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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Beaufort County

Honorable Diane Schafer Goodstein, Circuit Court Judge

ANDRE GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000002

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR Court erred in denying Petitioner relief, where deficiency was found following trial counsel's failure to object to a question by law enforcement to Petitioner asking why a non-testifying codefendant indicated that Petitioner committed the crimes for which both men were charged?

STATEMENT

Petitioner was indicted by a Beaufort County grand jury on or about December 15, 2011 for kidnapping, armed robbery, carjacking, and unlawful carrying of a pistol. App. 384 – 391. The state called his case to trial on April 23, 2012 before the Honorable J. Derham Cole and a jury. App. 1. Patrick Hall and Jeffrey Stephens appeared on behalf of the state, and Donald Colongeli represented Petitioner during the three-day trial. The jury found Petitioner not guilty on the armed robbery and unlawful carrying of a pistol charges and guilty of carjacking and kidnapping. App. 281 ll. 6 – 17.

Judge Cole sentenced Petitioner to thirty years on the kidnapping charge, suspended upon the service of twelve years and probation for five years. App. 285 ll. 10 – 21. On the carjacking charge, Petitioner was sentenced to twelve years, concurrent. App. 285 l. 22 – App. 286 l. 12.

Trial counsel made several post-trial motions the day after trial, all of which were denied. App. 288 – 302. Petitioner's direct appeal was dismissed following a brief filed pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Petitioner filed an application for post-conviction relief on or about February 17, 2014. App. 304 – 312. It contained multiple allegations of ineffective assistance of counsel, including claims that counsel failed to object when the State played a CD containing audio of an interview between Andre Massey and Petitioner and that counsel failed to object to the introduction of calls to a complaining witness wherein the State was alleging witness intimidation. App. 311. The state made its Return on or about September 8, 2014. App. 313 – 316.

An evidentiary hearing took place on June 5, 2017 before the Honorable Diane S. Goodstein. App. 318. Tristan Shaffer represented Petitioner, and Ruston Neely appeared on behalf of the State. Trial counsel testified at the hearing.

An Order of Dismissal was issued on or about November 21, 2017. App. 371 – 383. The PCR Court denied relief on five allegations raised by Petitioner, including counsel's failure to object to the State playing the CD containing an objectionable question suggesting that Petitioner's codefendant told law enforcement Petitioner had committed the crimes in question. Although the PCR Court found trial counsel was deficient in this regard, the Court found that Petitioner failed to prove prejudice. App. 377 – 380.

The undersigned filed a petition for writ of certiorari on or about October 10, 2018. The state filed its return on March 7, 2019. The South Carolina Supreme Court transferred the appeal to this Court on March 19, 2019. This Court then granted certiorari in part on May 18, 2022. This is the Brief of Petitioner.

STANDARD OF REVIEW

When an appellate court reviews a PCR action, the "standard of review in PCR cases depends on the specific issue" raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. at 180-181, 810 S.E.2d at 839. Appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id.; See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

The PCR Court erred in denying Petitioner relief, where deficiency was found following trial counsel's failure to object to a question by law enforcement to Petitioner asking why a non-testifying codefendant indicated that Petitioner committed the crimes for which both men were charged.

Through the recorded interview, the state magnified the credibility of Petitioner's co-defendant, thereby leveling improper accusations at him through the lens of a cop's words. In failing to object to this prejudicial and patently improper evidence, trial counsel provided deficient representation. The PCR court made this finding which the state does not contest. The issue in this case, therefore, revolves around prejudice. For the reasons discussed below, Petitioner satisfied his burden in that regard, and the PCR court erred in denying relief.

Relevant facts

A redacted version of the interview between law enforcement and Petitioner was played before the jury in Petitioner's trial. App. 198 ll. 8 – 12; Applicant's Exhibit 1 (CD of Andrew Green Interview). The interview is an unrefined conversation between Petitioner and Andre Massey, an employee of the Port Royal Police Department. Id.; App. 181 ll. 6 – 16. While the CD was being played, trial counsel interrupted and voiced an objection to the mention of Petitioner's background. App. 198 l. 19 – App. 202 l. 18. However, counsel failed to object to a question posed by Massey to Petitioner asking why codefendant Brandon Parker would have said Petitioner was with him and "the one who done these things, if he hadn't done it."

The facts giving rise to Petitioner's arrest allegedly took place on June 9, 2011. App. 111 l. 5 – App. 125 l. 14. Dennis Boskey rode with co-defendant Parker to some apartments so Boskey could collect twenty dollars that someone owed him. Id. Boskey testified that a man got

into the back of the car and rode with them. Id. Boskey claimed the man placed a gun against the back of his head and requested that he empty his pockets. Id. Boskey indicated that he was directed to get into the trunk of the car, which he did. Id.

