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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County

James L. Barber, III, Circuit Court Judge

KEVIN MERCER

PETITIONER-RESPONDENT,

V.

STATE OF SOUTH CAROLINA

RESPONDENT-PETITIONER.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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The Petitioner-Respondent (hereinafter “Respondent”) hereby replies to the Return to the Petition for Writ of Certiorari.

A. Mercer’s assertion that there are additional sustaining grounds is not supported by the record; the alleged additional sustaining grounds are all claims upon which the PCR Court denied relief and cannot serve as additional sustaining grounds as a result.

Mercer has asserted four additional sustaining grounds in support of denying the State’s Petition for Writ of Certiorari. First, he contends trial counsel was ineffective for not calling an expert in eyewitness identification. Second, he asserts trial counsel was ineffective in not presenting evidence there was more than one perpetrator. Third, he argues that Timothy Johnston gave perjured testimony. Fourth, he asserts trial counsel was ineffective in not objecting to some of the victim impact testimony presented at trial.

1. Mercer’s claims that these can serve as additional sustaining grounds is not supported by the law.

All four alleged additional sustaining grounds offered by Mercer were claims upon which the PCR Court denied relief. As such, these claims cannot serve as additional sustaining grounds.

“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR.

The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

1'On. L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

Respondent submits that none of the claims now raised as additional sustaining grounds

can serve as such. As with the claim upon which Mercer has sought writ of certiorari, all four alleged additional sustaining grounds were all separate claims upon which the PCR Court denied relief. As such, Mercer cannot utilize these claims as potential additional sustaining grounds because he was not the prevailing party upon those claims. See generally I'On, 338 S.C. at 419, 526 S.E.2d at 723 (noting prevailing party is the winner upon claims in lower court). Since Mercer did not appeal the denial of relief upon these claims as he did with the freestanding claim he does raise in his cross-appeal, he abandoned those claims and the denial of relief by the PCR Court upon these claims has become law of this case.¹ See generally McCray v. State, 317 S.C. 557, 559, 455 S.E.2d 686, 687 (1995) (issue must be raised in petition for writ of certiorari to be preserved for review); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling becomes law of the case and should not be reconsidered on appeal).

2. The PCR Court properly found trial counsel was not ineffective in not utilizing an eyewitness identification expert.

The PCR Court's denial of relief upon this claim is supported by the record. The PCR Court noted that Mr. Littlejohn indicated that he did not believe this case was a good one for an eyewitness identification expert because there was no facial identification. (App. 4264). Further, the PCR Court also noted that Ms. Armstrong did not recall discussing whether such an expert should be hired. (App. 4264). She further noted that she may have thought at the time that Mercer's case was not a case in which

¹ To the extent this Court disagrees, Respondent would further assert that even if these claims could be considered as additional sustaining grounds, it would be unwise to do so in light of the fact the PCR Court's denial of relief upon those claims was clearly supported by the record.

one should be used, but she did not recall any specific conversations regarding using an eyewitness identification expert. Id. The PCR Court's factual findings in regards to the attorneys' testimony were supported by the record. (App. 3673-74, 3758-59, 3816).

Mercer also presented the testimony of Dr. Van Wallendael, a psychologist who focuses on memory and eyewitness identification. The PCR Court stated,

Van Wallendael testified there were a number of variables that should be used in assisting in the evaluation of an eyewitness identification. Those included how long the witness had to view, the lighting, the stress level of the witness, whether the witness was focused on a weapon, and whether there were other distractions present. She noted that stress was a very important variable. She also testified there is a misperception that police officers and members of the military are better at making eyewitness identifications because of their training. Van Wallendael testified there were several factors at play in the "identification" made by the victim's roommate in Applicant's case. First, she maintained the description could have been more accurate if Magwood was under less stress. She noted there was no mention of seeing a gun in Magwood's statement, but the presence of a weapon was implied. Van Wallendael also noted that a sense of heightened awareness does not necessarily translate into more accurate identification. Van Wallendael also indicated that the lighting conditions can influence one's visual perceptions. She remarked that the lighting conditions probably played a role in the accuracy of Magwood's "identification" in this case.

