

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO BEAUFORT COUNTY
Carmen T. Mullen, Trial Judge
Eugene C. Griffith, Jr., PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2023-001525

MYKEL JOHNSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Petitioner's Question

Did the post-conviction relief court err in finding that trial counsel's failure to object to testimony that commented on Petitioner's right to remain silent was ineffective assistance of counsel?

Respondent's Counterstatement of Questions

Did the post-conviction relief court properly find Petitioner did not prove prejudice when (1) the reference to Petitioner's silence was a single reference, (2) the State did not tie the exercise of Petitioner's right to an exculpatory account, (3) Petitioner's alibi defense was not a true alibi, making it an implausible defense, and (4) the State presented overwhelming evidence of Petitioner's guilt?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a fifteen-year-sentence. In December 2011, the Beaufort County Grand Jury indicated Petitioner for two counts of attempted murder (2011-GS-7-2269, 2270). These charges arose after Petitioner shot at victims Frank Babiecki and Desiree Constantineau on December 15, 2011.

On June 18-20, 2012, Petitioner proceeded to a jury trial before the Honorable Carmen T. Mullen. Eric Erickson, Esquire, represented Petitioner, and Assistant Solicitor Jeffrey S. Stephens prosecuted the case. The jury convicted Petitioner as indicted, and Judge Mullen sentenced him concurrently to fifteen years for each charge.

Petitioner timely appealed, and Appellate Defender Kathrine H. Hudgins perfected the appeal through the filing of an Anders brief, wherein she argued the trial court erred in not striking Investigator Joshua Dowling's testimony that Applicant did not want to talk and wanted an attorney because this constituted an improper comment on Petitioner's right to remain silent. The Court of Appeals dismissed pursuant to Anders, and the remittitur was sent April 18, 2014.

On July 21, 2014, Applicant timely filed a PCR application alleging ineffective assistance of counsel. The State filed a return requesting an evidentiary hearing. On May 17, 2016, an evidentiary hearing convened before the Honorable Brooks P. Goldsmith. James K. Falk, Esquire, represented Petitioner, and Assistant Attorney General J. Rutledge Johnson represented the State. During the hearing, Petitioner asserted counsel was ineffective for not objecting to Investigator Dowling's comment on his right to remain silent. Thereafter, Judge Goldsmith issued an order finding this allegation was procedurally barred because Petitioner raised the same issue in his direct appeal.

Petitioner filed a notice of appeal, and Appellate Defender Susan B. Hackett filed a Petition for a Writ of Certiorari asserting (1) the PCR court erred in finding this claim procedurally barred, and (2) trial counsel was ineffective for not objecting to Investigator Dowling's comment. The case was transferred to the Court of Appeals, which granted certiorari, reversed the PCR court's finding that this allegation was procedurally barred, and remanded to the PCR court for a hearing on the merits of the issue. The remittitur was sent February 5, 2020.

On August 9, 2021, the PCR court convened a hearing on the narrow issue of whether counsel was ineffective for not objecting to Investigator Dowling's comment.¹ Thereafter, the Court issued an order finding Petitioner did not prove prejudice and denying PCR.

Pertinent Trial Testimony

Victims Frank Babiecki and Desiree Constantineau were shot at while in their car near Cross Creek Apartments. (App. 90). In their 911 call, they identified "Hot Boy" as the shooter. (App. 100). After determining Hot Boy was Petitioner's nickname, law enforcement prepared a photo lineup that included Petitioner and showed it to Babiecki, who "immediately" and "emphatically" identified Petitioner as the shooter.² (App. 101, 132, 135-36).

At trial, Babiecki testified he and his wife Constantineau were driving when they saw Petitioner walking by; Babiecki was acquainted with Petitioner and asked Constantineau to pull over so they could talk. Babiecki testified he asked Petitioner "what happened the other night," and Petitioner began shooting at the car. (App. 171-75). Babiecki stated the incident occurred around noon. (App. 172). Constantineau similarly testified to seeing Petitioner walking by and

¹ Petitioner sought to amend his PCR application prior to the hearing to raise an additional issue but the State objected, arguing this was a limited remand. Thereafter, Petitioner (through counsel) agreed to only present testimony on the issue of whether counsel was ineffective for not objecting to Investigator Dowling's comment. (App. 500).

² Law enforcement did not show the lineup to Constantineau. (App. 135).

then hearing gunshots, although she clarified she did not actually see Petitioner fire the weapon. She further clarified she did not see anyone in the area other than Petitioner. (App. 202-04, 209).

During Investigator Joshua Dowling's testimony, the following exchange occurred:

Q. Is there any other additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?

A. Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.