Boskey pulled the release latch while in the trunk of his car and jumped out. App. 115 l. 22 – App. 118 l. 11. A 911 call was made, and law enforcement arrived. Id. Boskey looked at a series of photographs and identified a man listed as Andre Green. App. 118 l. 16 – App. 121 l. 13. However, Boskey was unable to identify Andrew Green at trial. App. 118 l. 25 – App. 119 l. 3; App. 148 ll. 16 – 17. Further, the solicitor received a notarized letter from Boskey indicating he no longer wishes to participate in prosecuting Petitioner and stating he had never seen Petitioner before. App. 147 ll. 11 – 19; App. 225 ll. 16 – 22.

The day after Petitioner was sentenced, trial counsel made multiple post-trial motions and spoke at length regarding one of the objections he should have made at trial. App. 290 – 302. Regarding the interview with Petitioner and the mention of Parker suggesting that Petitioner was the one who robbed Boskey, counsel for Petitioner remarked:

> I, unfortunately, failed to address or object spontaneously with some discussion Sergeant Massey had with Andre Green dealing with statements purportedly made by Brandon Parker. I was not admonished by the Court, but I had been informed by the Court earlier that day, based on these redactions that [the prosecutor] went out of his way to make the night before, that I should take time at lunch to sit down and address that particular tape, and I fully admitted to the Court after I failed to do so.

App. 291 l. 21 – App. 292 l. 5. Counsel explicitly remarked on the subject of this appeal:

> It was right after that objection and motion for a mistrial that a snippet, which even [the prosecutor] would agree to was maybe 1.5 seconds of a comment made by Detective Sergeant Massey about this Brandon Parker comment where it, specifically, if we hear or later read the transcript, said or question Mr. Green saying why would Brandon Parker, who was charged with the exact same charges, say that you were the one with him and did these things to, what would his motive be to lie. *I failed to jump up and object to that.*

App. 293 ll. 7 – 17 (emphasis added). He further suggested that the trial court "would agree that was an error" and indicated that the objection he should have made would have been based on meritorious grounds and possibly sustained. App. 293 ll. 18 – 23.

Counsel later indicated that the tapes, which were redacted, were full of prejudicial comments. App. 294 ll. 10 – 22. He even went as far as to say "[b]ut for my failure to spontaneously object to the testimony of Mr. Massey regarding the co-defendant, I believed that what has transpired in the last 24 hours very well could have been different." Id. Later during the hearing, counsel again admitted to making a mistake. App. 301 ll. 3 – 11. He posited that in order to save the state money and time, a new trial should be granted. App. 301 ll. 12 – 25. The trial court denied the motion for a new trial. App. 302 ll. 21 – 22.

Discussion

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

To satisfy the prejudice prong, an applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland v. Washington, 466

U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693). In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. Strickland at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case).

Counsel admitted that he had not listened to the tape before it was played before the jury. App. 342 ll. 1 – 4; App. 345 ll. 11 – 13. PCR counsel expounded upon the PCR court's remark that "at no point did I hear Mr. Green agree with what the officers were saying, at any point" by noting that "at no point was there a confession where he actually said he did it." App. 338 ll. 11 – 25.

PCR counsel made a cogent argument regarding deficiency which the PCR court appeared to entertain when it asked specifically about prejudice. App. 347 l. 1 – App. 352 l. 3. Notably, PCR counsel pointed out that the complainant did not identify Petitioner at trial. Additionally, the jury returned a not guilty verdict on two out of the four charges. Rather than simply judging the credibility of Boskey, the state was able to bolster his testimony with Parker, a man who Boskey placed in the car at the time of the robbery.

The PCR court exhibited concern that trial counsel was unable to cross-examine the codefendant, only the law enforcement officer. App. 356 l. 22 – App. 358 l. 14. Prejudice manifested itself in Petitioner's case when this remark reinforced the credibility of Boskey. This was a comment by a law enforcement official representing that Petitioner's codefendant advised the police that Petitioner was the one who robbed Boskey. Without such a remark, the jury would only have had Boskey's testimony, sans bolstering. Based upon the two not guilty verdicts and the lack of identification at trial, there exists a reasonable probability that but for the

deficiency in the form of counsel's failure to object, the jury may have found him innocent of additional charges as well.

The PCR court found the state's evidence against Petitioner was overwhelming. App. 379. In Smalls v. State, our Supreme Court held that "[o]rdinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), our Court pointed out its history of balancing "the impact of counsel's error against the strength of the State's case on the point in question" and found Simmons proved prejudice. Id. In particular, the Court noted:

> [B]ecause the issue is whether the solicitor's improper argument prevented the jury from fairly considering [its sentencing options], the overwhelming evidence of petitioner's guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument.

