

IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2024-000687

Michael T. Barnes,

Petitioner,

vs.

The State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to object to the State's mischaracterization of key evidence in closing arguments?
- II. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to request a limiting/cautionary instruction in the trial court's charge to the jury based on the State's characterization of key evidence in the State's closing argument?
- III. Whether the PCR Court erred in finding trial counsel was not ineffective for eliciting testimony from a State witness that was not called and ultimately bolstered the State's case?
- IV. Whether the PCR court erred in finding trial counsel was not ineffective for failing to impeach Oliver Nelson with his proffer agreement with the State?

STATEMENT OF THE CASE

Petitioner was indicted by a Charleston County grand jury in April 2006 for one count of murder and one count of attempted armed robbery stemming from an incident on December 23, 2005. App. 464-465; 470-471. Petitioner proceeded to a jury trial in front of the Honorable R. Markley Dennis, Jr., in Charleston County General Sessions Court from November 1st-3rd 2006 where he was represented by the Charleston County Public Defender's Office. He was convicted by the jury on both counts and sentenced to a term of 30 years imprisonment for murder and a term of 15 years imprisonment for attempted armed robbery to be served consecutively, leading to a total term of imprisonment of 45 years. App. 463; 469.

Petitioner filed a direct appeal which was perfected by the South Carolina Commission of Indigent Defense Division of Appellate Defense on March 18, 2008. Appellate counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) and raised one legal issue but stated that the appeal was without legal merit sufficient to warrant a new trial. The South Carolina Court of Appeals dismissed the appeal through an unpublished opinion and the Remittitur was issued on December 1, 2009. *State v. Barnes*, Op. No. 2009-UP-516 (S.C. Ct. App. filed November 12, 2009).

Petitioner filed an application for post-conviction relief (PCR) on January 7, 2011, which was outside the statutory filing period provided by S.C. Code Ann. §17-27-45(a). As a result, Circuit Court Judge Kristi Harrington issued a conditional order of dismissal on March 31, 2011, and gave Petitioner a period of twenty days to state the reasons as to why his PCR application should not be dismissed. App. 433-435. Petitioner, who was *pro se* after Judge Harrington did not appoint him counsel, sent a letter to the Court indicating he had indeed tried to file his PCR application on

November 9, 2010, in the middle of a lockdown period at Lee Correctional Institution that began the day before due to an inmate stabbing an officer on November 8, 2010. App. 436-439. Although he had dropped the application at the prison's mailroom on November 9th, he was not able to actually send out the application until November 18th as the mailroom indicated he had the wrong postage and returned his application to him, and his dormitory was on restricted movement lockdown as a result of the violence until November 16th. App. 436-439.

On November 29, 2010, Petitioner received a letter from the Charleston County Clerk of Court indicating that Petitioner had used the wrong form and that to have his application received and filed, he would have to file it again with a new form. Petitioner did so, but it was received after the statute of limitations period on January 7, 2011. Petitioner responded to the Court within the twenty-day period set by Judge Harrington and in a letter to the Court asserted he had proof as to the veracity of circumstances of the prison lockdown and the issue with the Clerk's Office. However, Judge Harrington signed the conditional order of dismissal of Petitioner's application on March 31, 2011, but the final order of dismissal with prejudice was not signed until May 21, 2015, by Judge Dennis. App. 440-442.

After the 2015 order of dismissal, Petitioner was appointed counsel to file a petition for writ of certiorari which was dismissed by this Court. Undersigned counsel then filed a common law petition for a writ of certiorari in August 2020 seeking permission to file a successive PCR application based on the actions of the Charleston County Clerk's Office. By Order dated June 3, 2021, this Court granted Petitioner's writ and held that Petitioner's application was indeed timely and allowed Petitioner to file an amended PCR application. This Court ultimately found that the Charleston County Clerk's office failed to execute "its ministerial function properly" and

Petitioner was entitled to his “one bite at the apple.” This Court further directed Petitioner to file a successive application within 30 days of the Order, which Petitioner did on June 21, 2021. An evidentiary hearing was held on April 19, 2023, after the State made its Return. The PCR Court, presided over by the Honorable Judge R. Kirk Griffin, issued an Order of Dismissal of Petitioner’s PCR claims which was filed on April 17, 2024. This petition for writ of certiorari follows.