(App. 103).

During Investigator George Erdel's testimony, the following exchange occurred:

Q. Did you speak with Mr. Johnson when he was brought out of that trailer?

A. I didn't, uh,—I didn't ask him any questions. Basically, in an instance like that where somebody's under arrest and we know it, especially when it's a big case, we will bring it back to talk to us. I did speak with him because he asked me questions. At which point, I engaged him in a conversation but it was at his behest. It was—he initiated it.

Q. You know if he had been provided Miranda warnings yet?

A. At that point, he had not. He was not being questioned at that point.

Q. You said he asked you questions. Do you recall what he said to you?

A. I do recall what he said to me. He asked me—I do not recall the exact order, but the gist of it was, uh, he did say that he was going to turn himself in once he hired a lawyer. That was—he didn't specify and I didn't ask. He said there was something in his phone that will tell the story. Then he asked how did y'all find me. That's—you know, I did tell him, listen, I'm not going to discuss the case with you here. I'm going to take you back to the police department. . . .

Q All right. Uh, now, when he was given his Miranda warnings later at the Beaufort Police Station, do you have any question in your

mind that he understood that he had a right to remain silent and not say anything?

A. I believe he understood what his rights were, yes.

Q. Now, when you, uh, when he came out and he asked you or said that he was going to turn himself in when he got a lawyer and asked you how you found him, did he ask you any questions about what you wanted him for?

A. No.

Q. But he did indicate that he would have turned himself in and got a lawyer, correct?

A. That's what he said.

(App. 141-42).

Applicant did not testify, but he recalled Investigator Dowling to establish Petitioner's booking report indicated he was 5' 3" and 130 pounds. (App. 228). Additionally, Petitioner called Kendalle Simmons as an alibi witness. Simmons testified he was with Petitioner at a friend's house a little after 3:00 p.m. until around 6:45 to 7:00 p.m. the day of the shooting. (App. 249). He stated the home was about two to three miles, or about a fifteen minute drive, from Cross Creek Apartments (where the shooting occurred). (App. 250). The court charged the jury on alibi. The jury convicted Petitioner of both attempted murder charges.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found Petitioner did not prove prejudice when (1) the reference to Petitioner's silence was a single reference, (2) the State did not tie the exercise of Petitioner's right to an exculpatory account, (3) Petitioner's alibi defense was not a true alibi, making it an implausible defense, and (4) the State presented overwhelming evidence of Petitioner's guilt.

Petitioner asserts trial counsel was ineffective for not objecting to comments on Petitioner's right to remain silent. He further contends each of the four Doyle factors weigh in favor of finding prejudice. However, as set forth below, the PCR court properly found *all* the Doyle factors weigh in favor of Respondent, and Petitioner thus cannot show prejudice.

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

"The State may not comment on a defendant's exercise of a constitutional right." McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000). "Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." Id. (citing Doyle v. Ohio, 426 U.S. 610 (1976) (providing an accused has a constitutional right to remain silent that cannot be used against him)).

“When a Doyle violation has occurred, the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal.” McFadden v. State, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000). Thus, Courts should consider whether “(1) the reference to the defendant's right to remain silent was a single reference, which was not repeated or alluded to; (2) the solicitor did not tie the defendant's silence directly to his exculpatory story; (3) the exculpatory story was totally implausible; and (4) the evidence of guilt was overwhelming.” Id.

As set forth below, the PCR court properly found each of these factors weighs in favor of Respondent. Thus, Petitioner cannot show prejudice.

A. Petitioner has conceded the post-Miranda reference to his silence was a single reference.

Petitioner contends he did not concede the first Doyle factor weighed in favor of the State. (Pet. 10). Contrary to that assertion, however, Petitioner conceded this issue in his Brief during the first PCR appeal, wherein he stated, “The first factor weighs against Petitioner as the reference to his invocation of his rights to counsel and silence occurred only once.” (App. 451).

Likewise, evidence supports the PCR court’s finding that the post-Miranda reference to Petitioner’s silence was a single reference. Although Petitioner relies on Investigator Erdel’s testimony (in addition to Investigator Dowling’s testimony) in his Petition, Investigator Erdel’s testified about statements Petitioner made *before* being apprised of his Miranda warnings. (App. 141-42). Thus, Investigator Erdel’s testimony does not constitute a reference to Petitioner’s exercise of his right to remain silent. See Brown v. State, 375 S.C. 464, 479, 652 S.E.2d 765, 773 (Ct. App. 2007) (“Doyle is only applicable after Miranda warnings have been given.”). Overall, as Petitioner conceded in his brief to the Supreme Court, this factor weighs in favor of Respondent.

