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STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

CERTIORARI TO CLARENDON COUNTY
Court of Common Pleas
The Honorable Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2025-001998

Jeremiah Smith, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

1. Did the PCR judge err in refusing to find prejudice resulting from trial counsel's failure to renew the objection to the identification testimony at trial after the judge, pre-trial, refused to suppress the identification as unnecessarily suggestive and unreliable?
2. Did the PCR judge err in refusing to find prejudicial error resulting from trial counsel's failure to object and seek a curative instruction when Petitioner's sister testified the gun used in the shooting could not have been used by her brother because she had misplaced the gun before Petitioner came home from prison?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court properly found Petitioner was not prejudiced by Counsel's failure to renew his pre-trial objection to the photographic lineup, where the trial court correctly ruled that the lineup procedure was not unduly suggestive and where the witness knew Petitioner personally.
2. The PCR court properly found Petitioner was not prejudiced by Counsel's failure to object when a defense witness briefly referred to Petitioner's previous imprisonment, where Petitioner was identified as the shooter by multiple eyewitnesses at trial, including the victim.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On the one hand, pure questions of law are reviewed *de novo* without deference to the lower court. *Id.* at 180–81, 810 S.E.2d at 839–40. On the other hand, the lower court’s findings of fact receive great deference during appellate review and will be upheld if “any evidence of probative value” exists in the record to support those findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

1. **The PCR court properly found Petitioner was not prejudiced by Counsel's failure to renew his pre-trial objection to the photographic lineup, where the trial court correctly ruled that the lineup procedure was not unduly suggestive and where the witness knew Petitioner personally.**

Petitioner was charged with attempted murder following the shooting of Breshaun Pendergrass ("Victim") outside Browntown Social Club during the early morning hours of December 20, 2014. Prior to trial, Petitioner's attorney, Timothy Griffith, Esq. ("Counsel"), moved to suppress evidence that one eyewitness, Cindy Calvin, identified Petitioner as the shooter from a photographic lineup. A *Neil v. Biggers*¹ hearing was held, during which Calvin testified that she knew who Petitioner was prior to the shooting. At the conclusion of the hearing, the trial court ruled that the evidence was admissible because the photographic lineup was not an unduly suggestive identification procedure. During trial, when Calvin was examined about the photographic lineup, Counsel failed to renew his pre-trial objection.

Petitioner now argues that he was prejudiced by Counsel's failure to renew his pre-trial objection and thereby preserve the issue for appellate review. Although the trial court denied Counsel's pre-trial motion, Petitioner argues the trial court's ruling would likely have been reversed by the appellate court if the matter had been properly preserved.

In *Neil v. Biggers*, the United States Supreme Court addressed "the scope of due process protection against the admission of evidence deriving from suggestive identification procedures." 409 U.S. 188, 196 (1972). When identification evidence is challenged under *Biggers*, the trial court must first determine whether the police used an unnecessarily suggestive identification

¹ 409 U.S. 188 (1972).

procedure; if so, the trial court must then determine whether the witness's identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Warner*, 436 S.C. 395, 406, 872 S.E.2d 638, 643 (2022) (citing *State v. Wyatt*, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017), and *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). “Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.” *Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).

Citing the five-factor reliability test discussed in *Liverman*, Petitioner now argues Calvin's identification of Petitioner from the photographic lineup was “so unreliable that a substantial likelihood of misidentification existed.” (Pet.p.10). However, the reliability factors only come into play *after* the trial court determines that “the identification resulted from unnecessary and unduly suggestive police procedures.” *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426. “The due process check for reliability . . . comes into play only *after* the defendant establishes improper police conduct.” *Perry v. New Hampshire*, 565 U.S. 228, 241 (2012) (emphasis added).

“[T]he potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair[;] . . . the jury, not the judge, traditionally determines the reliability of evidence.” *Id.* at 245. “The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.” *Id.*

In this case, the trial court ruled the evidence was admissible because the photographic

lineup was not an unduly suggestive police procedure: “I do not find, based on what I’ve heard here today, that there was any unduly suggestive identification procedure.” (App.p.90, lines 15–17). Even if Counsel *had* properly preserved his objection to the photographic lineup by renewing his objection during trial, he would *still* have had to prove that Calvin’s identification of Petitioner as the shooter resulted from unnecessary and improperly suggestive police conduct.

Petitioner asserts, in a conclusory fashion, that “the photographic lineup was an unduly suggestive identification arranged by law enforcement.” (Pet.p.10). However, he has not bothered to articulate any support for this assertion. Instead, he argues at length about the supposed unreliability of Calvin’s testimony—but this argument concerns only the second prong of the *Biggers* analysis. See *Perry*, 565 U.S. at 241 (“The due process check for reliability . . . comes into play only *after* the defendant establishes improper police conduct.”). Petitioner has not even attempted to carry his burden of proof as to the first prong of the *Biggers* test.

Moreover, Petitioner’s reliability analysis is fatally flawed for the simple reason that Calvin *already knew who Petitioner was* at the time of the shooting. “[T]he fact that an identification witness knows the accused remains a significant factor in determining reliability.” *Liverman*, 398 S.C. at 141, 727 S.E.2d at 427. In such circumstances, a police identification procedure that would be “normally considered unduly suggestive” should instead be viewed “as merely confirmatory.” *Id.* at 142. In *Liverman*, this Court took into account the fact that the witness was already familiar with the accused before the police administered an allegedly suggestive “show-up” procedure; in light of this fact, the Court held that the trial court’s improper refusal to hold a *Neil v. Biggers* hearing was harmless beyond a reasonable doubt. *Id.* at 142–44.

