

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

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MAY - 8 2013

S.C. Supreme Court

MARK LOWERY, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212170

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to introduce during the Jackson v. Denno¹ hearing corroborative evidence to bolster petitioner's position that he was too intoxicated from alcohol, cocaine, and prescription drugs received while hospitalized to give a voluntary statement to police within only a few hours after his release from the hospital, particularly where the trial judge requested documentation in support of his claim

¹ 378 U.S. 368 (1964).

STATEMENT

Petitioner Mark Lowery was convicted of armed robbery, failure to stop for a blue light, and possession of a knife during the commission of a violent crime per a jury trial held during the September 2007 term of the Sumter County General Sessions Court before Judge George C. James. Petitioner was sentenced to life without parole on the armed robbery conviction and five years, concurrent, on each of the two remaining convictions. App. 1 – 243. Lauren B. Stevens represented the petitioner at trial. Petitioner appealed, but his case was subsequently dismissed by the South Carolina Court of Appeals. See State v. Lowery, Op. No. 2009-UP-537 (S.C. Ct. App. filed on November 19, 2009). Robert M. Pachak represented petitioner on direct appeal.

On April 14, 2010, petitioner filed a PCR application with the Sumter County Office of the Clerk of Court. App. 245-250. On February 4, 2011, respondent filed a return and motion to dismiss requesting summary dismissal for failure to state a PCR claim. App. 251-254. On September 12, 2011, petitioner filed an amended PCR application in the case. App. 255-257.

A PCR hearing was held in the case on October 27, 2011, at the Sumter County Courthouse before Judge R. Ferrell Cothran. App. 260-317. On May 12, 2012, Judge Cothran filed an Order denying petitioner's allegations of ineffective assistance of counsel in the case. App. 347-365.

Petitioner appealed Judge Cothran's order. This petition follows.

ARGUMENT

Trial counsel erred in failing to introduce during the Jackson v. Denno hearing corroborative evidence to bolster petitioner's position that he was too intoxicated from alcohol, cocaine, and prescription drugs received while hospitalized to give a voluntary statement to police within only a few hours after his release from the hospital, particularly where the trial judge requested documentation in support of his claim.

At trial, Sharonda Alston testified that on November 27, 2006, she was working as a cashier at a Kangaroo gas station located in Sumter when she noticed a white male wearing a camouflage jacket, ski mask, and hat enter the store around midnight. Alston stated that the perpetrator pulled out a knife from his pocket and demanded that she give him the money from the register. Alston added that she put the money from the register in a bag as directed and gave the perpetrator the bag. Shortly thereafter, Alston called police on her cell phone and told police that the perpetrator who robbed her departed in a black truck and drove down Stamey Livestock Road. App. 51, l. 23-p. 57, l.2, App. 80, l. 125-p. 81, l.5. Sumter County Police Officer Wayne Acevedo testified that he was going toward Stamey Livestock Road when he received a call about this armed robbery. Officer Acevedo stated that he observed the described vehicle in the area in question and that he gave chase until it (black truck) crashed into a convenience store at an intersection nearby. App. 85, l.5-p. 91, l. 10. Officer Bill Wingate pulled petitioner from his truck after the impact and retrieved his wallet, which contained the name identification of Mark James Lowery (petitioner). App. 104, l. 22-p. 107, l. 8. Petitioner was then airlifted to a hospital nearby for treatment for his injuries.

Former Police Officer Marcus Johnston stated that petitioner gave a statement wherein he explained that he was stressed over his money woes and other problems and that "the next thing I was in the store telling the cashier to give me the money." App. 156, l. 10-p. 158, l. 16.

Prior to trial, a Jackson v. Denno hearing was held in order to determine whether petitioner's statement was voluntarily and intelligently given in the case. Petitioner and Officer Marcus Johnston, who obtained the statement from petitioner, were the only two witnesses who testified at the hearing.

During the Jackson v. Denno hearing, Marcus Johnston testified that petitioner was aware of his rights and that he did not threaten petitioner into making a statement. App. 6, l. 25-p. 12, l. 24. Johnston admitted that the statement was taken from petitioner at nine o'clock a.m. on November 27, 2006, which was only seven/eight hours after petitioner's vehicular crash and hospitalization. App. 13, l. 21-p. 14, l. 12. Johnston stated that he did not ask petitioner if he had received and taken medicine at the hospital, and that petitioner's only request was for a cup of coffee. Johnston concluded that he had no reason to believe that petitioner was incoherent. App. 14, l. 3-22, App. 15 l. 14-p. 17, l.1.

