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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Lancaster County
The Honorable R. Knox McMahon, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2019-001272

Devatee T. Clinton

Petitioner,

v.

State of South Carolina,

Respondent.

**REPLY TO THE RETURN TO THE PETITION
FOR REHEARING AND REHEARING EN BANC**

In Petitioner Devatee T. Clinton's Return to the Petition for Rehearing, Clinton argued that Respondent "misapprehended the substantive issue before the Court at this stage in the proceedings" and Respondent "failed to recognize that this Court was deciding different substantive issues at each stage of Clinton's appellate process." (Petitioner's Return to Pet. pp. 1-2). Specifically, Clinton argued that the issue on direct appeal was trial court error, whereas the issue on Clinton's post-conviction relief appeal deals with trial counsel error. Respondent agrees; however, Clinton fails to respond to Respondent's contention that the record before this Court is insufficient to conduct a meaningful appellate review of prejudice. Additionally, Clinton asserted, "prejudice can be established because there was not overwhelming evidence of guilt in this case."

(Petitioner's Return to Pet. p. 6). This misstates the standard before the Court in determining prejudice.

In its Petition, Respondent argued the record before this Court was insufficient to conduct a meaningful appellate review of *prejudice* based on this Court's holding in Clinton's direct appeal¹ in dealing with the **same record**, noting this Court found the issue unpreserved because Trial Counsel failed to make a proffer. Clinton noted this Court's holding on direct in their Return but offered that the issues could not be viewed "through the same lens" as the direct appeal dealt with trial court error while the post-conviction relief appeal dealt with trial counsel error. While this is generally correct, it fails to acknowledge that by holding the issue unpreserved based on trial counsel's failure to make the necessary proffer, this Court implicitly held it could not analyze whether Clinton suffered *prejudice* from the exclusion of the hearsay statements. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990) (Alleged erroneous exclusion of evidence is not basis for *establishing prejudice on appeal in absence of adequate proffer of evidence in court below.*) (emphasis added); See Honea v. Prior, 295 S.C. 526, 534, 369 S.E.2d 846, 851 (Ct. App. 1988).

Even though the post-conviction relief court deals with errors by counsel, the court analyzes deficiency and *prejudice*. Strickland v. Washington, 466 U.S. 668 (1984). Where an applicant alleges counsel was ineffective for failing to proffer the testimony of a witness, the applicant must present the testimony of that witness at the evidentiary hearing to establish prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding an applicant could not establish prejudice based on a claim that counsel was ineffective for failing to present an alibi witness where applicant failed to "produce the witnesses at the PCR hearing or otherwise

¹ State v. Clinton, Op. No. 2016-UP-206 (Ct. App. filed May 11, 2016).

introduce the witnesses' testimony in a manner consistent with the rules of evidence.');

see also Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (holding that pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different). Applicant failed to present the alleged helpful testimony and, thereby, failed to establish prejudice. However, where this Court held they could not analyze prejudice based on the absence of a proffer, on post-conviction relief appeal, this Court held Clinton was prejudiced in the absence of Clinton making the necessary proffer he complained trial counsel failed to make.

Clinton wholly ignored and failed to respond to Respondent's argument and, further, erroneously framed Respondent's argument as "infer[ring] that this Court ruled on direct appeal that Duce's statements were inadmissible." (Petitioner's Return to Pet. p. 4). However, Respondent clearly asserted throughout the Petition that this Court refused to make a determination as to the admissibility of the statements on direct appeal because of an insufficient record, and that same record is before this Court now, but resulted in a contradictory holding.

Further, Clinton asserted that "prejudice can be established because there was not overwhelming evidence of guilt in this case," citing Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). However, the proper standard in determining prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In Smalls, the Court stated a PCR court should *consider* the strength of the State's case in determining prejudice, noting the "stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." 422 S.C. at 188, 810 S.E.2d at 843. However, the Court did not find that the

lack of overwhelming evidence of guilt automatically establishes prejudice, only that it is a consideration in the prejudice analysis.

As Respondent noted in its Petition, the State's case did not rely exclusively on the testimony of Clinton's co-defendant as there was corroborating circumstantial evidence placing Clinton at the scene and as the shooter.² Moreover, no credible evidence was presented of Rashad's involvement or evidence challenging his alibi at trial or at the evidentiary hearing. Critically, Clinton utterly failed to present any testimony or evidence whatsoever regarding what helpful testimony Investigator Taylor would have provided had Trial Counsel made a proffer during his trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness* or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis added). Notably, in determining prejudice, the strength of the State's case is but one factor. The Court must also consider the non-existence of evidence inculcating Rashad Johnson, Clinton's failure to present relevant witness testimony, and Clinton's failure to proffer the testimony of the witness at the evidentiary hearing.