B. Petitioner conceded the solicitor did not tie the exercise of his right to an exculpatory account.

Petitioner has likewise conceded the solicitor did not tie the exercise of his right to silence to an exculpatory account. In his Brief from his first PCR appeal, he stated, “The second factor also weighs against Petitioner because the solicitor did not tie Petitioner’s silence to his exculpatory story.” (App. 451). Thus, Petitioner conceded this factor weighs in favor of Respondent.

Likewise, evidence supports the PCR court’s finding that the State did not tie the exercise of his right to silence to an exculpatory account. Although the State referenced Petitioner’s pre-Miranda request for an attorney to his fleeing from law enforcement and guilty conscience (which was permissible),³ the State did not tie his exculpatory account to any post-Miranda invocation of his constitutional rights. (App. 273). In support of his argument that the State improperly tied the exercise of his right to his exculpatory account, Petitioner points to the solicitor’s argument about Petitioner’s failure to respond to a text message sent from Babiecki’s phone to Petitioner’s phone, which said, “[G]ood job, buddy, trying to kill me and my pregnant wife.” (App. 273-74). It strains credibility to suggest this reference to a text message chain was a comment on a post-Miranda invocation of the right to remain silent. Petitioner has not shown any example of the solicitor improperly commenting on Petitioner’s post-Miranda silence. Thus, the PCR court properly found this factor weighs in favor of Respondent.

C. Petitioner’s alibi was not a true alibi, making it an implausible defense.

Petitioner’s primary defense was an alibi defense based on Simmons’ testimony that he

³ Petitioner acknowledges this was not a Doyle violation. (Pet. 11, “From the two law enforcement officers’ testimony, it seems that Petitioner did not make a pre-Miranda statement regarding wanting to get a lawyer before he turned himself in. The reference in the State’s closing argument to this is not a Doyle violation.”).

was with Petitioner at a friend's house a little after 3:00 p.m. until around 6:45 to 7:00 p.m. the day of the shooting. (App. 249). Simmons stated the home was about two to three miles, or about a fifteen minute drive, from Cross Creek Apartments (where the shooting occurred). (App. 250). However, the only testimony presented as to the time this shooting occurred was Babiecki's testimony that it occurred at noon.⁴ (App. 172). Based on Simmons' testimony that he saw Petitioner at 3:00 p.m. (or later) at a home that was fifteen minutes away, Applicant could have easily been the shooter and still arrived at this home by 3:00 p.m. Thus, Simmons' testimony—even if true—does not create an alibi for Petitioner. Due to the overwhelming evidence of Petitioner's guilt (discussed below), this alibi was not a plausible defense. Thus, the third Doyle factor weighs in favor of Respondent.

D. The State presented overwhelming evidence of Petitioner's guilt.

At trial, both victims testified they were acquainted with Petitioner—who lived in the same apartment complex as them—and identified him as the shooter. In the 911 call, the victims identified Petitioner by the nickname “Hot Boy,” which law enforcement determined was a nickname Petitioner used. The State also introduced a text message from Babiecki's phone to Petitioner's phone wherein he stated, “Good job, buddy, trying to kill me and my pregnant wife.” (App. 273-74). Finally—and critically—both victims identified Petitioner, whom they were

⁴ Admittedly, the solicitor later asked Babiecki, “You said it was sometime in the afternoon, you think maybe between 12:00 and 2:00. Was it an overcast day? A bright day?” Babiecki responded, “It was beautiful out. Like right now. Sunny day.” (App. 178). Even if the solicitor's questioning constituted evidence that the shooting may have occurred as late as 2:00 p.m., this still would not establish a true alibi for Petitioner when Simmons testified the home where he saw Petitioner was about fifteen minutes, or two to three miles, from the location of the shooting. In other words, the shooting could have occurred as late as 2:00 p.m., and Simmons *still* could have seen Petitioner at the friend's house at 3:00 p.m.

familiar with and acquainted with, as the shooter,⁵ and Babiecki selected Petitioner “immediately” and “emphatically” from a photographic lineup. (App. 137, 171-75, 202-04, 209). The State thus presented overwhelming evidence of Petitioner’s guilt, such that it is not reasonably likely the single reference to Petitioner’s post-Miranda invocation of his right to remain silent affected the outcome of this trial. Thus, the final Doyle factor weighs in favor of Respondent.

⁵ Although Constantineau indicated she did not actually see Petitioner shoot at them, she clarified he was the only person she saw in the area at the time.

CONCLUSION

Based on the foregoing, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 26th day of February, 2024