STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Barnwell County
Paul M. Burch, Circuit Court Judge

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S.C. Supreme Court

William Allen Owens,

Petitioner,

vs.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

The PCR court did not err in denying the PCR application based on counsel's failure to object to closing argument where the prosecution's closing argument was based on evidence in the record, counsel made a reasonable strategic decision not to object, and Petitioner was not prejudiced by the alleged deficiency of counsel.

STATEMENT OF THE CASE

Petitioner Owens was tried and convicted of murder and possession of a weapon during a violent crime on December 4, 2008, following a four day trial. The Honorable Judge Doyet A. Early, III, sentenced Owens to life imprisonment for murder and a consecutive sentence of five years imprisonment for the weapons charge. Owens appealed and the appeal was dismissed following review pursuant to Anders v. California, 386 U.S. 738 (1967).

Owens filed an application for post-conviction relief on September 16, 2011. A hearing was held on July 10, 2012 before the Honorable Paul M. Burch at the Aiken County Courthouse. Judge Burch denied the PCR application by order dated August 19, 2011.

STATEMENT OF FACTS

Victim was a preacher and avid fisherman killed by Owens. Joe Allen James testified he knew Victim and often saw him fishing down at the river landing where Victim was found murdered. James saw Victim fishing by the river at 7:15 p.m. on July 6, 2007, the night Victim was murdered. App. p. 139. The pathologist testified that Owens was shot at close range, the gun was only three to six inches away when discharged into the back of Victim's head. App. p. 519.

Robert Williams went fishing with his eleven-year-old son at about four or five p.m. that day. They brought Catawba worms for bait because that was the best bait to use during that time of year. He fished with his son by the river for a few hours before loading his boat and giving his worms to a black gentleman who was fishing while sitting on a white bucket by the riverside. As Williams left, he saw a white male fitting Owens' description come down to the river from the parking lot. The white male did not seem dressed or equipped for fishing or swimming. App. pp. 153-172. Victim was found murdered later that night by a neighbor after Victim's wife became worried that he had not yet returned by 10:30 p.m. App. pp. 204-208; pp. 217-221.

Renee McKinney, Owens' live-in girlfriend, testified Owens returned home with two white buckets, some kind of worms she never saw before, and a dead rabbit. Owens told her the worms were Catawba worms. He told her he "just found out what it was like to be a real man – that [Owens] had just blew a black man's head off and picked him up and threw him in the water." App. pp. 313, lines 5-17. Owens had blood on his t-shirt and boot. App. p. 313. Since Owens said crazy things all the time, McKinney thought he was putting her on at that point. App. p. 314.

Owens skinned the rabbit with the kids. Owens and McKinney left the kids with McKinney's sister to buy cocaine – Owens made a phone call to pick some up from his man. App. pp. 314-315.

Later, she smelled something burning and asked Owens what it was. He told her he had just burned the black man's wallet. App. p. 319. He changed his clothes, put them in a black trash bag and left the house with the trash bag. App. pp. 320-321.

Law enforcement later recovered several white buckets from Owens' premises along with a cricket box containing Catawba worms. App. pp. 541-542. Owens also had men's jewelry McKinney never saw before. He put the jewelry in a pink bag McKinney owned. App. pp. 322-324. Victim's jewelry was missing when he was found dead. He also would have had several hundred dollars in cash received as payment for some freelance house repairs he did. App. pp. 208-209. Jeanette Sweat, McKinney's sister, later found the pink bag with jewelry in it. App. p. 415; pp. 454-455. However, Victim had $380 in his pocket when he was found. App. p. 517.

After Owens and McKinney picked up the cocaine, they rode across a bridge where they saw the flashing lights of emergency vehicles. Owens slowed down to where a black man stood on the side of the road. Owens and the black man just looked at each other. McKinney testified this was when she realized Owens really did kill someone. App. pp. 331-332. McKinney fled with the children to Maryland. She was charged with murder and extradited from Maryland. Her charge was later reduced to accessory after the fact to murder. App. p. 342; p. 350.

After Owens argued over the phone with McKinney while she was still in Maryland, Owens told his cousin, Susan Miles Lucado, that he shot a man and threw him

into the river. He said he was not going back to the jail and started talking about the devil. During the phone conversation, he called McKinney a rat and a narc. App. pp. 616-618.

Victim's widow was recalled to the stand and she identified the jewelry from the pink bag as jewelry belonging to Victim. App. pp. 630-631.

ARGUMENT

The PCR court did not err in denying the PCR application based on counsel's failure to object to closing argument where the prosecution's closing argument was based on evidence in the record, counsel made a reasonable strategic decision not to object, and Petitioner was not prejudiced by the alleged deficiency of counsel.

Petitioner Owens argues the PCR court erred in finding counsel was not ineffective for not objecting to the prosecution's closing argument. The prosecution suggested Owens' murder victim was kneeling and praying when he was shot. However, probative evidence supports the PCR court's finding that counsel was not ineffective because the closing argument was based on a reasonable inference from evidence in the record, trial counsel exercised reasonable trial strategy in not objecting, and Owens was not prejudiced by the alleged deficiency.

