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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Richland County

The Honorable Kristi F. Curtis, Post-Conviction Relief Judge
The Honorable James R. Barber, III, Trial Judge

Appellate Case No. 2019-001677

Michael Orlando Brown, #295408,

Petitioner,

v.

State of South Carolina,

Respondent,

BRIEF OF RESPONDENT

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PETITIONER'S ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding Petitioner was not prejudiced by trial counsel's deficient performance where counsel failed to contemporaneously object to the admission of Petitioner's alleged statements to law enforcement in which Petitioner allegedly offered to plead guilty to a lesser offense after counsel moved pretrial to suppress the statements pursuant to Rule 403, SCRE, since there is a reasonable probability Petitioner would have prevailed on appeal had trial counsel properly preserved the issue for appeal?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

Counsel was not ineffective for not renewing an objection to Petitioner's voluntary statement under Rule 403, SCRE because even if the issue was raised on direct appeal, appellate counsel would be unable to show the trial court abused its discretion because Petitioner's expressed eagerness to work out a deal with law enforcement, even after officers advised they lacked authority to make a deal, was probative as an admission and it did not present a danger of unfair prejudice.

STATEMENT OF THE CASE

Michael Orlando Brown (Petitioner) was indicted at the April 2014 term of the Richland County grand jury for attempted armed robbery (2014-GS-40-02050). Anastasia L. Walker (Counsel), and Alicia Dyar Goode, Esquires, represented Petitioner. Meghan L. Walker, Kathryn L. Campbell, and Sandra V. Moser, Esquires, prosecuted the case for the State. On August 4-5, 2014, Petitioner was tried before the Honorable James R. Barber, III. The jury found Petitioner guilty and Judge Barber sentenced Petitioner to life imprisonment pursuant to S.C. Code § 17-25-45.[1]

Petitioner appealed and was represented by Laura Baer, Esquire. This Court affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Brown, Op. No. 2016-UP-349 (S.C. Ct. App. filed July 6, 2016).

Petitioner filed a post-conviction relief application. A PCR hearing was held February 19, 2019, before the Honorable Kristi F. Curtis at the Richland County Courthouse. Petitioner was present and represented by Leah B. Moody, Esquire. Assistant Deputy Attorney General Lindsey A. McCallister represented Respondent. Following the hearing, the PCR court issued an order, filed September 4, 2019, denying relief.

Petitioner filed a petition for writ of certiorari, and following the Respondent's return, the appeal was transferred from the Supreme Court to this Court. This Court subsequently granted certiorari on August 5, 2022, as to the single issue found in this brief, and denied certiorari as to the remaining issue raised by Petitioner by order dated August 5, 2022.

Petitioner filed his brief. The Brief of Respondent follows.

[1] Petitioner had a previous conviction for attempted armed robbery in Lexington County in 2003 (2002-GS-32-04128).

STATEMENT OF THE FACTS

On the night of January 3, 2013, as a group of employees cleaned up the Chuck E. Cheese restaurant in Columbia prior to closing, an armed gunman entered the restaurant wearing a bandana over his face and a wig. App. pp. 123-24, pp. 172-73, pp. 187-88. The man grabbed an employee, put a gun to the employee's back, and demanded money before fleeing on foot. App. pp. 174, pp. 190-91, p. 197, p. 203. Portions of the attempted armed robbery were captured on the restaurant's surveillance video. App. pp. 124, pp. 165-66. In surveillance footage, the robber runs out of the restaurant and in a separate video, the robber is running behind a close by restaurant, El Toro. Police arrived and a K9 officer tracked the man's trail from Chuck E. Cheese to behind El Toro, which was only several feet away from Chuck E. Cheese. Police recovered a red bandana and a wig matching the description of the one worn by the robber from behind El Toro. App. pp. 124-27, pp. 155-59. Both the wig and the bandana were tested for DNA, and the DNA recovered from the bandana was a match with Petitioner. App. pp. 207-08.

Richland County Sheriff's Department Investigator Robert Martin interviewed Petitioner in his office on March 14, 2013, after Petitioner's arrest. App. pp. 212-14. Investigator Martin advised Petitioner of his Miranda[2] rights both orally and in writing, which Petitioner voluntarily waived. App. pp. 213-17.

Petitioner wanted to know what evidence officers had against him. Investigator Martin explained: "He wanted to know more of the facts. We discussed DNA and he wanted to know what type of DNA was found, at which point I just told him it was his DNA." App. p. 217, lines 15-20. Expounding on that point, Investigator Martin explained:

> I believe the – he had known what the warrant said, it sounded like someone read him the warrant. . . . [H]e wanted to know about the

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

> case and how we came to our evidence and what was going on with our case. So he was pretty much trying to interview me at that point. And you have to kind of shut that down. . . .

App. p. 218, lines 1-10.

Investigator Martin explained suspects will want to know how bad they were caught, what kind of evidence the investigators have on the suspect, and use that information to spin an explanation. App. p. 218, lines 11-16. Investigator Martin would not tell him what the DNA was on but only that they had DNA evidence on him. Realizing Petitioner's tactics, Investigator Martin "just stopped and said, 'Look I know you were the one that committed this robbery,' . . . ." App. p. 218, lines 17-22.

At that point, Petitioner explained he was not going to challenge the DNA and he asked to be charged with a lesser offense. Petitioner admitted his DNA would convict him. Petitioner wanted a lesser charge and wanted to discuss a plea. Investigator Martin explained a plea would be between Petitioner's attorney and the solicitor. App. p. 218, line 25 –p. 219, line 9.

Investigator Martin asked why Petitioner's DNA would be found at the scene of the crime, and Petitioner could not give a valid reason. App. p. 222, p. 224. Petitioner told Investigator Martin the only time he had been to that Chuck E. Cheese restaurant was for a family member's birthday party in 2011. App. p. 222. Investigator Martin testified that rather than challenge the validity of the DNA evidence, Petitioner admitted he was not going to challenge the DNA because he knew it would be enough to convict him. App. pp. 218-220.

During the interview, Investigator Martin allowed Petitioner to make a phone call and he called his girlfriend, Ms. Castro. During the call, he claimed someone framed him. Investigator Martin asked Petitioner about that after the phone call, and Petitioner declined to tell him who

might be trying to frame him. At that point, Petitioner once again attempted to negotiate and once again, Investigator Martin told Petitioner he was not able to negotiate. App. p. 223, p. 227.

Petitioner ultimately did not want to talk about the case anymore, and Investigator Martin ended the interview. App. p. 64, p. 66, p. 220. At some point – Martin could not recall if it was during the interview or at the end – Martin requested Petitioner's DNA, and Petitioner declined until he could speak with an attorney.[3] App. p. 66.

Investigator Martin noted Petitioner wore a big clunky ring consistent with what the robber wore and Petitioner wore black-framed eyeglasses similar to the one he saw the robber wore in the video. App. p. 220.

Counsel challenged the admissibility of Petitioner's statements in a pretrial Jackson v. Denno[4] hearing. App. pp. 53-55. During the hearing, several items were redacted upon counsel's request. The trial court ruled testimony regarding Petitioner declining Investigator Martin's request for a DNA sample was not admissible. The trial judge allowed testimony about the portion of the statement where Petitioner said, "I know the DNA will convict me." App. p. 73.

Counsel also argued that Petitioner's request to Investigator Martin to plea to a lesser charge was an offer to plead guilty and should be inadmissible. App. p. 78, lines 7-11. The prosecutor responded, "[T]his wasn't a plea negotiation that took place between his attorney and us. This was him walking in and saying, I want – it is an admission of guilt." App. p. 78, lines 15-24. After a short break, the issue was addressed again and the prosecutor noted Rule 410(4), SCRE, which excludes statements made during plea negotiations, contemplates a statement to a prosecuting attorney and Petitioner was not entering negotiations with a prosecuting attorney. The

[3] Martin testified to Petitioner's request for an attorney and refusal to give a DNA sample in the pre-trial hearing, but not before the jury. App. pp. 73-76.
[4] 378 U.S. 368 (1964).

prosecutor explained, "[T]here is really nothing in Rule 410(4) that keeps [the statement] out. App. p. 95; p. 98 (direct quote p. 98, lines16-21). Petitioner admitted the rule only contemplated a prosecuting attorney and the trial judge ruled it was admissible. App. p. 99.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold the findings if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40.

The applicant bears the burden of proving the allegations in applicant's application for post-conviction relief. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance

by its "reasonableness under professional norms." Id. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 688.

ARGUMENT

Counsel was not ineffective for not renewing an objection to Petitioner's voluntary statement under Rule 403, SCRE because even if the issue was raised on direct appeal, appellate counsel would be unable to show the trial court abused its discretion because Petitioner's expressed eagerness to work out a deal with law enforcement, even after officers advised they lacked authority to make a deal, was probative as an admission and it did not present a danger of unfair prejudice.

Petitioner contends Counsel was ineffective for failing to renew her previous objection under Rule 403, SCRE to Petitioner's statements to law enforcement in which Petitioner inquired about pleading guilty to a lesser offense. Counsel did not renew the objection before the jury. App. pp. 78-79, pp. 95-99, pp. 219-20. Subsequently, the Court of Appeals found the issue was not preserved for appellate review. State v. Brown, Op. No. 2016-UP-349 (S.C. Ct. App. filed July 6, 2016). The PCR court in turn found Counsel's performance deficient for failing to preserve the issue. However, the PCR court determined Petitioner was not prejudiced by the deficiency because the statements were ultimately admissible. App. pp. 696-98. The PCR court's ruling is supported by probative evidence because the trial court did not abuse its wide discretion in allowing the evidence in over a Rule 403, SCRE objection. Petitioner's argument for prejudice is that the jury

might believe that these statements are admissions of guilt; however, that is exactly the probative value of the testimony.

An issue raised on direct appeal but deemed unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013). However, an applicant must establish a reasonable probability of success if the unpreserved issue was reviewed on direct appeal. Id. at 475-76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim." (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994)).

In the instant case, the PCR court found Petitioner was not reasonably likely to prevail on direct appeal because Petitioner's statement "offering" to plead guilty to a lesser charge was properly admitted as consciousness of guilt and was not made in the course of a plea negotiation. App. pp. 696-98. The PCR court therefore correctly found Petitioner suffered no prejudice due to Counsel's missed objection. App. p. 696.

While claiming the issue in this appeal is a Rule 403 claim, Petitioner mostly argues the applicability or rather a perceived near applicability of Rule 410(4), SCRE. The red herring in Petitioner's brief is that Rule 410(4), SCRE does not even remotely apply to the facts of this case. Rule 410 applies to negotiations between a defendant or his attorney and a prosecuting authority, and certainly not a law enforcement officer when the officer makes clear he has no negotiating authority. Petitioner claims, without citing authority, that "even informal plea discussions that do not fall under the purview of Rule 410, SCRE, may still be excluded as unfairly prejudicial pursuant to Rule 403, SCRE." Br. of Pet. p. 14. The horseshoes scoring system Petitioner seeks

is not convertible to a meritorious Rule 403 argument on appeal. As shown below, Rule 410 does not apply, and when conducting the Rule 403 analysis, the statements carry probative value because reasonable jurors could believe the statements are some evidence of consciousness of guilt.

Petitioner's argument starts as a Rule 410 analysis. Under Rule 410, SCRE,

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendre;
>
> (3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions **with an attorney** for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

(Emphasis added).

The rule is similar to Fed. R. Evid 410. The federal rule was examined in United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978):

> Plea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation. Suppressing evidence of such negotiations serves the policy of insuring a free dialogue only when the accused and the government actually engage in plea negotiations; discussion in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.

Id. at 1365 (citations and internal quotation marks omitted).

A United States District Court noted the following:

> The weight of authority has held that while Rule 410 does not

> command that a statement to a police officer will never fall within its purview, statements made to law enforcement officials are excluded from Rule 410's exclusionary principle unless the law enforcement officer is acting with express authority from a government attorney.

United States v. Jansen, 218 F.Supp.2d 659, 668 (M.D. Penn. 2002) (finding that statement made after trooper advised that he would make the magistrate, judge, and district attorney aware of Jansen's cooperation was not excludable under Fed. R. Evid. 410) (citation and internal quotation marks omitted) *overruled on other grounds* Jansen v. United States, 369 F.3d 237 (3d Cir. 2004); see State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005) (finding statements defendant made to police were not barred by Rule 410, SCRE, in prosecution for murder where discussions between defendant, solicitor, and investigators were not in furtherance of defendant making a plea on the murder charge). Therefore, the rule does not apply to a defendant who seeks a plea deal with a law enforcement officer who disavows the ability to negotiate.

In Chase v. State, 528 N.E.2d 784, 785 (Ind. 1988), the defendant contacted law enforcement after his girlfriend was arrested for selling methamphetamine and told them she was his courier and offered his biggest drug connection in exchange for her release. The Indiana Supreme Court rejected the argument that this statement was made in the course of plea negotiations. In so finding, the court found the following:

> The plea bargaining process does not start until persons having the authority to make a binding agreement have agreed to negotiate. There must be an agreement, a meeting of the minds, after the leveling of a felony or misdemeanor charge, to enter into plea negotiations. A unilateral offer of evidence to induce a party to negotiate is not protected.

Id. at 786. Rejecting the defendant's arguments for exclusion, the court concluded, "What occurred was a unilateral decision to volunteer incriminating statements in an attempt to induce plea negotiations between the State of Indiana and appellant's girlfriend . . . ." Id.

Petitioner relies on language in Robertson to argue Rule 410(4), applies in the instant case. The discussion and interpretation of Rule 410 in Robertson, though, is based on the pre-1979 version of the federal rules, which was substantially broader than its current form.

