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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Appellate Case No. 2023-001613

The Honorable Robert J. Bonds, Circuit Court Judge

Ernest Stewart Daise, Petitioner,

vs.

The State of South Carolina, Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The State's Return argues the following points: (1) the PCR Court did not err in finding trial counsel was ineffective for failing to raise a hearsay objection to Child 1's statements; (2) the PCR Court did not err in determining Petitioner had failed to show prejudice from trial counsel's failure to object to sections of Frank Mullen's testimony; and (3) the PCR Court did not err in finding appellate counsel was not ineffective for failing to raise the *Franks* issue on direct appeal. Therefore, Petitioner offers this brief reply.

ARGUMENT

I. PCR Court's determination that trial counsel was not ineffective for failing to object to Child 1's statements as inadmissible hearsay.

Petitioner again argues that trial counsel failed to articulate a valid reason for their failure to object to Child 1's statements as inadmissible hearsay and that the statements were in fact, hearsay, and not within the excited utterance exception.

Despite the State's contention that trial counsel articulated a valid reason for failing to object, no valid reason was actually given. Trial counsel could not remember the discussions between the defense team and the Solicitor's office and no specifics of the agreement about the child's testimony were gathered at the PCR hearing. Trial counsel seemed to speculate as to the reason about why an objection was not lodged to the hearsay testimony, but speculation cannot serve as articulable reason for this failure when the testimony was so greatly "damning" to Petitioner as trial counsel characterized.

Additionally, Petitioner again asserts that Child 1's statement was indeed inadmissible hearsay and that it does not fall under the excited utterance exception. An excited utterance is "a statement relating to a startling even or condition made while the declarant was under the stress of excitement caused by the event or condition." SCRE 802(2). When considering if a statement falls within the excited utterance exception, the Court must "consider the totality of the circumstances" in which the statement was made. *State v. Davis*, 371 S.C. 170, 178-179, 638 S.E.2d 57, 62 (2006). In this case, after an examination of the totality of the circumstances, Petitioner asserts that Child 1's statement is not an excited utterance. There was no evidence presented the child was under the stress of an exciting event, just that at first, he was unconscious and then he was groggy and unable

to respond coherently. App. 1919; App. 3003-3006. The State at trial and in their Return seem to be asserting that just because the child was involved in a murder and was the victim of an attack, that any statement made by Child 1 automatically is an excited utterance. Such an assertion has already been rejected by this Court. *Davis*, 371 S.C. at 179.

Child 1's statement was hearsay and trial counsel's failure to object and then to provide an articulable reason as to their failure to object was ineffective and the PCR Court's decision otherwise was in error.

II. PCR Court's determination that trial counsel was not ineffective for failing to object to portions of Frank Mullen's testimony.

Petitioner further asserts that trial counsel was ineffective for failing to renew his objection to Frank Mullen's testimony that the victim was afraid of Petitioner. Even though trial counsel objected to testimony before Mullen took the stand, he failed to re-raise the objection and Mullen was allowed to state his prejudicial and cumulative testimony to the jury. The PCR Court erred by finding that such testimony was not prejudicial to the Defendant and that trial counsel was not ineffective for failing to object.

Regarding hearsay testimony, like that which was elicited from Mullen, this Court has held that the *reason* for the declarant's state of mind is not admissible as an exception for hearsay. *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999). The Court of Appeals already found that similar statements made by another witness regarding the victim's fear of the defendant were inadmissible and cumulative to Mullen's testimony. *State v. Daise*, 421 S.C. 442, 460-61, 807 S.E.2d 710, 719 (Ct. App. 2017). Mullen's testimony was squarely within the prohibition stated by this Court. He noted his daughter was trying to leave Petitioner and the reason for that was because she was afraid.

The PCR Court further erred because they found that such testimony was not prejudicial. Such an assertion ignores the whole foundation of the State's case—that Petitioner killed the victim because she was going to end their relationship. Allowing the jury to hear inadmissible testimony about the victim's fear was undoubtedly prejudicial and sought to induce emotional assessments from the jury. Trial counsel should have objected and because they did not, Petitioner was exposed to prejudice and invalid evidence. The PCR Court's decision, and the State's contention otherwise, is in error.

III. PCR Court's determination that appellate counsel was not ineffective for failing to raise the *Franks* issue on direct appeal.

The PCR Court erred in its summary dismissal of Petitioner's claim that appellate counsel was ineffective for failing to raise a valid issue based on trial counsel's arguments under *Franks v. Delaware*, 438 U.S. 154 (1978). Petitioner again contends that the warrant used by law enforcement to search the Poppy Hill Road Residence lacked exculpatory information prescribed under *Franks* and therefore lacked sufficient probable cause on which to sustain a valid search.

Of particular note, law enforcement failed to indicate the age and circumstances under which Child 1, two years old at the time, identified Petitioner as the shooter of his mother, his brother, and of himself. Law enforcement also failed to note that the neighbor who stated she saw Petitioner around the time of the murders failed to identify him by his actual name and instead just noted that the individual was the victim's boyfriend. The affidavit made it seem as if Child 1, without any mention of his severe incapacity, simply named his father by his full name, as did the neighbo,r without indicating her inability to name him directly. Such a failure by law enforcement to include highly relevant exculpatory circumstances is squarely within *Franks*.

Appellate counsel was ineffective for failing to raise this clearly meritorious issue. The *Franks* issue was the subject of a considerable pre-trial hearing and the fruits from the warrant was relied on by the State to prove their case. It does not matter that appellate counsel raised other issues, and won two of those issues, as the State claims in their Return. Appellate counsel failed to raise *this* meritorious issue on appeal and such performance prejudiced Petitioner's chance at meaningful appellate review.

The PCR Court erred in its swift dismissal of the claim and its failure to offer any substantive analysis. It's finding that appellate counsel was not ineffective was misguided.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and allow appellate review of the PCR Court's Order of Dismissal.

May 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel certifies that she has provided a copy of this reply brief on Danielle Dixon, of the South Carolina Attorney General's Office, via email on this date, May 23, 2024.

/s/Elizabeth Franklin-Best