Smalls, 422 S.C. at 189, 810 S.E.2d 836, 844 (citing Simmons, 331 S.C. at 340, 503 S.E.2d at 167).

The Smalls Court also examined Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007). The Court then clarified how prejudice should be analyzed moving forward:

> Simmons and Smith illustrate the proper consideration of the strength of the State's case in the PCR court's analysis of prejudice: it is one significant factor the court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice.

Id. at 190, 810 S.E.2d at 844.

"[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice ... the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong

that the Strickland standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met. Smalls at 191, 810 S.E.2d at 845.

Further, the Smalls Court explained "the strength of the evidence must be considered along with the specific impact of counsel's errors. When potentially strong evidence ... is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." Id. at 194, 810 S.E.2d at 846. In the matter *sub judice*, trial counsel thought his error so egregious that he brought them to the trial judge's attention *immediately*, the day after Petitioner's trial concluded. He therefore moved for a new trial based upon his own admission that he failed to object to the prejudicial and improper remarks about co-defendant Parker:

> I think the Court would agree that was an error on my part. And if I had objected, I can only venture to guess that, possibly, this Court would have taken that into serious consideration and possibly, possibly, may have ruled on that motion, other than the one I did about the background.

App. 293 ll. 18 – 23.

Counsel further argued how the state's case was insufficient to support the jury's guilty verdicts:

> The evidence presented at this trial was overwhelmingly in favor of the defendant. The victim's failure to identify the defendant in court and repeatedly, upon cross examination by me as to not only the fact that he could not identify Mr. Green, but did this man commit the offenses alleged against you - - the ultimate question most lawyers would never ask the victim or witness on the stand ... who he said *No, no, no, no,* to all four charges. So you have overwhelming evidence in favor of the defendant.

App. 298 l. 23 – App. 299 l. 8.

In Petitioner's case, the state called only four witnesses and admitted only four exhibits. The first witness, Monica Wiser, was the woman who called 911. App. 98 ll. 12 – 19. The second witness, Melanie Smith, was the Beaufort County Sheriff's Department employee used to

authenticate the 911 call. The third witness was Dennis Boskey and the fourth witness was Massey, the officer who interviewed Petitioner.

In Rutland v. State, our Supreme Court held that Rutland was prejudiced by his attorney's deficient performance. In Rutland, a witness named Kestner gave a written and signed statement to law enforcement indicating the victim was armed when he was shot. 415 S.C. 570, 573, 785 S.E.2d 350, 351 (2016). At trial, Kestner testified that the only thing she saw in the victim's hands was a pack of cigarettes. Id. Trial counsel failed to question Kestner regarding the discrepancy between her prior statement and her trial testimony. Notably, Peele, the wife of the victim, gave *duplicative* testimony to that of Kestner's sworn statement: "Peele testified the victim entered the Boutique, drew his 9mm handgun, chambered a round, and pointed the handgun at Peele." Id. at 574, 785 S.E.2d at 351-52. Similar to the case at bar, the PCR judge determined trial counsel was deficient but found Rutland failed to prove prejudice. The Court reversed the PCR court.

Regarding prejudice, the Court held "had trial counsel discredited Kestner's testimony by raising the prior inconsistent statement on cross-examination, Kestner's credibility at trial would have suffered." Id. at 577-78, 785 S.E.2d at 353. The Court concluded the outcome would have been different had counsel cross-examined Kestner accordingly:

> As a result, we find there is a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statement demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting.

Id. at 578, 785 S.E.2d at 353-54.

Brandon Parker was a co-defendant who had not yet been tried at the time of Petitioner's trial; he was not present to testify against Petitioner. App. 208 ll. 2 – 9. It was improper for the trial judge to allow the remark to be heard by the jury; counsel should have objected. Had the

objection been sustained, the jury would not have heard the accusation from an untried co-defendant against Petitioner, made through the incontrovertible testimony of a police officer. Further, the jury was not instructed on how officers are able to lie freely during interrogations.

In Briggs v. State, our Supreme Court wrestled with a case where "two of Briggs' fellow prisoners testified he made incriminating statements." 421 S.C. 316, 334, 806 S.E.2d 713, 722-23 (2017). The Court did not find that evidence sufficient to reverse the PCR court's findings regarding prejudice. Id. at 334, 806 S.E.2d 713, 723.