The Fifth Circuit subsequently explored the effect of an amendment to Fed. R. Crim. P., Rule 11(e)(6)(D), which is incorporated in Rule 410 and mirrored Rule 410's requirement that the negotiations be with a government attorney. United States v. Keith, 764 F.2d 263 (5th Cir. 1985). The Fifth Circuit rejected the defendant's arguments under Rules 11 and 410, noting the purpose of revision to Rule 11 was to make clear only negotiations with an attorney for the government were excluded, legislatively overruling previous federal decisions like United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (finding defendant's "offer" to postal inspectors to plead robbery and produce gun if authorities dropped murder charge was within ambit of rule as it existed at the time); Keith, at 265 (noting Herman was superseded by amendment to rules of evidence). The Fifth Circuit concluded negotiations made to the DEA agents and not a prosecuting attorney were not protected under the federal rules. Keith; see United States v. Marks, 209 F.3d 577, 582 (6th Cir. 2000) (finding Congress amended Rule 11(e)(6) in 1979 to abrogate prior federal decisions that manifested what Congress thought was a too-broad view of the plea negotiation process.).

As the Notes to the Federal Rules of Criminal Procedure[5] explain, "This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather,

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[5] The Notes to Federal Rule of Evidence 410 explicitly direct the reader to the amendments to Federal Rule of Criminal Procedure 11(e)(6) for an explanation of the changes to Rule 410. See Fed. R. Evid. 410 advisory committee's note on 1979 Amendments ("A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence: see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.").

the point is that such cases... must be resolved by that body of law dealing with police interrogations." Fed. R. Crim. P. 11 advisory committee's note on 1979 Amendments to subdivision (e)(6). In fact, as the Notes go on to point out, "these statements are sometimes admitted in court against the defendant." Id. Clearly, the current version of both the federal rules and South Carolina Rule 410, specifically contemplates that statements regarding plea negotiations made to *law enforcement* are generally admissible, assuming the traditional voluntariness factors are met. As Robertson itself acknowledged, "[S]urely not every discussion between an accused and agents for the government is a plea negotiation." 582 F.2d at 1365. "[T]he cooperation of an arrested person often is prompted by a desire for leniency for himself or others. Statements or confessions made in such circumstances, if they are voluntary and made with full awareness of the person's rights, are reliable, probative and constitutionally admissible evidence." Id. at 1368.

Accordingly, Petitioner's attempt to bootstrap policy arguments supporting Rule 410 into a Rule 403 analysis is inappropriate for the simple reason that those policy arguments, even in the time of Robertson, do not exist when a defendant unilaterally requests leniency from a law enforcement officer.

Moreover, Petitioner's Rule 410 analysis is out of step with Petitioner's statement of the issue. Petitioner claims in the statement of the issue that the trial court abused its discretion in its Rule 403, SCRE analysis. Petitioner's attempt to bootstrap a 410 analysis into a Rule 403 analysis fails because Petitioner's statement was not made during a negotiation and was not made to a prosecuting authority. Therefore, it was a statement showing consciousness of guilt and nothing more.

For evidence to be admissible, it must be relevant. Rule 402, SCRE. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App.2004). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. Sweat, 362 S.C. at 127, 606 S.E.2d at 513.

"'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 206 (Ct.App.2008)). "**All** evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct.App.1998) (emphasis added) (citation and internal quotation marks omitted).

In the instant case, Petitioner said he did not contest the DNA evidence and asked for a lesser charge in his unilateral attempt to negotiate. Petitioner's acceptance that his DNA was at the crime scene (and the discarded items of clothes discarded only yards away from Chuck E. Cheese counts as part of the crime scene) may be properly interpreted by a juror as some evidence of consciousness of guilt. Petitioner's unilateral attempt to negotiate also constitutes consciousness of guilt. "As a general rule, any guilty act, conduct, or statements on the part of the

accused are admissible as some evidence of consciousness of guilt." State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976).

Petitioner's arguments as to prejudice also fail because Petitioner merely conflates the legitimate probative value of the evidence with an unexplained danger of unfair prejudice. Further, arguments about the quality of the officer's notes and the like are questions of weight, but not the admissibility of evidence.

Accordingly, the PCR court correctly found Petitioner was not prejudiced by Counsel's omission because he was not reasonably likely to have succeeded on appeal even if the objection was preserved. This case does not present even a remotely legitimate question of exclusion under Rule 410, which is not the issue raised in Petitioner's statement of issue. Petitioner's horseshoe approach does not bring Rule 410 to life as a Rule 403, SCRE question. Further, under the appropriate standard of review, the trial court did not abuse its wide discretion allowing the probative statements into evidence. Accordingly, there is not a reasonable probability of success on appeal, and thus no prejudice to Petitioner warranting post-conviction relief.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's denial of the post-conviction relief application and affirm Petitioner's conviction and sentence.

Respectfully submitted,

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