² Testimony of multiple witnesses establishing the relationship between the co-defendant and Clinton, their statements of their intention to commit a robbery a day before the victim's death, and statements Clinton made about having a gun in his possession he same day. (App. pp. 261–67; 271–79; 282–89; 291–94; 725–29). Testimony that two individuals borrowed a white ragtop Cadillac, circumstantial and direct witness testimony placing that Cadillac on the road leaving the trailer park where the victim lived in haste, and seeing the same Cadillac the next day at Piggly Wiggly. Additionally, investigators discovered molding from the Cadillac on the trailer park road. (App. pp. 242–52; 295–301; 380–401; 535–40; 546–47; 731–43). A jumpsuit was discovered in the Cadillac that a witness identified Clinton wearing the night of the murder, along with testimony of Petitioner's reply upon hearing about the murder of the victim and DNA analysis of the jumpsuit, which did not exclude his DNA or the DNA of the victim. (App. pp. 391–401; 534–40; 546–47; 597–615; 625–34). This evidence was presented in addition to Clinton's co-defendant's statements implicating Clinton and testimony that Clinton made a statement he killed the victim. (App. pp. 739–75).

Addressing Clinton's ancillary arguments, Clinton's contention that a proffer of the alleged helpful testimony was unnecessary to determine prejudice runs in contravention to this Court's finding on direct appeal and to the repeatedly established rule that applicants must produce testimony of a favorable witness or offer other testimony to establish prejudice. Additionally, Clinton's assertion that a witness can show personal knowledge through other senses³ does not negate the need for testimony or other evidence to establish that personal knowledge. The declarant was not available to testify at Clinton's trial about his personal knowledge, so the existence of evidence or testimony establishing the declarant's knowledge would be necessary to establish the foundation for admission. Further, Clinton erroneously asserts that the statements were made to various first responders.⁴

Though Clinton responded to some of the arguments in the Petition, Clinton failed to address the glaring issues before this Court, which warrants a Rehearing and a Rehearing En Banc: the existence of two opinions on the exact record in each case, which are contradictory.

Accordingly, for the foregoing reasons, Respondent respectfully urges this Court to reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate

³ Respondent notes that the hearsay statement "Rashad killed mommy" and "Shi's daddy killed mommy" identified Rashad Johnson as the shooter. The statement did not include "I heard Rashad kill mommy", and it is otherwise unclear to Respondent how a witness would be able to establish personal knowledge through the other senses—taste, smell, and touch—without actually observing the shooting.

⁴ During the motion *in limine*, trial counsel asserted the statements were made to Investigator Crump, and possibly two other officers. (App. p. 158). Officer Belk testified he never spoke with the declarant, and Officer Weiss also assisted with the children. (App. p. 232). Officer Weiss testified he only held the children and did not have any conversation with them. (App. pp. 240-241). Investigator Taylor testified he had a conversation with the declarant while he was in the EMS truck and there were two EMS workers inside the EMS with the children, but he could not recall their names. (App. pp. 501-502; 516-517). Investigator Taylor did not indicate whether the EMS workers were in the EMS when he spoke to the declarant or heard his statements, and there was no testimony from another officer that they had a conversation with the declarant.

its prior opinion, and issue a new ruling comporting with its earlier decision as the record is insufficient for this Court to find Clinton suffered prejudice from the exclusion of the minor child's hear statements. By doing so, this Court will maintain uniformity of its decisions and protect long-held legal principles that are integral in the effective application of the law. Furthermore, pursuant to Rule 219(b) of the South Carolina Appellate Court Rules, the State respectfully suggests this Court rehear the matter en banc in order to resolve the lack of uniformity that exists between its decision in Clinton's direct appeal and post-conviction relief appeal. See Rule 219(a), SCACR (explaining "rehearing *en banc* is not favored and ordinarily will not be ordered *except* (1) when consideration by the full court *is necessary to secure or maintain uniformity of its decisions*, or (2) when the proceeding involves a question of exceptional importance") (emphasis added)).

Respectfully submitted,

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May 21, 2024

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Date: Tuesday, May 21, 2024 9:13:00 PM
Attachments: [CLINTON Devatee T. - Reply to Return to P4R \(03585145xD2C78\).pdf](#)

Good Evening –

Please find attached the Reply to the Return to the Petition for Rehearing and Rehearing En Banc in the above referenced PCR appeal to be filed with the Court soon.

If you have any questions, please let me know.

Respectfully,

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