(App. 4264-65). The PCR Court's recitation of the testimony of Van Wallendael's testimony is also supported by the record. (App. 3579-83, 3586-96, 3602-10).

As noted by the PCR Court, this was not a case in which an eyewitness identification was made. Magwood did not identify Mercer in any lineup. Nor did Magwood testify that he saw any shots fired that night. He merely described the individual he saw at the victim's vehicle shortly before the shooting. Van Wallendael acknowledged that the description of the perpetrator given by Magwood was consistent with the photograph taken of Mercer on the night of the murder. (App. 3603-06). She also noted that the initial description given by an eyewitness is the purest reflection of

what the witness actually saw. (App. 3602-03). The description Magwood gave at trial was consistent with the clothing Mercer was wearing when he was arrested shortly after the shooting. It was further consistent with the description he gave law enforcement in his initial statement to police. (App. 4103-04). In all, the PCR Court's finding that trial counsel was not deficient in not presenting the testimony of an eyewitness identification expert was supported by the record. Further, the PCR Court's finding that Mercer was not prejudiced by counsel not presenting an eyewitness identification expert was similarly supported by the record. Mercer presents no argument as to how Van Wallendael's testimony would have supported the defense theory that Mercer's co-defendant was either present at the scene or that the co-defendant was the one who shot the victim, especially in light of the stark contrast between what Mercer's general size and clothing as compared to his co-defendant's size and clothing on the evening of the shooting. Since this testimony would not have undermined the description provided by Magwood, it would not have led to a different result at trial. Thus, this argument is insufficient to serve as an additional sustaining ground in this case.

3. The PCR Court properly found trial counsel was not ineffective in not presenting additional evidence of more than one perpetrator at the scene of the murder.

Mercer's contention that trial counsel should have presented additional evidence that more than one perpetrator was at the scene of the murder is without merit. As properly noted by the PCR Court, Mercer failed to establish how any of the alleged additional evidence could have been presented at trial. Much of the alleged evidence was inadmissible hearsay. Mercer has not presented how the evidence could be presented at trial, and it is not apparent from the record that the alleged additional evidence of two

perpetrators could have been presented. Thus, the PCR Court's finding that Mercer failed to show that counsel was deficient was reasonable. See generally Hoots v. Allsbrook, 785 F.2d 1214, 1222-23 (4th Cir. 1986)(finding no ineffective assistance of counsel in failure to present inadmissible evidence). Furthermore, Mercer was not prejudiced by the fact counsel did not present this alleged evidence. As noted by the PCR Court, the additional evidence was cumulative to testimony presented at trial through Deputy Stazer and Terry Brown, both of whom indicated Mercer was not the sole perpetrator. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625-26 (1989)(finding counsel not ineffective for not presenting cumulative testimony that would not have proven a defense). Altogether, the PCR Court's findings were supported by the record, and Mercer's contention that this claim is an additional sustaining ground is without merit.

4. The allegation that Timothy Johnston provided perjurious testimony was properly denied

Mercer's reliance upon the allegation that Timothy Johnston testified falsely at the motion for new trial hearing does not constitute an additional sustaining ground. The PCR Court properly denied relief upon this claim, and the PCR Court's denial of relief is supported by the record.

At the motion for new trial hearing, Timothy Johnston testified he was one of Marcus Thompson's cell mates in May 2006. (App. 2688-89). He recalled Thompson talking about his charges. (App. 2689). Johnston testified that Thompson told him what had happened, and Thompson was asking his cellmates what he thought they [the State] would do to him. (App. 2689-90). Thompson's focus was on his murder charge. (App.

2690). Johnston testified that both he and their third cellmate, Kevin Fuller, both had been to prison before. (App. 2690). Thompson had not. (App. 2690).

Johnston testified that Thompson told him that he had dropped Mercer off at an apartment complex. Mercer used a cut to go through and get a truck. Thompson told Johnston that the guy got killed, but the guy's girlfriend was on the telephone and heard everything. Thompson was concerned because she heard two car doors shut, and the police were using that to say Thompson was at the scene when the murder occurred. Thompson maintained he was at the other apartment complex. Thompson also told Johnston that he ended up at a local motel. (App. 2691-93).

