner believed that his trial attorney should have raised this issue at trial. App. 232 ll. 2 – 5. In particular, he opined that counsel should have done more to highlight the delay between the duplicate of the phone being made and the charge being leveled against him:

[W]e should have fought, you know, like I said, the duration of them having my phone, the fact that I didn't own the phone anymore after the fact, and, basically, they had used the video against me.

App. 233 ll. 3 – 6.

Petitioner did not have an arrest record at the time. App. 233 ll. 16 – 18; App. 239 ll. 11 – 25. He suggested defense counsel did not “properly put that information before the Court.” App. 233 ll. 19 – 21. Petitioner did not testify at his trial. App. 143 l. 1; App. 243 ll. 7 – 9.

Regarding this issue, trial counsel indicated he discussed Petitioner’s right to testify with him. App. 245 l. 20 – 246 l. 24. Counsel testified “we thought it was best him not to testify, since he, basically, testified through the FBI audio.” Id. Counsel claimed the decision not to testify was Petitioner’s: “It’s ultimately his [decision], because we put him - - he stood up in front of Judge Cole, and Judge Cole gave him the opportunity whether or not to testify.” App. 254 ll. 5 – 9.

During closing remarks, PCR counsel characterized the failure to put Petitioner on the stand as Petitioner’s “main issue.” App. 255 ll. 4 – 9. He argued that Petitioner was unable to show that he had a clean prior criminal history because he did not testify. Id.

The Order of Dismissal described this allegation as one without merit. App. 269 – 271. The PCR court found trial counsel was not deficient and that the decision not to testify was Petitioner’s. Id.

Discussion

“An ineffective assistance claim has two components: A petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). “To establish deficient performance, a petitioner must demonstrate that counsel’s representation ‘fell below an objective standard of reasonableness.’ ” Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “[T]o establish prejudice, a 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.” Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts “reweigh the evidence in aggravation against the totality of available mitigating evidence.” Id. Prejudice is established where “there is a reasonable probability that at least one juror would have struck a different balance.” Id. at 537, 123 S.Ct. 2527 (citation omitted). A “reasonable probability” is less than a preponderance of the evidence but still “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

Under S.C. Code Ann. § 16-15-410, possession alone is sufficient for a conviction. Facing a potential conviction, Petitioner could have taken the stand and clarified that the possession was an accident, based upon his nonexistent record. Although this information was conveyed to the judge in mitigation during sentencing, the jury could have possibly found him not guilty based on his testimony on the stand in his own defense. As long as the questions during direct examination were narrowly tailored, the state’s cross-examination would not have hurt Petitioner’s defense. A defense exhibit was entered into evidence, so there was no concern about losing the last closing argument. App. 108. Therefore, nothing could be lost by putting Petitioner on the stand. The PCR court erred in denying relief.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of February, 2022.

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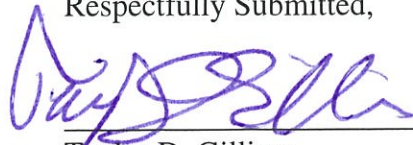
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Tyrell Gentry states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Brian M. Gibbons, which was held on June 1, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Robert Tyrell Gentry.

Respectfully Submitted,



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of February, 2022.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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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