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STATEMENT OF FACTS

Petitioner's conviction stems from the shooting death of Kyle Clark in Charleston County on December 23, 2005. To connect Petitioner to the murder of Clark, the State presented the testimony of the two minor co-Defendants, Oliver Nelson and Quinton Summers.

Nelson stated that he knew Summers and Petitioner from the neighborhood and Petitioner was dating a woman he was familiar with named Skeeter. App. 105. Skeeter was Summers' mother and Petitioner was living with them at the time of the murder. App.105. Nelson stated that while he was not familiar with the victim, Kyle Clark, he was familiar with the other victim, who was a passenger in Clark's truck, Dobry Viera, from seeing him in the neighborhood. App. 105. Nelson testified he was standing outside and a truck with the victims pulled up and they asked him where they could obtain some cocaine. App. 108-109. The victims showed Nelson cash and he left to find Quinton Summers because he "knew that he was probably able to get some coke." App. 110.

Nelson next stated that he saw Summers and Petitioner coming up the street and Petitioner told the victims to pull in between two trailers nearby. App. 111-112. Nelson then stated that Petitioner gave him and Summers a gun. App. 113. Summers told Nelson that they were going to rob the two men and Nelson, Summers, and Petitioner all had their guns out. App. 115-116. Nelson then testified that when the victims pulled out the money and asked for cocaine, Petitioner "pulled out the gun and he and the dude started tussling...". App. 117. From further prompting by the State, Nelson then clarified that the "dude" was Dobry Viera, who ended up running away. App. 117. According to Nelson, Kyle Clark, who was driving, started to back up the truck and drive away and he heard two-gun shots ring out. App. 117-118. Nelson stated he did not fire the gun, nor did he see who fired it. App. 118. On cross examination, Nelson stated that he never saw Petitioner use

his gun or strike the victim with it during the fight. App. 125. Trial counsel further elicited the fact that Nelson was being prosecuted in family court as a juvenile, rather than in general sessions court as an adult. App. 132-133.

Quinton Summers also testified that he was out selling narcotics when he received a call from Nelson stating that there was a man in the trailer park with a lot of money. App. 153-154. Summers stated that he met up with Nelson and they went to find Petitioner and the plan was for the three of them to rob the victims. App. 155. Summers said that he had a black .22 automatic firearm, Nelson had a revolver, and Petitioner had a .38 caliber firearm. App. 156-157. Summers testified that Petitioner gave him and Nelson the firearms. App. 157. Summers stated no plan was formed as to robbing the victims. App. 157- 159. According to Summers, Petitioner then “popped [Dobry Viera] on the head with the gun” when the cocaine was being exchanged. App. 159. Summers then stated that Viera ran away and Kyle Clark, when trying to escape in the truck, almost hit him and Summers shot at the door of the truck. App. 160. Summers stated that Petitioner shot, but he saw nothing else because he was running away. App. 161. On cross examination, Summers also stated that he was being prosecuted in family court rather than general sessions court as an adult. App. 167-169.

Petitioner testified in his own defense and equivocally stated he did not shoot, pull out his gun, which he stated was a nine-millimeter, or try to rob anyone. App. 303. He stated that Summers and Nelson came to him and told him the two victims wanted to buy some cocaine. App. 305. Petitioner stated that an altercation broke out after one of the victims, Dobry Viera, was given the cocaine but did not hand over the money as discussed. App. 308. Petitioner then testified that while he and Viera were fighting, Summers and Nelson took their guns out. App. 308. An individual in

the neighborhood where the altercation took place stated they were going to call the police and as a result, Petitioner stated he ran and did not fire the gun he was carrying. App. 310-311. Petitioner then denied that he admitted to anyone he fired a shot. App. 316.

ARGUMENTS

I. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to object to the State's mischaracterization of key evidence in closing arguments?

