

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO YORK COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2013-001196

Derrick Tyrone Blake..... 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 Counsel was not ineffective for failing to object during the State's closing argument, specifically concerning the reference to Petitioner as a businessman and the reference of a hand-to-hand transaction, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice?

STATEMENT OF THE CASE

Derrick Tyrone Blake, (Petitioner), was indicted at the August 2008 term of the York County Grand Jury for Distribution of Cocaine Base (2008-GS-46-3048) and Distribution of Crack Cocaine within proximity of a park. He was represented by Jim Boyd, Esq. On December 3, 2008, Petitioner was tried by a jury and convicted of both charges as indicted. The Honorable John C. Hayes, III sentenced the Petitioner to confinement for fifteen (15) years for each charge. The sentences run concurrently.

Thereafter, the Petitioner appealed his conviction and sentence. A brief was filed on his behalf pursuant to Anders¹. The South Carolina Court of Appeals affirmed his conviction. State v. Blake, 2011-UP-54 (filed February 10, 2011). The Remittitur was issued on March 1, 2011.

Petitioner subsequently filed an application for post-conviction relief (PCR) on September 7, 2011 alleging, *inter alia*, ineffective assistance of trial counsel for: “[failing] to object to statement by the prosecutor that were(sic) not in evidence” and “[failing] to object to statement by prosecutor in closing argument.” Respondent made its Return on September 21, 2012. An evidentiary hearing into the matter was convened on October 9, 2012, at the Moss Justice Center in York, SC. Petitioner was present at the hearing and was represented by Leah B. Moody, Esquire. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General’s Office, represented Respondent. The Honorable Edgar W. Dickson denied and dismissed the application by written order dated April 18, 2013.

A timely notice of appeal from the Order of Dismissal was filed on Petitioner’s behalf. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

¹ Anders v. California, 386 U.S. 738 (1967).

STANDARD OF REVIEW

The proper standard for reviewing a PCR 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 PCR 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 Counsel was not ineffective for failing to object during the State's closing argument, specifically concerning the reference to Petitioner as a businessman and the reference of a hand-to-hand transaction, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.**

Petitioner asserts the PCR court erred in finding trial counsel's performance was not deficient where Counsel failed to object to the State's comments in closing argument that he claims appealed to the jurors' passions, played on the jury's fear of the impact of drugs in society, went beyond the evidence presented at trial and the reasonable inferences therefrom and so infected the trial with unfairness as to make the resulting conviction a denial of due process. This argument is without merit.

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(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, *supra*. 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, 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 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.

The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 at 338, 503 S.E.2d at 166. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (citing Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001).

In the State's closing argument, the State argued Petitioner was a businessman for his role in selling and dealing crack cocaine to the Confidential Informant (CI):

This is a business man. This isn't a punk eighteen years old standing on a corner. This is a forty-four year old business man. [CI] says I want to meet your guy. [Petitioner] says you're not going to meet my guy. [Petitioner's] not going to cut himself out. [Petitioner's] not going to do that he is a business man. [Petitioner's] in this for the money. It's all about [Petitioner].

(App. p. 157 lines 15-22).

Later, the State argued, "Hand to hand at the window on the movie things are going back and forth." (App. p.159 lines 1-2).

The PCR Court held:

This Court finds Counsel was not ineffective for [not] objecting to the Solicitor's closing argument. First, the record and the evidence at trial support the Solicitor's version of the facts and the allowable inferences therefrom... As to the comment about the Applicant being a businessman, there is evidence in the record that the Applicant sold crack cocaine for one hundred and fifty dollars to the CI. *See* Tr. p. 63-66, 68-70. Therefore, there is testimony to support the Solicitor's comments that a transaction made where the Applicant sold the CI drugs for money; hence, the reasonable inference that the Applicant is a form of a businessman, or one who engages in the activity of buying and selling². As to the comment that there was a hand-to-hand transaction, although the transaction was not recorded by the video camera, the CI testified, "Yes, sir. [Petitioner] handed me the drugs and I took a look at them and agreed top(sic) what I saw and handed him some money." (Tr. p. 70 lines 5-6). Undoubtedly, the Solicitor had the right to reference a hand-to-hand transaction of the crack cocaine.

(App. p. 299-300).

Clearly, the State's comment that Petitioner was a businessman is a reasonable inference from the evidence presented at trial as the CI testified Petitioner sold him crack cocaine for one hundred and fifty dollars. Additionally, it was permissible for the State to argue that there was a hand-to-hand transaction based properly on the CI's testimony. As such, the State's closing

² According to Webster's II *New Riverside* Dictionary 97 (Rev'd 1996), business is defined as "trade; commerce." Commerce is then defined as "the buying and selling of goods."

argument was proper based on the evidence at trial and therefore, Counsel had no reasonable basis on which to object.

Even, assuming *arguendo*, the State's closing argument was improper and Counsel should have objected to the comments, Petitioner failed to present credible evidence that he did not receive a fair trial based on the State's closing argument. Petitioner failed to prove that "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process," where Petitioner admitted to selling illegal drugs, albeit marijuana, to the CI, where the CI testified that Petitioner actually sold him crack cocaine and where Counsel's investigator's notes, introduced at the PCR by Petitioner, show there was a hand-to-hand transaction where Petitioner gave the CI a product that "[l]ooks like raw baking soda" and that Petitioner stated was "pretty good" and that others "rock[ed] on it last night." (App. p. 285). Clearly, Petitioner sold the CI something other than marijuana. Thus, Petitioner can prove no resulting prejudice from Counsel's alleged failure to object to the State's closing argument.

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

Petitioner also argues Counsel was ineffective not objecting to the State's closing argument containing the following excerpt:

It's not about the lives that that crack is going to affect. This isn't just about the addict. This is about the families; it's about the people they steal from; it's about the rent that doesn't get paid, the food that doesn't get put on the table and the electricity bill that doesn't get paid. It's about the clerk that gets robbed or shot.

(App. p. 157 line 22-p. 158 line 2).

However, this issue is not preserved for appellate review.

“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal.” State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996); see also State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (“The issue which is not properly preserved cannot be raised for the first time on appeal). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). “A Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review.” Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

In this case, while Petitioner raised this issue at the PCR hearing (App. p. 227 line 1-p. 228 line 6), the PCR Court did not address it in the Order of Dismissal. Further, Petitioner filed no motion to alter or amend the judgment pursuant to Rule 59(e) SCRCP. Therefore, pursuant to Gee and Marlar, this issue is not preserved.

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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May 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Edgar W. Dickson, Circuit Court Judge

DERRICK T. BLAKE, 332138

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

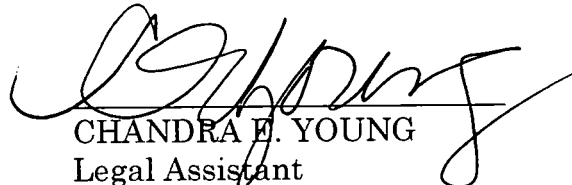
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani
SC Commission on Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 21ST day of May 2014.


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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

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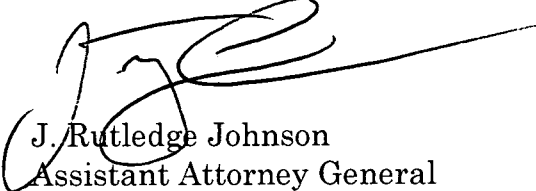
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Derrick T. Blake, 332138 v. State of South Carolina
2013-001196**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,



J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services