At trial, the victim, Boskey, was asked if he recognized Petitioner. Boskey answered in the negative. App. 118 l. 25 – App. 119 l. 3; App. 140 ll. 14 – 16; App. 148 ll. 16 – 25; App. 152 ll. 16 – 25; App. 162 ll. 3 – 13. The first time Boskey saw Petitioner was *after* the incident giving rise to Petitioner and Parker's arrest. App. 170 ll. 22 – 24.

Faced with inconsistent statements by the victim, counsel failed to object when another witness, an untried co-defendant, incriminated Petitioner. This accusation was not made on the stand, but rather through a recorded interview with law enforcement.

A similar situation unfolded in State v. Brewer, a case where our Supreme Court reversed a murder conviction following admission of the defendant's unredacted recorded interrogation. 411 S.C. 401, 768 S.E.2d 656 (2015). The Court noted how the inadmissible evidence was used against Brewer:

> During the interrogation, investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims. This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges.

Id. at 406-07, 768 S.E.2d 656, 659 (emphasis in original).

Brewer was cited in a recent opinion from this Court: State v. Washington, 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020). In Washington, this Court unambiguously concluded a

detective's "interrogation method may have been a proper investigative technique, but every word he uttered during the out of court interview was inadmissible hearsay." Id. at 622-23, 848 S.E.2d 794, 796. This Court declined to deem the error harmless. Id. at 624-26, 848 S.E.2d 794, 797-98.

The Supreme Court of Connecticut has discussed the benefits behind recorded interviews while also remarking on the inherent credibility mismatch between law enforcement and an accused:

> Furthermore, "[w]ithout a contemporaneous record of the interrogation, judges are forced to rely on the recollections of interested parties to reconstruct what occurred [in the interrogation room].
>
> The result is often a credibility contest between law enforcement officials and the [accused], which law enforcement officials invariably win." In re Jerrell C.J., 283 Wis.2d 145, 170–71, 699 N.W.2d 110 (2005); see also State v. Scales, 518 N.W.2d 587, 591 (Minn.1994) (recognizing that trial courts "consistently credit the recollections of police officers regarding the events that take place in an unrecorded interview" and that "[a] recording requirement ... will reduce the number of disputes over the validity of Miranda warnings and the voluntariness of purported waivers"); State v. Cassell, 280 Mont. 397, 405, 932 P.2d 478 (1996) (Trieweiler, J., concurring) (When police fail to record interrogation, "[t]he trial court, and [the reviewing] [c]ourt, are required to speculate about [the circumstances surrounding the confession and] to weigh the relative credibility of the people involved in the interrogation. Such an unreliable process is inexcusable when it is unnecessary because a means of absolute verification [is] readily available."); D. Donovan & J. Rhodes, "Comes a Time: The Case for Recording Interrogations," 61 Mont. L.Rev. 223, 229–30 (2000) ("A recording minimizes the swearing match between law enforcement and the accused over what actually happened. Experience teaches who wins that match.... As [the United States Supreme Court] noted, '[t]here is the word of the accused against the police. But his voice has little persuasion.' [Reck v. Pate, 367 U.S. 433, 446, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (Douglas, J., concurring).]

State v. Lockhart, 298 Conn. 537, 598–600, 4 A.3d 1176, 1211–12 (2010) (footnote and internal citations omitted) (Palmer, J., concurring).

The above rationale sets forth how law enforcement officers are inherently trustworthy, both to the public and to jurors. The presence of the recording is

theoretically used to balance the scales of credibility in that it presumably heightens a defendant's credibility. Setting aside doubts about the practicality of this supposition, one can nonetheless conclude that a police officer's credibility is seemingly infallible. It naturally follows, therefore, that in Petitioner's interview, all of the statements made by the officer are automatically trusted. As Justice Brennan recognized in Colorado v. Connelly:

> A concern for reliability is inherent in our criminal justice system, **which relies upon accusatorial rather than inquisitorial practices**. While an inquisitorial system obtains confessions from criminal defendants, an accusatorial system must place its faith in determinations of 'guilt' by evidence independently and freely secured... [W]e justified our reliance on accusatorial practices:
>
> > We have learned the lesson of history ... that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Connelly, 479 U.S. 157, 181, 107 S.Ct. 515, 529 (emphasis added) (internal quotations and citations omitted) (Brennan, J., dissenting).

Rather than gather extrinsic evidence, the state in the matter *sub judice* simply sought to put into evidence an inquisitorial interview and cast aspersions via the officer's continual questioning of Petitioner. But for trial counsel's failure to ensure the proper redactions of the interview, the jury would have rendered four not guilty verdicts instead of just two.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court reverse the PCR court, grant relief, and remand for a new trial.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Samantha Weidauer, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Andre Green, #283773, at 215 William Campbell Rd, Seabrook, SC 29940, this 30th day of June, 2022.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER