

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable Judge Benjamin H. Culbertson, Circuit Judge

CA No. 11-CP-26-3907

LOUIS MICHAEL WINKLER, JR., SK 6027, *Respondent/Petitioner*

v.

STATE OF SOUTH CAROLINA, *Petitioner/Respondent*

NOTICE OF CROSS APPEAL

Louis Michael Winkler appeals the order of the Honorable Judge Benjamin H. Culbertson, dated August 15, 2012, granting post-conviction relief as to sentencing. Respondent/Petitioner received Petitioner/Respondent's Notice of Appeal, April 25, 2014.

RECEIVED

APR 30 2014

S.C. SUPREME COURT

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April 28, 2014

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Honorable Judge Benjamin H. Culbertson, Circuit Judge

CA No. 11-CP-26-3907

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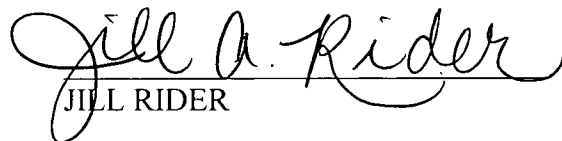
STATE OF SOUTH CAROLINA, *Petitioner/Respondent*

PROOF OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the petitioner/respondent one (1) copy respondent/petitioner's Notice of Cross Appeal in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 28th day of April, 2014, in Columbia, South Carolina.


JILL RIDER

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)
Louis Michael Winkler, Jr.,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2011-CP-26-3907

ORDER
GRANTING POST-CONVICTION RELIEF
RE: DEATH SENTENCE

Horry County
12 AUG 15 PM 2:06
MELANIE JUDGINS-WARD
CLERK OF COURT

TRIAL DATES..... June 18 – 21, 2012
PRESIDING JUDGE..... Benjamin H. Culbertson
APPLICANT'S ATTORNEYS..... Emily C. Paavola
John R. Mills
RESPONDENT'S ATTORNEYS..... Alphonzo Simon
Brendon McDonald
Anthony Mabry
COURT REPORTER..... Brenda R. Babb (June 18, 19, 21, 2012)
Kay H. Richardson (June 20, 2012)

In this case, the Applicant, Louis Michael Winkler, Jr., ("Winkler") seeks post-conviction relief from his conviction and death sentence for murder. Winkler alleges that he received ineffective assistance of counsel. He also alleges that his constitutional and statutory rights were violated when the trial court refused to allow him to discharge his appointed counsel and proceed *pro se*, when the trial court refused to charge the jury on what would happen if they could not reach a unanimous verdict during the sentencing phase of his trial and when the trial court gave jury instructions under unduly coercive circumstances. The Respondent, State of South Carolina, ("State") denies that Winkler is entitled to post-conviction relief.

Based upon a preponderance of the evidence in this case and a review of the pertinent parts of the criminal trial transcript, I do hereby find the following salient facts:

FINDINGS OF FACT

In 2006, Winkler was indicted for the murder of his estranged wife, first degree burglary, and assault and battery of a high and aggravated nature. On March 12, 2007, the State filed its Notice of Intent to Seek the Death Penalty in which the State asserted the following statutory aggravating circumstances supporting the death penalty: 1) that the murder was committed during the commission of a burglary; and 2) that the murder was of a witness or potential witness committed for the purpose of impeding or deterring prosecution of a crime.¹

Attorneys Ralph J. Wilson and Paul Elbert Rathbun were appointed to represent Winkler. During the early stages of their representation, Winkler became dissatisfied with his attorneys and wanted new attorneys. All requests to relieve his attorneys and appoint new counsel were denied by the court. At no time prior to the start of the criminal trial did Winkler ever ask the court to relieve his attorneys and allow him to proceed *pro se*.

In preparing for trial, Winkler advised his attorneys that the victim was killed by her ex-husband, Jonathan Grainger ("Grainger"). Winkler told his attorneys that he and Grainger fought over a pistol and that Grainger gained control of the pistol and shot the victim. Winkler never disputed that the fatal shot was fired from the pistol. His only contention was that he did not shoot the victim; Grainger did.

During the guilt or innocence phase of Winkler's criminal trial, the State presented Vello Paavel as an expert witness in the field of firearm and tool mark identification. Mr. Paavel opined that the bullet killing the victim was fired from the Jennings Bryco pistol found in Winkler's possession. During cross examination of Mr. Paavel, Winkler's attorney challenged whether any evidence existed to indicate that Winkler fired the Jennings Bryco pistol but did not

¹ When this murder occurred, charges were already pending against Winkler for the kidnapping and rape of his estranged wife.

challenge whether the fatal shot was fired from that pistol. Ultimately, Winkler was found guilty of murder, first degree burglary and assault and battery of a high and aggravated nature.

During the sentencing phase of his criminal trial, Winkler asked the court to discharge his attorneys and allow him to represent himself. The court denied Winkler's request.

More than 6 ½ hours into deliberations during the sentencing phase of Winkler's trial, the jury asked the court what would happen if they could not reach a unanimous decision.² The judge advised the jury that he could not answer their question "as it [was] asked." Two hours later, the jury asked the court again what would happen if they could not reach a unanimous decision. The court advised the jury that their question was hypothetical and the court could not answer hypothetical questions. Winkler's attorneys never objected to the court's refusal to answer the jury's question.

More than 10 hours into deliberations, the jury informed the court that they were deadlocked on whether to impose the death penalty or life. The judge gave the jury an Allen charge in which he advised them that their decision must be unanimous without telling them the law if they could not reach a unanimous decision. The court then allowed the jury to cease deliberations for the night and return the following morning.

The following morning, prior to resuming deliberations, several jurors asked for the judge to give them the Allen charge again. The judge recharged the jury and, again, advised them that their decision had to be unanimous without advising them on the law of what would happen if they could not reach a unanimous decision. Winkler's attorneys objected to the judge recharging the Allen charge but never objected to the contents of his charge or his failure to advise the jury

² This court cannot determine exactly how long the jury had been deliberating on Winkler's sentence before submitting its question to the court. However, the trial transcript indicates that the jury began deliberations at 1:30 p.m. and submitted its question to the court after 8:15 p.m.

on the law of what would happen if they could not reach a unanimous decision. After resuming deliberations, the jury returned a decision to impose the death penalty.³

LAW AND DISCUSSION

I. RIGHT TO SELF REPRESENTATION

Winkler argues that his constitutional right to self-representation was violated by the trial court's refusal to allow him to discharge his attorneys and proceed in his criminal trial *pro se*.⁴ Winkler further argues that he was denied his right to effective assistance of counsel due to his attorneys' failure to object to the trial court's pre-trial refusal to permit him to discharge his appointed counsel and proceed in the criminal trial *pro se*. However, a preponderance of the evidence indicates that Winkler never requested to discharge his attorneys and proceed *pro se* until the sentencing phase of his trial. Prior to that time, Winkler only requested that he be appointed new attorneys; not that he be allowed to proceed *pro se*.

An accused may waive the right to counsel and proceed *pro se*. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "[a] defendant's right to waive the assistance of counsel is not unlimited." *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Id.* (emphasis added). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." *Id.* (citing *United States v. Singleton*, 107 F.3d 1091 (4th Cir.1997); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir.1979)). The sentencing phase of a capital trial does not constitute a separate

³ Winkler was also sentenced by the presiding judge to concurrent sentences of thirty years in prison for first degree burglary and ten years in prison for assault and battery of a high and aggravated nature.

⁴ The court's refusal to discharge Winkler's attorneys and allow Winkler to proceed *pro se* was addressed and affirmed by the South Carolina Supreme Court in Winkler's criminal appeal. See *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596, (S.C.2010).

trial. See S.C.Code Ann. § 16-3-20(B) (2003); see also *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986).

Because Winkler never “clearly asserted” that he wanted to represent himself prior to trial, the court’s refusal to discharge his attorneys and allow him to proceed *pro se* did not violate his constitutional rights. Further, his attorneys’ failure to object to the court’s “pre-trial” denial of his request to represent himself when no pre-trial request was made does not constitute ineffective assistance of counsel. Therefore, Winkler is not entitled to post-conviction relief because the trial court denied his request to represent himself, nor is he entitled to post-conviction relief due to his attorneys’ failure to object to the court’s denial.

II. FAILURE TO IMPEACH STATE’S EXPERT WITNESS

Next, Winkler argues that he was denied effective assistance of counsel when his attorneys failed to object to and/or adequately impeach the trial testimony of the State’s firearm and tool mark expert, Mr. Vello Paavel. Winkler argues that his attorneys should have challenged Mr. Paavel’s testimony that the bullet that killed the victim was fired from the Jennings Bryco pistol found in Winkler’s possession. However, until Winkler filed this action for post-conviction relief, he never disputed that the fatal shot was fired from the Jennings Bryco pistol. The defense trial strategy was that Grainger, not Winkler, fired the fatal shot.

Based upon Winkler’s pre-trial account to his attorneys that Grainger shot the victim with the Jennings Bryco pistol, his attorneys challenged the State’s failure to find Winkler’s fingerprints or DNA on the Jennings Bryco pistol. Challenging whether or not the bullet that killed the victim was fired from that pistol would serve no purpose since Winkler acknowledged to his attorneys while preparing for his criminal trial that the victim was shot by Grainger with the Jennings Bryco pistol. Therefore, his attorneys’ failure to challenge Mr. Paavel’s opinion

that the victim was shot with the Jennings Bryco pistol is not ineffective assistance of counsel and Winkler's request for post-conviction relief on this ground should be denied.

III. FAILURE TO IMPEACH OTHER STATE WITNESSES

Next, Winkler alleges that he was denied effective assistance of counsel because his attorneys failed to impeach the State's witnesses with evidence that Jonathan Grainger was not on the telephone with Elizabeth Craft at the time of the crime. However, in presenting his case for post-conviction relief, Winkler did not identify or present any evidence that his attorneys could have used to impeach the State's witnesses. At the conclusion of Winkler's case in chief, the State moved for a directed verdict on Winkler's request for post-conviction relief on this ground.

The burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); citing *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Therefore, since Winkler failed to present any evidence that his attorneys could have used to impeach the State's witnesses, the State's motion for directed verdict on this ground for relief should be granted.

IV. FAILURE TO PRESENT EVIDENCE OF NEUROLOGICAL AND COGNITIVE IMPAIRMENTS AND/OR DYSFUNCTION

Next, Winkler alleges that he was denied effective assistance of counsel because his attorneys failed to investigate and present evidence of Winkler's neurological and cognitive impairments and/or dysfunction. However, Winkler did not present any evidence that he suffered from neurological and cognitive impairments or dysfunction. Therefore, at the conclusion of Winkler's case in chief, the State moved for a directed verdict on Winkler's request for post-conviction relief on this ground.

As previously stated, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since Winkler failed to present any evidence supporting his claim that he suffers from neurological and cognitive impairments and/or dysfunction, the State's motion for directed verdict on this ground for relief should be granted.

V. FAILURE TO PRESENT EVIDENCE OF MENTAL STATE

Next, Winkler alleges that he was denied effective assistance of counsel because his attorneys failed to present mitigating evidence regarding Winkler's change in demeanor and mental state before the crime and evidence that the victim harassed and taunted Winkler while he was on home arrest. However, the preponderance of the evidence indicates that the victim did not taunt Winkler while he was on home arrest and, thus, Winkler did not have any change in demeanor or mental state due to the victim's conduct. Winkler's attorneys did not have any mitigating evidence to present to show a change in demeanor or mental state and, thus, any failure to present evidence of a change in demeanor or mental state does not constitute ineffective assistance of counsel. Therefore, Winkler's claim for post-conviction relief on this claim should be denied.

VI. PHYSICAL HARM AND INTIMIDATION OF JUROR

Winkler also alleges that he is entitled to post-conviction relief due to the physical harm and intimidation of a juror. However, Winkler did not present any evidence of physical harm and intimidation of a juror. At the conclusion of Winkler's case in chief, the State moved for a directed verdict on Winkler's request for post-conviction relief on this ground.

As stated before, the burden is on the petitioner to prove the allegations in a post-conviction relief application. *Smith v. State, ibid.* Therefore, since Winkler failed to present any

evidence of physical harm and intimidation of a juror, the State's motion for directed verdict on this ground for relief should be granted.

