

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Mar 20 2023

S.C. SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY

Court of Common Pleas

The Honorable Grace Gilchrist Knie, Circuit Court Judge

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Case No. 2015-CP-40-00331
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Steven Bosnell Gillian, #282336,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2022-000769

—————
JOHNSON PETITION FOR A WRIT OF CERTIORARI
—————

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QUESTION PRESENTED

1. DID THE PCR COURT ERR IN FINDING TRIAL COUNSELS EFFECTIVE WHEN COUNSELS FAILED TO OBJECT TO HEARSAY THROUGHOUT THE TRIAL?

STATEMENT OF THE CASE

The Richland County Grand Jury indicted the Petitioner on February 14, 2001, for Murder (2001-GS-40-01201). (App. pp.). Assistant Solicitors R. Knox McMahon and K. Luck Campbell represented the State. Assistant Public Defenders Sheila R. Mims and Beattie I. Butler represented the Petitioner.

On February 25, 2002, the Petitioner proceeded to trial before the Honorable Marc H. Westbrook. (App. pp.). Petitioner was found guilty as indicted and on March 1, 2002, and sentenced to imprisonment for a term of life without parole. (App. p.).

Petitioner timely filed a Notice of Appeal from his convictions and sentence and an appeal was perfected. Appellate Defender Robert M. Dudek represented the Petitioner on appeal. Petitioner's conviction and sentence was affirmed by opinion by the S.C. Court of Appeals on June 28, 2004. (State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004)). (App. pp.). Petitioner timely filed a Petition for a Writ of Certiorari with the SC Supreme Court on February 16, 2006. (App. pp.). The Petition was denied on June 11, 2007. (App. pp.). The Remittitur was sent on June 27, 2007. (App. p.)

Petitioner filed his application for post-conviction relief (PCR) on June 4, 2015¹. (2015-CP-40-03331). (App. pp.). Petitioner amended his application on or about September 8, 2015. (App. pp.). The State filed its Return and Motion to Dismiss on July 21, 2017. (App. pp.). Subsequently, a mental health evaluation was

¹ Petitioner initially filed two PCR applications: 2015-CP-40-03331 and 2015-CP-40-05501. (App. pp. 1297-1315) These applications were merged and the application ending in -03331 was the remaining case number. (App. pp. 1318-1319.)

ordered by the Honorable Clifton Newman during the pendency of his PCR application (App. pp.), and the Department of Mental Health deemed Applicant incompetent by evaluation dated January 16, 2019 (subsequent to the trial and plea hearings in 2002).

The PCR hearing was held on March 28, 2022, before the Honorable Grace Gilchrist Knie at the Richland County Courthouse. (App. pp. 878-1006). Petitioner was present and represented by Nancy C. Fennell, Esquire. Senior Assistant Deputy Attorney General David A. Spencer represented the Respondent. At the hearing, the State raised its motion to dismiss this matter under the statute of limitations. In defense of the State's motion, Petitioner presented testimony from Dr. Donna S. Maddox. Following Dr. Maddox's testimony, the State withdrew its motion to dismiss. On April 25, 2022, Judge Knie denied the Petitioner's PCR application by written order. (App pp.). This petition follows.

STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

STATEMENT OF THE FACTS

Jason Ward's body was found on January 28, 2001, behind Boozer Shopping Center in Richland County around 8:00am. He had been shot five times. (App. pp. 204-205). A nearby resident noted they heard shots early in the morning, around 6:30am. (App. p. 125; pp. 129-130). There was no forensic evidence found at the crime scene that link the Petitioner to the crime scene. There were no shell casing found near the victim's body. (App. pp. 225-226).

The Petitioner and the victim were at a friends' house very early in the morning before the victim's death. (App. p.). They both left around 5:15am after the Petitioner got a phone call². (App. p.). Shortly afterwards, Petitioner arrived at a party where a witness testified that the Petitioner was very angry when the Petitioner got there. (App. p. 303, lines 7-12). Once there, the Petitioner began hitting the young men that had allegedly beaten up his friend Jeremiah Page. (App p. 303, line 11 – p. 304, line 22). Petitioner then got mad when the younger men told Petitioner that Page had lied to him about what happened before Petitioner got to the party. (App. p. 306, line 18 – p. 309, line 11).