Johnston also testified about a second time Thompson told him about the crime. During this second conversation, Kevin Fuller was asleep. Thompson told Johnston the same story. However, this time, Thompson told him he was in the stolen truck when they were stopped. (App. 2693-94). Johnston further testified that Thompson never said anything about pulling the trigger. (App. 2698-99). Johnston did ask Thompson about the gloves found on Thompson when he was arrested. Thompson informed Johnston that the gloves were from his job. (App. 2699-700). Thompson never told Johnston about the pistol or target practice. (App. 2700).

Johnston acknowledged on cross-examination that he had prior convictions for criminal domestic violence, shoplifting, failure to stop, and a couple of driving under suspensions. He also noted that he had pending charges for first degree burglary and second degree burglary. However, he was not seeking assistance with the first-degree burglary charge because it was already set to be dismissed. He testified that the complaining witness had already informed law enforcement that he had permission to

enter the residence, and he was in a dispute with the solicitor's office as to whether the charges were still pending. (App. 2702-04). He also testified he was pleading guilty to the second-degree burglary. (App. 2709).

At the evidentiary hearing, Johnston testified that Thompson had told him a third version of the events on the night of the shooting. (App. 3566). In the third version, which Johnston asserted he did not share with the solicitor's office, Johnston alleged that Thompson was the one who shot Sgt. Davis. Id. Johnston testified that he had never told anyone else that Thompson had told him he was the shooter. (App. 3567). Johnston also testified that he lied at the motion for new trial hearing because Thompson grew up in the same area as Johnston and his family. Id. Johnston claimed that Thompson threatened to "reach out and touch" Johnston's family. Id. Johnston also testified that he did not know which of the three versions of the story were true. (App. 3569).

Deputy Solicitor Samuel R. Hubbard testified that when the Solicitor's Office met with Johnston, he started by indicating they would not like what he had to say about Kevin Fuller. Johnston had indicated that Fuller was lying in an attempt to receive assistance with his charges. Hubbard testified that Johnston never said that Thompson indicated he was the shooter. To the contrary, Johnston's impression of Thompson was that he was afraid of prison, and he was seeking advice from his two cell mates who had more experience with the system. Further, Johnston indicated that Fuller would say anything. (App. 3638-44). Assistant Solicitor Shawn Graham also indicated that Johnston told them that Fuller would say anything. Graham's testimony indicates that Johnston's testimony at the motion for new trial hearing was consistent with what he told them prior to the hearing. (App. 3648-52).

“Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.” State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)); State v. Harris, 391 S.C. 539, 544, 706 S.E.2d 526, 529 (Ct.App.2011). “The credibility of newly-discovered evidence is for the trial court to determine. Only the trial court and not the appellate court has the power to weigh the evidence; the trial court’s judgment will not be disturbed except for error of law or abuse of discretion.” Harris, 391 S.C. at 545, 706 S.E.2d at 529. Here, the PCR Court determined that Johnston’s testimony was not credible. The PCR Court’s findings are supported by the record. Thus, Mercer cannot show that this claim could be an additional sustaining ground for the PCR Court’s grant of post-conviction relief.

5. Victim impact evidence claim

Mercer’s assertion that trial counsel was ineffective for not objecting to victim impact testimony at trial was properly denied by the PCR Court for lack of merit. The PCR Court’s findings are supported by the record. In her deposition, Ms. Armstrong testified that she believed the testimony of the four soldiers regarding the victim’s loss on themselves and the Army generally was properly admissible victim impact testimony. (App. 3781). She felt the State had some latitude under which it could present the testimony of people who knew the victim and his qualities. (App. 3782). Mr. Littlejohn also testified that he did not believe that Judge Few would have excluded any of the testimony had an objection been made. (App. 3675).