VII. FAILURE TO CHARGE JURY

Lastly, Winkler alleges that he is entitled to post-conviction relief because his attorneys failed to object to the court's refusal to answer the jury's question regarding what would happen if the jury failed to reach a unanimous verdict on Winkler's sentence. Winkler further alleges that his attorneys were ineffective for failing to object to the court's improper jury instructions under unduly coercive circumstances. Further, Winkler alleges that the trial court's refusal to charge the jury on what would happen if they could not reach a unanimous verdict and/or the court's jury instructions given under unduly coercive circumstances entitles him to post-conviction relief.

Under Code of Laws of South Carolina 1976 §16-3-20, when aggravating circumstances are found to exist in a capital murder case tried before a jury, the jury decides whether the defendant should be sentenced to death or life in prison. A jury's decision to impose the death penalty must be unanimous. Code §16-3-20(C) states, in pertinent part, that "[i]f members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment...."

In the case at hand, more than 6 ½ hours into jury deliberations during the sentencing phase of the trial, the jury asked on two different occasions what would happen if they could not reach a unanimous verdict on Winkler's sentence. The judge refused to answer the question both times and Winkler's criminal trial attorneys never objected to the judge's refusal to answer the question.

Although sentencing in non-capital cases is a matter of law to be decided by the court, sentencing in capital murder cases is made by the jury and, therefore, the jury is entitled to know the law on sentencing. Even if the jury is not entitled to an instruction that the defendant will receive a life sentence if they cannot reach a unanimous verdict of death, the jury is entitled to an instruction that the defendant's sentence becomes a matter of law to be imposed by the court if they cannot reach a unanimous verdict. During the Allen charge by the judge in this case, the jury was informed that their verdict must be unanimous. However, Code §16-3-20 does not require the jury to reach a unanimous verdict. It only requires a unanimous jury verdict if the death penalty is to be imposed.

The burden is on the petitioner to prove the allegations in the PCR application. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); citing *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624, (1989) - "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052.

To establish prejudice, the applicant is required "to 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." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010). Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

In the case at hand, Winkler's criminal defense attorneys' performance not only fell below an objective standard of reasonableness when they failed to object to the trial judge's refusal to answer the jury's question on what would happen if the jury could not reach a unanimous verdict on Winkler's sentence, that deficient performance prejudiced the sentencing phase of Winkler's case. Had the jury's question been answered by the judge, a reasonable probability exists that the jury would not have reached a unanimous verdict and the court would have imposed a sentence of life in prison. Therefore, the results of the proceedings would have been different. Although overwhelming evidence of Winkler's guilt exists in the case at hand, the ineffective assistance of counsel did not occur during the guilt or innocence phase of the trial. It occurred during the sentencing phase of the trial. Therefore, Winkler is entitled to post-conviction relief as to the sentence imposed in this case.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

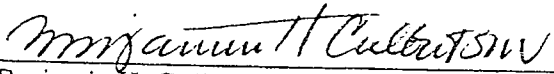
ORDERED, that the application for post-conviction relief by the applicant, Louis Michael Winkler, Jr., for his conviction for murder is DENIED; it is further

ORDERED, that the application for post-conviction relief by the applicant, Louis Michael Winkler, Jr., for his sentence of death for murder is GRANTED; it is further

ORDERED, that Louis Michael Winkler, Jr.'s sentence of death is set aside and he is sentenced to life in prison without parole for his conviction for murder; it is further

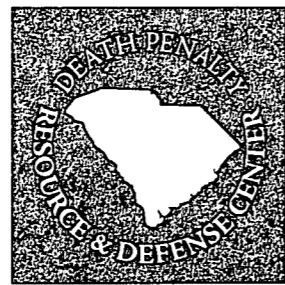
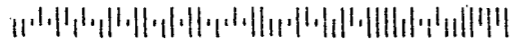
ORDERED, that the sentence imposed hereunder shall run concurrently with the sentences imposed for the applicant's convictions for first degree burglary and assault and battery of a high and aggravated nature.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

August 15, 2012
Conway, SC



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Suite 101
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The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
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