The PCR court erred in holding that trial counsel was not ineffective when counsel failed to object to the State's mischaracterization of key evidence during the closing arguments. A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "In order to prove counsel was ineffective, the [Petitioner] must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 648-649 (2008) (citing *Strickland v. Washington*, 566 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* "Moreover, 'when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)) (internal quotation marks and citations omitted).

In reviewing PCR cases, this Court has noted: "[o]ur standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018)

(citations omitted). “The Court will reverse the PCR court’s decisions when it is controlled by an error of law.” *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

When examining claims based on counsel’s failure to object, this Court will accord “a favorable presumption” to Counsel’s performance and will “proceed 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*, 466 U.S. at 690, 104 S.Ct. 2052)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Id.* When counsel does not articulate a valid reason for failing to object, they will be found to be ineffective. *Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (overruled on other grounds).

Here, trial counsel was ineffective for failing to object to the State’s contention that the fatal bullet that killed Mr. Clark was a .380 caliber and it was Petitioner who fired the gun without corroboration. The State specifically argued in trial:

“I don’t know what kind of guns they had, I don’t know if they all had nine millimeters, for all I know they all had .380’s. He thought he was getting out of it by saying he had a nine. I don’t know what he had. But all we know is that he had the only gun that would fire an automatic, based on the statements and testimony of each (Summers and Nelson). That was the gun, that was the projectile, the bullet that went through Kyle Clark’s head. Those are the reasons that we think that you can be comfortable that Michael Barnes being the shooter.”

App. 363-364.

It is clear that State had no idea which of the three co-defendants had what gun and which of the guns could fire a .380 cartridge and which ones actually did. The State’s closing argument augments the actual evidence to such a degree that it is impermissible. Trial counsel failed to render

effective assistance by allowing the State to put forth such a mischaracterization of evidence and that mischaracterization inevitably prejudiced the defendant. Trial counsel had an affirmative duty to object to this argument and request a curative instruction during the State's closing argument. *See State v. White*, 371 S.C. 439, 639 S.E.2d 160 (Ct. App. 2006) (holding that generally a curative instruction can cure an alleged error). The State's argument effectively pushed the jury to find Petitioner was the fatal shooter when no testimony was presented corroborating such an assertion.

The PCR Court committed an error of law in finding trial counsel was not ineffective for failing to object to such an assertion. This Court will reverse a decision by 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).

II. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to request a limiting/cautionary instruction in the trial court's charge to the jury based on the State's characterization of key evidence in the State's closing argument?

Trial counsel's failure to request a limiting or cautionary instruction based on the State's mischaracterization of the firearm evidence constituted ineffective assistance of counsel and the PCR Court erred in finding otherwise.

Cautionary instructions, when requested, can be used by the trial court to "correct the ascertained damage" of the impermissible evidence or testimony on the jury. *State v. Aldert*, 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999) (quoting *United States v. Resko*, 3 F.3d 684, 695 (3rd Cir. 1993)).

The State was allowed to put forth arguments that were uncorroborated by testimony and without any reasonable inference. The State's closing argument was one of the last things that entered the jury's mind before deliberations and such a mischaracterization of important evidence

such as the firearm analysis was undoubtedly prejudicial. Any reasonably competent attorney would have requested a limiting instruction based on these events. Trial counsel's failure to do this constitutes ineffective assistance of counsel and the outcome of the trial likely would have been different had such a limit been put on the jury's consideration of the State's mischaracterizations.

The PCR Court committed an error of law in finding trial counsel was not ineffective for failing to request a limiting/cautionary instruction. Although this Court will defer to a PCR judge's finding of fact, it will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012). That occurred here and this Court should reverse Barnes's conviction and sentence and remand for a new trial.

III. Whether the PCR Court erred in finding trial counsel was not ineffective for eliciting testimony from a State witness that was not called and ultimately bolstered the State's case?

Trial counsel rendered ineffective assistance of counsel when she called and elicited testimony of a witness—firearms examiner Agent Paavel—that ultimately bolstered the State's case against Petitioner. The PCR Court erred in finding otherwise.

