

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-00131

RECEIVED

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S.C. Supreme Court

Travis Parker, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective for failing to contemporaneously object to testimony regarding the victim's dying declaration, when Petitioner failed to establish any resulting prejudice?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Cherokee County Clerk of Court's orders of commitment. The Cherokee County Grand Jury indicted the Petitioner at the October 2007 term of General Sessions for murder (07-GS-11-1212). Thomas E. Shealy, Esquire, represented the Petitioner at trial. On August 13, 2008, a jury convicted the Petitioner of this charge. The Honorable Roger L. Couch sentenced the Petitioner to confinement for life without parole.

A timely Notice of Appeal and Anders brief were filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Parker, Op. No. 2010-UP-144 (filed February 23, 2010). The Remittitur was returned on March 12, 2010.

The Petitioner subsequently filed a PCR application on November 2, 2010. The Respondent made its Return on or about December 12, 2011. An evidentiary hearing into the matter was convened on September 4, 2012, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Ernest Hamilton, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing, The Honorable J. Derham Cole denied the PCR application by written Order dated December 7, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **The PCR Court properly held that Counsel was not ineffective for failing to contemporaneously object to testimony regarding the victim’s dying declaration, when Petitioner failed to establish any resulting prejudice.**

Petitioner was charged with murder following the shooting death of victim, Maraine Foote. Following a jury trial, Petitioner was convicted and received a sentence of life without parole. Petitioner alleges that Counsel failed to properly object to and preserve the issue for appeal of the inadmissibility of the victim’s statement identifying Petitioner as the murderer. (App. p. 283-4). Respondent notes that testimony in support of this allegation at the PCR hearing was general at best, with Petitioner making the brief statement, “no, my lawyer didn’t object to that.” (App. p. 521).

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that “Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Counsel made a motion in limine to have the victim's statement identifying the Petitioner as the murderer excluded based upon three grounds: first, that the identification was tainted; second, that the statement was not a dying declaration; and third, the prejudicial value of the statement outweighs the probative value. (App. p. 51-54). A pre-trial hearing was held, with the State presenting as witnesses the police officer on the scene, two paramedics who responded to the scene, and a bystander. (App. p. 55-72). The defense presented one witness, the victim's widow. (App. p. 72-76). The State argued that both the dying declaration and excited utterance exception applied to the victim's statements at the scene and in the ambulance. (App. p. 78, lines 10-25; p. 79, lines 1-22). Following State and defense arguments, the court denied the motion and allowed the statements to come in. (App. p. 80, lines 12-13).

During trial, Sedrick Littlejohn, the witness who called 911 to report the shooting, testified that he heard the victim telling the police officer, “Dick Parker, Dick Parker shot [me].” (App. p. 194). Counsel cross-examined Littlejohn and pointed out the fact that the alleged statements the victim made regarding “Dick Parker” were not heard on the 911 tape. (App. p. 197). Counsel also highlighted the inconsistencies with Littlejohn’s testimony that the victim could not talk because he was spitting up blood, but then supposedly made these statements. (App. p. 198).

Officer Ken Taylor, the first responder to the scene, then testified that when he asked the victim if he knew who shot him, the victim initially stated, “Parker from Blacksburg.” (App. p. 205, lines 3-4). Taylor relayed that information over his radio, at which time the dispatcher responded by saying “could it possibly be a Travis Parker?” (App. p. 206). Taylor stated that the victim heard the dispatcher and responded with “yes, that’s him.” (App. p. 206, line 8). Counsel cross-examined Taylor as to the fact that Littlejohn never indicated to Taylor that the victim stated “Dick Parker” and Taylor never heard the victim use the word “Dick.” (App. p. 210).

David Swank, paramedic, testified that when he arrived and found the victim with a gunshot wound to his abdomen, he assisted in getting the victim on a board and in the truck. (App. p. 214). Swank testified that the victim was upset and kept stating that he could not breathe. (App. p. 215). Swank also testified that once the victim was in the truck, he continued to state that he could not breathe and “he was dying, he was going to die.” (App. p. 216, lines 4-12). The victim also told Swank that the shooter was “Parker,” and when asked which Parker, the victim responded with “Travis Parker” and later “From Open Air.” (App. p. 216, lines 17-18; 22). Swank confirmed that he never heard the victim say the name “Dick Parker.” (App. p. 221, lines 14-16; p. 222, lines 5-8).

