

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Richland County  
Clifton Newman, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

FEB 10 2012

S.C. Supreme Court

TODD MICHAEL SOWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

KATHRINE H. HUDGINS  
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

INDEX ..... 1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT.....4

CONCLUSION .....9

## ISSUES PRESENTED

1. Did the PCR judge in refusing to find counsel ineffective for failing to object to the introduction in evidence of petitioner's conviction for criminal domestic violence and referencing the conviction several times when the incident took place the same night of the burglary charge upon which petitioner proceeded to jury trial and involved the same alleged victim?
2. Did the PCR judge err in refusing to find counsel ineffective for conceding that petitioner did not have permission to enter the residence involved in the burglary charge when petitioner and his fiancée had recently lived together at the residence, petitioner told counsel he had consent to enter and in petitioner's statement to the police he told them he entered the residence to remove some of his things and did not believe anyone was at home.

## STATEMENT

In June of 2005, the Richland County Grand Jury indicted Sowell for burglary first degree, indictment #2005-GS-40-393. On March 15, 2007, Sowell proceeded to jury trial before the Honorable L. Casey Manning. Attorneys Maxwell Schardt and Deon O'Neil represented Sowell at trial. The jury returned a verdict of guilty and Judge Manning sentenced Sowell to twenty (20) years. A timely notice of intent to appeal was filed and a direct appeal perfected on Sowell's behalf. On January 15, 2009, the South Carolina Court of Appeals dismissed the appeal. State v. Sowell, Op. No. 2009 – UP-40 (S.C. Ct.App. Filed January 15, 2009).

On April 14, 2009, Sowell filed an application for post conviction relief. The State filed a return on July 8, 2009. On April 14, 2010, an evidentiary hearing was held before the Honorable Clifton Newman. Neither of Sowell's trial attorneys testified at the hearing. In a written order signed April 6, 2011, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 21, 2011. This petition for writ of certiorari follows.

## ARGUMENTS

1. The PCR judge erred in refusing to find counsel ineffective for failing to object to the introduction in evidence of petitioner's conviction for criminal domestic violence and referencing the conviction several times when the incident took place the same night of the burglary charge upon which petitioner proceeded to jury trial and involved the same alleged victim.

The jury found Sowell guilty of the burglary of the residence Sowell formerly shared with his fiancée. His former fiancée, Sandrica Jacobs, testified that on Monday, November 29, 2004, she told Sowell he had to leave. (App. pp. 157-160). The indictment alleges that the burglary took place on December 1, 2004. (App. p. 336). Jacobs, the former fiancée, signed a warrant against Sowell for criminal domestic violence [CDV] that also took place on December 1, 2004. (App. p. 433). Sowell pled guilty to the CDV.

During the trial for burglary the State moved to introduce the letter of disposition pertaining to the CDV charge. (App. p. 133, lines 3-7). Counsel did not lodge an objection and the disposition sheet was introduced in evidence. (App. p. 133, lines 8-21; App. p. 431). Counsel was ineffective in failing to object to evidence of Sowell's conviction for criminal domestic violation.

At the PCR hearing Sowell submitted that counsel was ineffective for failing to object to the evidence of the CDV conviction and in fact continued to reference the conviction through out the trial. (App. pp. 375 – 380). In the order of dismissal the PCR judge wrote:

The Applicant further alleged that Trial Counsel was ineffective for failing to challenge the admission of his CDV conviction pursuant to Rule 403, and 404 SCRE. The CDV conviction, however, was not used as character evidence or give the impression that Applicant was predisposed to some sort of mischief, but to establish some of the elements of burglary, i.e., that the Applicant had the intent to commit a crime in the dwelling he entered.

(App. p. 418). The PCR judge erred.

While evidence of actions after entry have been held relevant to prove that the intent existed at the time of entry, State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000), an actual conviction for those actions is not necessary and the prejudicial effect of the conviction far outweighs any probative value. The fiancée testified about Sowell's actions after he entered the house. (App. p. 123, lines 22 – p. 125, lines 1-9). The State did not need evidence of a conviction for CDV in order to prove the intent to a commit a crime element for burglary when the fiancée testified that he entered the house and hit her.

The indictment for burglary first degree reads, “. . . the defendant did enter during the hours of darkness and/or caused physical injury to any person who is not a participant in the crime.” (App. p. 336). A conviction for CDV would not necessarily meet the element of physical injury needed for burglary because CDV does not require physical injury. The criminal domestic violence statute provides:

It is unlawful to:

- (1) cause physical harm or injury to a person's own household member; or
- (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

S.C. Code §16-25-20.

Counsel was ineffective in failing to object to evidence of Sowell's conviction for criminal domestic violation. The error was further compounded when counsel referenced the conviction several times in closing argument. (App. p. 285, lines 14-17; p. 295, lines 8-18; p. 297, lines 13-23).