Both Oliver and Summers gave different descriptions of Petitioner's weapon. Nelson said that Petitioner had, although he was not completely sure, a ".380 army edition." App. 114-115. Summers said Petitioner had a .38 caliber weapon. Tr. 157. Nelson and Summers gave different descriptions of the firearm and the State's case was premised on the fact that the .380 cartridge could also be fired from a nine-millimeter handgun which Petitioner admitted to possessing. Agent Paavel then corroborated that fact at trial counsel's prompting.

Eliciting testimony hurtful to a client is ineffective assistance of counsel and is not a valid trial strategy. Clearly Petitioner was harmed by counsel's ineffectiveness because Agent Paavel was an

expert and juries often afford great weight to the testimony of experts, although they are not required to. *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009).

The PCR court committed an error of law in finding trial counsel was not ineffective for eliciting such testimony from Agent Paavel. Although this Court will defer to a PCR judge's finding of fact, it will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012). That occurred here and this Court should reverse Barnes's conviction and sentence and remand for a new trial.

IV. Whether the PCR court erred in finding trial counsel was not ineffective for failing to impeach Oliver Nelson with his proffer agreement with the State?

Trial counsel was ineffective for failing to use the proffer agreement to impeach a key witness. The proffer agreement was known to trial counsel at the time of trial and its use would have assisted the defense of Petitioner. The PCR Court's finding to the contrary was in error.

"A proffer agreement is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a proffer session. *United States v. Lopez*, 219 F.3d 343, 345 n.1 (4th Cir. 2000) (internal citations and quotations omitted). "The proffer agreement defines the obligations of the parties and is intended to protect the defendant against the use of his or her statements, particularly in those situations in which the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement or other form of cooperation agreement." *Id.* "It is generally recognized that proffer agreements are to be construed in accordance with the principles of contract law." *State v. Wills*, 409 S.C. 183, 196, 762 S.E.2d 3, 9 (2014) (Beatty, J., dissenting). "Specifically, proffer agreements,

like plea agreements ‘are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguard obtain.’” *Id.* at 10. (quoting *United States v. Parra*, 302 F.Supp.2d 226, 236 (S.D.N.Y. 2004)). Generally, if a proffer agreement unambiguously provides that a defendant’s statement can be used against them by the State if the State determines the defendant is untruthful, the proffer agreement can be used to impeach the defendant should they testify at trial. *State v. Wills*, 390 S.C. 139, 145, 700 S.E.2d 266, 269 (Ct. App. 2010).

In its Order of Dismissal, the PCR Court found that the proffer agreement with Oliver Nelson would not have been valuable impeachment evidence because the State made no promises to Nelson as to how they would prosecute him for his involvement in the murder. App. 572-573. However, the agreement between Nelson and the State notes that Nelson must be truthful in his statements and “testify fully and truthfully at any trials”, and if not, “the State may use for any purpose any statements made and other information provided by [Defendant] in the prosecution of [Defendant] on any charges.” From that, it is logical to assume that Nelson had a vested interest in testifying against Petitioner and that same testimony resulted in his prosecution as a minor, rather than in adult court where he would have been facing a possible life sentence for murder.

Nelson was one the two key witnesses at trial. He and Summers were the only witnesses that could testify as to Petitioner’s involvement and that he shot his weapon. Any reasonable attorney would want to display to the jury that such a witness as Nelson was obviously biased and self-serving in pointing the finger at their client. Trial counsel admitted at the PCR hearing that using the proffer agreement to impeach Nelson would have been helpful to Petitioner’s case and would have tended to suggest that there was an agreement between the State and Nelson that he would testify to the facts that he did. App. 548. Trial counsel’s failure to impeach Nelson in this manner

was ineffective and she did not articulate any valid reason as to why she did not bring it up. Her ineffective performance prejudiced Petitioner by failing to give the jury valuable information about a biased witness.

The PCR Court committed an error of law in finding trial counsel was not ineffective for failing to impeach Nelson with his proffer agreement. Although this Court will defer to a PCR judge's finding of fact, it will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 726 S.E.2d 1 (2012). That occurred here and this Court should reverse Barnes's conviction and sentence and remand for a new trial.

CONCLUSION

Petitioner therefore requests the Court grant the petition for a writ of certiorari and ultimately grant Petitioner a new trial.

Respectfully submitted,

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