Petitioner testified during the Jackson v. Denno hearing and explained that he was given prescription medications while hospitalized for his broken nose, cracked ribs, and knots on his head courtesy of the car crash. Petitioner stated that he slept while on route to the Sumter County Police Department and that he was so sleepy during the interrogation that he asked for coffee. Petitioner stated that he had trouble remembering anything, and that he had "flashes" of what happened, and that he could not "piece everything together," but that he knew he was not connected to the robbery. Petitioner stated that he just wanted to get some sleep and rest and have the police leave him alone. App., l. 21-p. 22, l. 16., App. 24, l. 3-8. Petitioner stated that he told the police that he did not remember the robbery. App. 26, l. 3-18.

Trial counsel argued at the Jackson v. Denno hearing that petitioner was unresponsive, bleeding, and suffering from convulsions when he was airlifted to a Columbia hospital at 1:00 am

on November 27, 2006, after his vehicular crash and when he was brought back to the detention center for questioning at 9:00 am on that same morning, he was not in control of his faculties due to his medicated state, and that he was unable to have given a voluntary statement in the case at that time. App. 27, l. 18 – p. 30, l. 2.

The trial judge commented during the Jackson v. Denno hearing that he was open to receive documentation corroborating petitioner's intoxication argument, which was evidenced by the following remarks:

THE COURT: But what's the proof he was given that? The – there's proof that he may have walked out with some paper prescriptions. But he said he was given what he thinks to be pain medication, but how do we know it wasn't Tylenol?

MS. STEVENS: But your honor, even Tylenol Four has codeine in it.

THE COURT: But not Extra Strength Tylenol.

App. 28, l. 2-6, App. 29, l. 6-13

Nonetheless, the trial judge ruled that per Miranda, petitioner's statement was admissible into evidence at the trial. App. 37, l. 7-p. 38, l. 25.

During the PCR hearing, petitioner testified that he was too overly medicated (cocaine, alcohol, and prescription medications) to give a statement only seven/eight hours after his hospitalization following his vehicular crash, especially since he experienced convulsions and unconsciousness at the scene. Petitioner complained that counsel erred in failing to present these hospital records at the Jackson v. Denno hearing as proof that he was too medicated to be mentally cognizant during the police interrogation. App. 274, l. 2-3, App. 263, l. 7- p. 268, l. 21. Petitioner claimed that the hospital records would have proved that he was too drugged to give a voluntary statement. App. 273, l. 3-p. 275, l. 20, App. 285, l. 23-p. 286, l. 7. Petitioner added that he informed counsel that he was under the influence of cocaine, alcohol, and pain medication during his interrogation. App. 296, l. 7-17. See Applicant's Exhibits #1 & #2 (hospital records and SLED toxicology report) at App. p. 319-323. Note that petitioner was originally arrested for DUI in the

case by Trooper Baker. Petitioner indicated that Trooper Baker should have been called as a witness during the Jackson v. Denno hearing. App.266, l. 23 – p. 269, l. 19. The defense's theory in the case was not that he did not drive away from the police because of the robbery, but rather he drove away from the police because he was driving while drugged. Finally, petitioner stated that pictures of him at the scene on a stretcher being airlifted to the hospital should have been presented at the Jackson v. Denno hearing to show his unfit state. App. 269, l. 24-p. 271, l. 13. See applicant's Exhibit #3 at Supp. App. p. 324-329.

Moreover, petitioner stated at the PCR hearing that he was prejudiced by counsel's error at the Jackson v. Denno hearing because his statement was the only piece of evidence that linked him to the case. App. 273, l. 10-p. 274, l. 6. Clearly, the cashier did not (and could not) identify petitioner as the perpetrator because the perpetrator's face was covered with a ski-mask, and there was no forensic evidence in the case. App. 275, l. 23-p. 277, l. 21. At the PCR hearing, petitioner explained as follows:

Q. Part of his testimony was that when he started reading the Miranda rights, you stopped him and said, oh, I know all about those?

A. Again, I was under the influence.... influence of alcohol and cocaine. I'd been up for two days. I had I had just gotten in a severe car wreck. I could have been saying anything to this man.

Q. Okay, so you were impaired, obviously, based on your allegations, But not so impaired that you didn't understand your Miranda rights.

A: ... I was too impaired to understand my Miranda rights.

Q. Okay. And [trial counsel] even brought out during the Jackson v. Denno hearing a lot of testimony saying he was on pain killers. You know, this was his condition at the time of the wreck.