Neither of Sowell's trial counsel testified at the PCR hearing and no affidavit was admitted providing that the failure to object and references to the conviction was part of some trial strategy. Sowell told the police that he when he entered the house, he did not believe anyone was at home and he just wanted to remove his things. (App. p. 425). There is a reasonable probability that but for counsel's error, the result of the trial would have been different.

2. The PCR judge erred in refusing to find counsel ineffective for conceding that petitioner did not have permission to enter the residence involved in the burglary charge when petitioner and his fiancée had recently lived together at the residence, petitioner told counsel he had consent to enter and in petitioner's statement to the police he told them he entered the residence to remove some of his things and did not believe anyone was at home.

During the PCR hearing Sowell submitted that counsel was ineffective for failing to argue that Sowell had a right to enter the house he formerly shared with his fiancée. The fiancée, Sandrica Jacobs, testified that on Monday, November 29, 2004, she told Sowell he had to leave. (App. pp. 157-160). The indictment alleges that the burglary took place on December 1, 2004. (App. p. 336). When asked if trial counsel argued as part of the defense that Sowell still resided at the house, Sowell testified, "No, He elected to – in contrast to what I tell him about my defense, I feel I had consent. We had an agreement. I had consent. Okay, we're not getting along. I'm going to leave Friday. He said, I'm not going to argue consent, because if it was consent we wouldn't even be going through this, but I want to argue the intent that you did not have to commit a crime, because you just wanted to get your stuff." (App. p. 368, lines 23 – p. 369, lines 1-7). Sowell further testified that he was concerned when counsel argued in closing that Sowell had no right to be at the house. (App. p. 369, lines 14 – p. 370, line 1).

In the order of dismissal the PCR judge wrote, “The Applicant alleged that Trial counsel was ineffective for failing to argue consent in his case. However, the evidence in the case would not support an argument of consent. Applicant’s statement to law enforcement was admitted at trial. This statement directly contradicted any argument of consent that could have been made. Accordingly, this Court finds that counsel’s failure to argue consent was reasonable under prevailing norms when the weight of the evidence would not have borne such a claim.” (App. p. 416). The PCR judge erred.

Sowell’s statement does not directly contradict an argument for consent. (App. pp. 425-426). In the statement Sowell admits that the door was probably locked and he budged it with his shoulder and it came open. (App. p. 425). The fact that he entered without a key does not necessarily indicate that he did not have permission to enter the house he recently shared with his fiancée. In the statement Sowell told law enforcement that he did not believe anyone was at home because nobody answered the phone or the door. (App. p. 425). When asked what he did when he entered the house he replied, “Sandrica was standing there inside the door and started screaming. She cursed me. I told her I came to get my stuff. She pushed me to keep me from coming into the house.” (App. p. 425). No part of Sowell’s statement contradicted an argument of consent. The consent argument and the lack of intent to commit a crime argued by counsel were not contradictory and in fact complimented one another.

Counsel was ineffective in conceding that Sowell did not have permission to enter the house. In closing argument counsel argued, “Sandrica was staying there on December 1<sup>st</sup>. That was her home. Todd was not. Todd didn’t live there. It wasn’t his house. It wasn’t his apartment. Sandrica put him out and he was wrong for being there absolutely. It wasn’t his house.” (App. p.

281, lines 10-14). In addressing the without consent element of burglary, counsel argues, “He was wrong to be there. He had no right to be there, okay. Sandrica didn’t invite him in, she didn’t let him in. He had no consent. He was wrong. Done. Okay. His statement says it<sup>1</sup>, her testimony says it.” (App. p. 285, lines 19- p. 286, lines 1-4).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel’s performance such that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. *Id.* at 693, 104 S.Ct. at 2052.

Counsel was ineffective in conceding that Sowell did not have permission to enter the house. There is no evidence in the record to support the PCR judge’s finding that Sowell’s statement directly contradicted the issue of consent. There is a reasonable probability that, but for counsel’s error, the result of the trial would have been different.

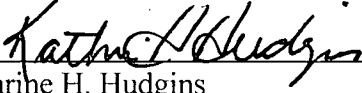
---

<sup>1</sup> His statement does not say that he did not have consent.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issues.

Respectfully submitted,

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2012.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Richland County

Clifton Newman, Circuit Court Judge  
\_\_\_\_\_

TODD MICHAEL SOWELL,

PETITIONER,

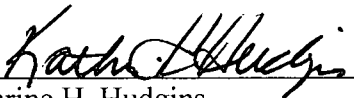
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

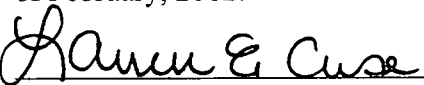
\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Brian Petrano, Esquire this 10th day of February, 2012.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day  
of February, 2012.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2012.