The victim intervened in the physical contact and asked the Petitioner why he was messing with the younger men when they were scared of him and didn't want to fight him. (App. p. 309, lines 12-17). The Petitioner then told the victim to hit him and initially the victim refused. At some point however, the victim took his shirt off, punched the Petitioner, and pinned him to the floor. At this point the

² The phone call the Petitioner received was from his friend, Jeremiah Page. Page had told the Petitioner he had been kicked out the party and had been beaten up by some younger men that were there. (App. p.).

Petitioner finally agrees to calm down and the victim gets up of the Petitioner. (App. p. 343, lines 1-25). After this, the victim asks the Petitioner to take him home, but Petitioner suggested they go back to the Petitioner's house where they can both "fight fair" without getting into trouble. (App. p. 344, line 22 – p. 345, line 2). On the way out, the Petitioner said "you'll see this in the newspapers tomorrow." (App. p. 345, lines 18-19). Shortly afterwards, the victim was found shot behind Boozer Shopping Center.

ARGUMENT

The PCR court erred in finding trial counsel was effective when counsel failed to object to hearsay throughout the trial.

Throughout the trial there were numerous times when trial counsel failed to object to hearsay testimony. When reviewing a claim for ineffective assistance of counsel, the "court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (*quoting* Strickland v. Washington, 466 U.S. 668, 690 (1984)). To rebut this presumption and succeed on an ineffective assistance claim, a PCR applicant must show (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced the outcome of the trial. Strickland, 466 U.S. at 687.

"To prove trial counsel's performance was deficient, a [PCR] applicant must show '[trial] counsel's representation fell below an objective standard of reasonableness.'" Smalls, 422 S.C. at 181, 810 S.E.2d at 840 (*quoting* Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)).

Richie Cunliffe presented hearsay testimony when he testified about what another person was worried about. His testimony referenced what Steve Valek, another person having a party the night the victim was killed, was thinking when he said that Valek was working about the police showing up to his party. (App. p. 294, lines 5-17.) Trial counsels did not object. Trial counsel testified that this testimony was not prejudicial and not worthy of objection. (App p. 1404, line 20 – p. 1405, line 7).

Michael Glenn also presented hearsay testimony. He testified that after the Petitioner assaulted the younger men, that the victim told the Petitioner to calm down and testified to several things the Petitioner said to the victim, particularly a comment about seeing “this is in the newspaper tomorrow.” (App. p. 343 – 345). Trial counsel did testify that these statements were important. (App. p. 1408, lines 3-5).

Ronnie Muller was yet another witness that presented hearsay testimony. The State asserted that the murder weapon was stolen from Mr. Muller’s sister-in-law’s safe. He stated that he knew she kept a revolver in a safe in her closet and that it five chambers, rather than six. (App. p. 474, lines 12-25). He testified that he was told that that particular firearm was missing from his sister’s safe. (“That’s what I was told, yes sir.”) (App. p. 475, line 8).

Tying the five-chambered revolver to the Petitioner was important evidence the State used to convict the Petitioner. Trial Counsel agreed that tying the revolver to the Petitioner was important but still felt that this testimony did not warrant objection. (App. p. 1410, lines 17-23).

Evidence is hearsay if it is an out of court statement offered to prove the truth of the matter asserted. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992). Trial counsel's elicitation of hearsay testimony from one witness and failure to object to elicitation thereof from another witness amounts to deficient performance. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002).

While Trial Counsel testified that there was no reason to object to these hearsay statements, Trial counsels' failure to object to the multiple hearsay issues had the cumulative effect of ineffective assistance. Trial counsels' failure to object to these hearsay statements did not preserve them for appeal, either. "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013).

CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari and reverse the convictions and sentence and the case remanded for a new trial.

Respectfully submitted,



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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven Bosnell Gillian states:

1. She is a member of the South Carolina Bar and was appointed to represent the Petitioner.
2. She has reviewed the records and transcripts of Petitioner's post-conviction relief hearing which was held on March 28, 2022. In her opinion seeking certiorari from the Order of Dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 SC 310, 364 SE2d 201 (1998), 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 Mr. Miller.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for a Writ of Certiorari complies with SCACR 11(b) 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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