A. Yes, sir.

Q. And those are all in the record. That was all brought before the judge at the hearing?

A. She brought it up verbally, but she produced no records to support her argument when the record existed.

A. Yes

App. 293, l. 8 – p.294, l. 22.

Trial counsel testified at the PCR hearing and explained that she did not recall petitioner telling her that he was under the influence of alcohol and cocaine. However, counsel admitted that she did not gather hospital records, or any other records or pictures to corroborate petitioner's intoxication claim to present as evidence during the Jackson v. Denno hearing held prior to trial. Counsel stated in effect that she focused on his intoxication from hospital prescription drugs as the reason why his statement was not voluntarily given. App. 301, l. 14 – p. 303, l. 15. App. 304, l. 24 –p. 305, l. 14, App. 307, l., 22 – p. 308, l. 8.

The PCR judge ruled that trial counsel was not ineffective with regard to her handling of the Jackson v. Denno hearing because she argued that the hospital painkillers petitioner ingested rendered his state of comprehension impaired and as a result, his statement was not voluntarily given, and that no different ending would have been had if counsel had presented hospital records, pictures, and the testimony of the arresting officer during that hearing. App. 347 – 358.

Clearly, counsel erred in failing to obtain records documenting petitioner's drug-induced state while he was interrogated by police, which was what the trial judge asked for and needed to review before ruling on the admissibility of the statement. See again Applicant's Exhibit #1 at App. 319 – 321(hospital emergency room paperwork) and Applicant's Exhibit #2 at App. 322 – 323 (SLED toxicology report). Furthermore, it was error not to call Trooper Baker, who was at the scene and ultimately charged petitioner with DUI, to testify during the Jackson v. Denno hearing in corroboration of the fact that petitioner was in an intoxicated state of being after the crash to support of petitioner's position that his statement given only hours later was not voluntarily given.

Corroborating evidence is defined as evidence supplementary to that already given and tending to strengthen it or confirm it. State v. Nelson, 331 S.C. 1, 501 S.E. 2nd 716 (1998). Counsel had a duty to investigate into and present corroborating evidence in petitioner's case in order to

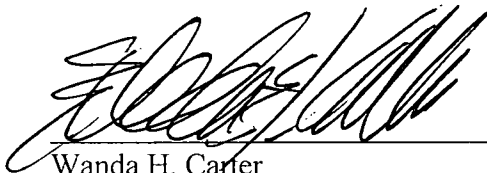
prove that he was too intoxicated to give a voluntary statement to police. As a rule, a criminal defendant has a duty to conduct reasonable investigation in a case. Strickland v. Washington 466 U.S. 668 (1984); Wiggins v. Smith, 539 U.S. 510 (2003).

When an allegation of counsel's error is a failure to investigate or discover potentially exculpatory evidence, the determination of whether the error prejudiced the defendant turns on whether the discovery of said exculpatory evidence would have led to a different outcome. Hyman v. State 397 S.C. 355; 723 S.E. 2nd 375 (2102). Counsel's error in this regard prejudiced petitioner's case because but for the statement, there was insufficient evidence to convict petitioner. Thus, counsel's error and omission with respect to the issue at hand constituted deficient performance that violated petitioner's Sixth Amendment right to competent counsel at trial. But for counsel's error in this regard, a reasonable probability exists that the outcome of petitioner's trial might have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that his petition be granted and full briefing on the issue be allowed.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

MARK LOWERY, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212170

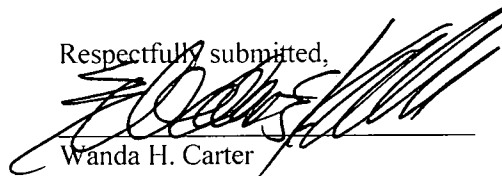
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Lowery, Jr. states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 16, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 requests that the Court relieve her as counsel for Mark Lowery, Jr..

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of May, 2013

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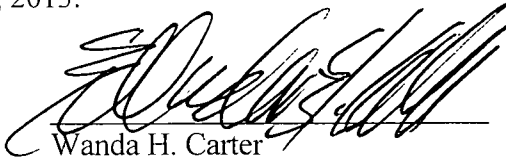
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CERTIFICATE OF SERVICE

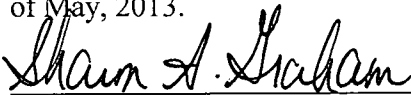
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mark Lowery, Jr., #281488, at Broad River Correctional Institution this 8th day of May, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of May, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: April 27, 2022.