Respondent submits that the PCR court was correct in finding that Counsel was not ineffective in his failure to make a contemporaneous objection to the victim's statements as a dying declaration. The hearsay exception when the declarant is unavailable to testify applies to statements when, "[i]n a prosecution for homicide or in a civil action or proceeding, a statement [is] made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Rule 804, SCRE. It is clear from the statements made and the arguments made, that the statements were properly admitted as dying declaration exceptions to the hearsay rule. The three requirements for the dying declaration hearsay exception to apply are: 1. death must be imminent at the time the declarations in question are made; 2. the declarant must be so fully aware of this as to be without any hope of life; 3. the 'subject of the charge' must be the death of the declarant, and the circumstances of the death must be the subject of the declarations. State v. Bethea, 241 S.C. 16, 21, 126 S.E.2d 846, 848-49 (1962) (citing State v. Johnson, 26 S.C. 152, 1 S.E. 510, 512 (1887)). Further, "determination by the trial court of the preliminary facts, on which the competency of a dying declaration depends, will not be disturbed on appeal 'unless clearly incorrect and prejudicial.'" Id. Respondent submits that even if Counsel made a contemporaneous objection during trial to the statements made by the victim to police and paramedics to preserve the issue for appeal, the court would have overruled the objection and that ruling would not have been overturned on appeal.

Additionally, as argued by the State, Respondent submits the excited utterance hearsay exception would provide additional grounds to support the introduction of the victim's statements. An excited utterance is considered an exception to the hearsay rule when [the] statement relating to a startling event or condition [is] made while the declarant was under the

stress of excitement caused by the event or condition. Rule 803, SCRE. The exception applies because the courts recognize that an “excited utterance expresses the real belief of the speaker because the utterance is made under the immediate and uncontrolled domination of the senses, rather than under reason and reflection.” State v. McHoney, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001).

Furthermore, two additional witnesses, Nicole Thompson and Jarvis Thompson (unrelated), testified that Petitioner shot a gun from inside of Nicole’s car as they passed the location of the victim. Specifically, Nicole testified that she was driving the car, when Petitioner hung out of the window and shot a gun, then had her drop him off near the Open Air Trailer Park. (App. p. 109-113). Nicole testified that after she dropped Petitioner and the other passenger off, she immediately went to the Blacksburg Police Station to report the shooting. (App. p. 114, lines 9-25; p. 115-116). Jarvis testified that as Jarvis rode in the backseat of the car, Petitioner took his hat and shirt off, rolled down the front window and shot out. (App. p. 154, lines 22-25; p. 168, lines 17-19). Jarvis also testified that Petitioner stated if “[victim] wasn’t dead, [Petitioner] was gonna turn around and make sure [victim] was dead.” (App. p. 156, lines 2-4). Therefore, Petitioner was not prejudiced by any alleged deficient representation because there was overwhelming evidence of the Petitioner’s guilt. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991).

Because of the two valid exceptions to the hearsay rule and overwhelming evidence, even if Counsel was deficient in failing to contemporaneously object to the statements of the victim, the Petitioner failed to demonstrate any prejudice suffered as a result. Respondent submits that

the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By: 
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January 14, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Circuit Case No.: 2010-CP-11-0860
Appellate Case No.: 2013-000131

TRAVIS PARKER,

Petitioner,

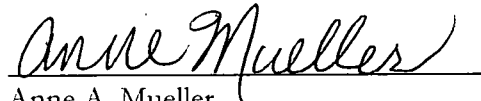
v.

STATE OF SOUTH CAROLINA,

Respondent.

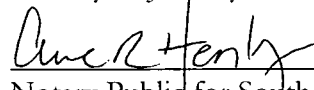
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, David Alexander, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 14th day of January, 2014.



Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
14th day of January, 2014.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 7/18/2014



ALAN WILSON
ATTORNEY GENERAL

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January 14, 2014

Via Hand Delivery

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

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JAN 14 2014

**RE: Travis Parker v. State of South Carolina
Circuit Court Case No: 2010-CP-11-0860
Appellate Case No.: 2013-00131**

S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Deputy Attorney General

SHW/aam
Enclosures

cc: David Alexander, Esquire (w/enclosure)