In this case, as Petitioner acknowledges, Calvin testified that she knew who Petitioner was at the time of the shooting. Even if there had been some impropriety in law enforcement’s use of

a photographic lineup—which, again, Petitioner has not even tried to establish—it is clear that Calvin’s identification of Petitioner as the shooter “was nonetheless properly admitted as it had an independent origin.” *Id.* at 142. Even if Counsel had properly preserved his pre-trial objection to the admissibility of the photographic lineup testimony, it would have made no difference; the trial court was correct to rule that the testimony was admissible.

Therefore, the PCR court did not err in concluding Petitioner failed to prove Counsel was ineffective on this ground. This Court, accordingly, should deny the petition for a writ of certiorari as to this issue.

2. The PCR court properly found Petitioner was not prejudiced by Counsel’s failure to object when a defense witness briefly referred to Petitioner’s previous imprisonment, where Petitioner was identified as the shooter by multiple eyewitnesses at trial, including the victim.

During Petitioner’s trial, Counsel called Petitioner’s sister, Sierra Smith, as a defense witness to testify that Cindy Calvin had a “beef” against Petitioner’s family. On cross-examination, the solicitor asked Ms. Smith whether she ever owned a “380 Cobra,” the type of gun another witness said Petitioner was carrying on the night of the crime. (App.p.312, line 13–p.313, line 11). Ms. Smith replied that she had a gun “before my brother came home from prison,” but she misplaced it when she moved to Winter Hill. (App.p.312, line 16–p.313, line 15). The solicitor then asked, “When did he come home from prison?” (App.p.313, line 21). Smith responded that she wasn’t sure of the date, but she believed he came home “around that time, 2014, end of 2013.” (App.p.313, lines 22–24). The solicitor then stated, “So your brother had just recently come home from prison—” when Counsel objected. (App.p.313, line 25–p.314, line 4). The court asked the lawyers to approach, and a bench conference ensued. (App.p.314, lines 5–6). Afterward, the solicitor resumed asking the witness about the timeline of her brother coming home and the gun going missing; Smith responded that the gun went missing “before he even got released

from prison.” (App.p.314, lines 7–14).

Petitioner argues Counsel was ineffective for failing to object immediately when the witness first mentioned Petitioner having been in prison. Petitioner also contends Counsel should have requested a curative instruction to remove the prejudice from the witness’s discussion of Petitioner’s history of imprisonment. The PCR court agreed that Counsel was deficient for not requesting a curative instruction, but found Petitioner suffered no prejudice due to “the strength of the evidence against him.” (App.p.512).

Petitioner now argues the PCR court erred in finding he was not prejudiced because “the State did not present overwhelming evidence of guilt.” (Pet.p.14). However, in post-conviction relief proceedings, the State does not bear the burden of proof. Rather, the burden is on Petitioner to prove the allegations in his PCR application. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP; *see also Strickland v. Washington*, 466 U.S. 668, 693 (1984) (“[C]laims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.”).

To support a finding of prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.” *Id.* at 695–96.

“In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. . . . In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). “[T]he strength of the State's case . . . is one significant factor the [PCR] court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice.” *Id.* at 190, 810 S.E.2d at 844.

“Overwhelming evidence” of guilt is not necessary to defeat a claim of ineffective assistance; even in cases where the evidence is concededly not overwhelming, the applicant still bears the burden of proving prejudice from Counsel’s allegedly deficient conduct. *See, e.g., id.* at 195, 810 S.E.2d at 847 (“Because we find the evidence is *not overwhelming*, Smalls’ individual claims of deficient performance must be analyzed separately to determine whether either of them gives rise to a reasonable probability the result of the trial would have been different without counsel’s error.”) (emphasis added).

Here, the PCR court did not find that the evidence of Petitioner’s guilt was “overwhelming.” Nevertheless, it properly found that the strength of the State’s evidence defeated any possibility of prejudice from Counsel’s failure to address Smith’s testimony about Petitioner’s history of imprisonment. The PCR court summarized the “relevant facts” from the trial, which included Petitioner’s identification as the culprit by Victim, who stated Petitioner shot him in the back from only “three to five feet away”; by Fritz Aguon, who testified he saw Petitioner pull out a gun and shoot the victim; by Shandara Abraham, who stated Petitioner and Victim were the only two people in the vicinity of the shot; and by Cindy Calvin, who identified Petitioner as the shooter and testified that she saw Petitioner and Victim talking immediately before she heard the shot and

saw Victim fall to the ground. (App.pp.503–04).

The mere fact that Petitioner had once been imprisoned, though unflattering, was not likely to have “moved the needle” in the jury’s assessment of his guilt compared with the testimony of so many eyewitnesses. Rather than “altering the entire evidentiary picture,” the fact of Petitioner’s prior imprisonment had at most an “isolated, trivial effect” on the overall trial. *Strickland*, 466 U.S. at 696. Accordingly, the PCR court reasonably determined that the eyewitness testimony presented at trial was sufficiently strong that it rendered insignificant any potential prejudice that might have resulted from Ms. Smith’s brief references to Petitioner’s former incarceration. This finding is clearly supported by substantial evidence in the record and is entitled to deference.

Therefore, this Court should deny the petition for a writ of certiorari.

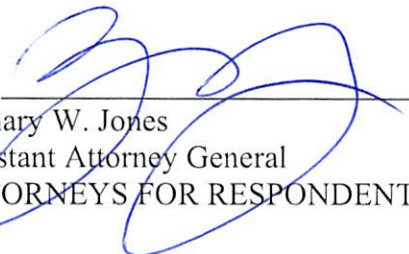
CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari.
Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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