Owens alleges counsel was ineffective for failing to object to the following portion of prosecution's closing argument:

> I dare say he was executed. Why? Because the distance between the weapon and his head was three to six inches, and it was straight through his head, and it was with a high velocity weapon that took out his brain stem and brain pons and half the front of his face. That is execution. And what is he trying to tell you? He [is] trying to tell you, I am not sitting on the fishing bucket. That's too far, but I could have been on my knees. I was bent where it didn't get in my lap. I was bent, and I fell right there.
>
> I dare say that Defendant executed Reverend McCreary. He was on his knees and I dare say Reverend McCreary was praying. He was executed, and, you know, what does he[, Owens,] do? Somehow he has a rabbit. He could have got it right down there at the river because he collects that kind of stuff.

App. p. 667, lines 11-25.

At trial, the crime scene expert testified as follows:

> . . . the victim was bent at the waist and we can tell that from the lack of spatter from here at the waistline to about the inseam area. There is no spatter there, and if you look at the photos there is spatter on his legs. There is spatter on his chest which would tell me he was sitting **or kneeling** or at least bent over at the waist at the time he was shot.

App. p. 495, lines 6-14 (emphasis added).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). The proper measure of attorney performance is reasonableness under professional norms. Id. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

The solicitor's closing argument is permissible where it stays within the record and reasonable inferences from it. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002).

State v. Condrey, 349 S.C. 184, 562 S.E.2d 320, 325 (Ct. App. 2002) ("A trial judge is allowed broad discretion in dealing with the range and propriety of closing argument to the jury.").

In the instant case, there was forensic evidence suggesting Victim, a preacher, was kneeling when he was shot, execution style. A reasonable inference is that he was praying, but more to the point, he was shot with malice aforethought. At the PCR hearing, counsel disagreed with PCR counsel that the argument was excessively inflammatory and would raise passion and prejudice before the jury. App. p. 776, lines 1-10. Accordingly, counsel was not ineffective because the argument was not objectionable, contrary to Owens' contention.

Further, Counsel testified he did not think the argument was objectionable and he would not have objected as a matter of strategy. When asked whether he could have made an objection to the closing argument, counsel answered "No – well, I could object to anything." App. p. 776, lines 11-13.

Counsel testified further on this point:

> Reverend McCreary was shot in the back of the head, whether he was kneeling, sitting on the bucket, it didn't make any difference. You know the fact is he was shot in the back of the head. It is reasonable to assume that the person who's about to be shot in the back of the head would be praying. So I didn't think it was necessary or important to call that to the jury's attention. Sometimes you just don't want to get into things, you know, that could inflame the jury, you know, even more. Sometimes you just don't want to emphasize things by having it repeated.

App. p. 776, line 24 – p. 777, line 8.

This is valid trial strategy. Where counsel articulates a valid trial strategy,

counsel's performance will not be deemed ineffective. State v. Caprood, 338 S.C. 103, 525 S.E.2d 514 (2000). As the Missouri Supreme Court sagely noted: "In many instances, seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good." Deck v. State, 381 S.W.3d 339, 356 (Mo. 2012). In the instant case, counsel made a reasonable strategic decision to not object to the extent the argument was even objectionable. Accordingly, the PCR court did not err in finding counsel's performance was not deficient.

Further, Owens was not prejudiced in light of the abundant evidence of guilt. Owens bragged about the murder to his girlfriend, his girlfriend's sister found the hidden jewelry that Owens took from his dead victim, and Owens told his cousin in a fit of delirious anger about how he killed a man. Owens is tied to the murder by the Catawba worms found in his home that his fisherman-victim so thankfully received from witness Robert Williams.

The PCR court's findings will be affirmed if supported by probative evidence. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In the instant case, abundant evidence supports the PCR court's findings and the petition for writ of certiorari should be denied.

CONCLUSION

For the above stated reasons, the petition should be denied. If this Court sees fit to grant the petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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October 16, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County

The Honorable Paul M. Burch, Circuit Court Judge

WILLIAM ALLEN OWENS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Wanda H. Carter
Division of Appellate Defense
Post Office Box 11589
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This 16th day of October, 2013

CAROLINE KAISER
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 16 2013
S.C. Supreme Court

October 16, 2013

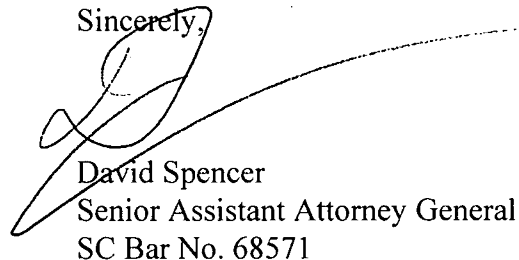
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **<u>William Allen Owens v. State of South Carolina</u>**
Appellate Case No. 2012-213147

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



David Spencer
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DS/ck
Enclosures

cc: Appellate Defender Wanda H. Carter (2 copies)