The PCR Court properly found the testimony contained on R. pp. 2078-83 was properly admitted at trial. This was the testimony of Command Sergeant Major Martin

Wells, U.S. Army. Much of his testimony explained the various medals and ribbons that were earned by the victim prior to his death. This was properly admitted victim impact testimony. See Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) (“A State may legitimately conclude that **evidence about the victim** and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.”). State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (adopting Payne); see generally State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000) overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (“Victim impact evidence is admissible in the sentencing phase to demonstrate the ‘uniqueness’ of the victim and the specific harm committed by the defendant.”). The same was also true for Wells’ statement that Sgt. Davis personified the ideals captured in the creed for all non-commissioned officers. Since this testimony focused solely on the character of the victim, it was properly admitted testimony. Similarly, Clifton Magwood’s response to the question regarding the memorial service at Fort Jackson was also properly admissible. Since this testimony was properly admissible, counsel was not deficient in not objecting to it. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

As noted by the PCR Court, there was nothing particularly heartwrenching about this testimony; it was pretty much what someone would expect and delivered in a

professional and matter-of-fact manner. Thus, given the limited nature of the testimony during the course of a large proceeding and the lack of any undue prejudice, it cannot be said it rendered Mercer's trial fundamentally unfair or its absence alone would create a reasonable probability of a different result given the extremely egregious nature of this crime as well as Mercer's other violent run-ins throughout his life. See, e.g. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (improper argument not reversible where it was but 10 lines in transcript).

To the extent Mercer alleges that the testimony of Robert Ames, Clifton Magwood, David O'Garro, and Martin Wells was improper victim impact testimony, the PCR Court finds this claim is without merit. It was established by their testimony that Robert Ames, Clifton Magwood, and David O'Garro were all close friends of the victim, Sergeant Davis. Martin Wells indicated that he was Davis' immediate superior officer at Fort Jackson. The admission of fellow workers statements have been deemed admissible as proper victim impact evidence under Payne v. Tennessee as showing the uniqueness of the individual. See, U.S. v. Barnard, 299 F.3d 467 (5th Cir 2002); Franklin v. State, 965 So. 2d 79 (Fla. 2007) ("designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"); Wesley v. State, 112 Nev. 503, 520, 916 P.2d 793, 804 (Nev.1996) (victim impact evidence from neighbors and co-worker appropriate under Payne where each witness's testimony was relevant to the impact of Wesley's actions); U.S. v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y.2006) (victim impact testimony admissible from colleagues and co-workers in police department, where the testimony of NYPD coworkers will be presented to demonstrate "the chilling effect" these murders had specifically on undercover

detectives within the NYPD and the fact that as a result of these murders, undercover detectives were “refusing to go out on the street, do these operations because of the danger, how some even retired from undercover work, said I’ll be a police officer but I will not do undercover work anymore.”); U.S. v. Battle, 173 F.3d 1343 (11th Cir. 1999) (prison officials testifying about the impact the prison murder had upon the prison guards admissible impact evidence). “Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant . . . “ People v. Valencia, 43 Cal.4th 268, 300, 74 Cal.Rptr.3d 605, 639 (Cal.,2008). But see U.S. v. Fields, 516 F.3d 923 (10th Cir. 2007).

The PCR Court also did not err in finding Mercer failed to the extent Mercer alleges that Mercer has not shown that counsel was deficient in not objecting to the testimony regarding the roll call done at the funeral or the funeral video. Payne authorizes the admission of evidence under the Eighth Amendment which focuses on demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.” The evidence of the video that Mercer now challenges gave that brief glimpse of Sergeant Davis and his loss and its impact on his community - his family and his friends. In addition, testimony, prior to the admission revealed the community acknowledgment of the deaths - the video only confirmed it and bread more life into those static comments.

The video played at the funeral expressed no outrage, contained no clarion call for vengeance, but may have implied sadness. See, People v. Kelly, 68 Cal.Rptr 3d 531 (2008), cert. denied 129 S.Ct. 564 (2008) (particular video montage admissible under Payne); cf. State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), cert. denied (Apr. 25,

2011)(finding no error in admission of video of funeral slain law enforcement officer). Here, the video supplemented but did not duplicate any of the witnesses' testimony. While Mercer may suggest that revealing emotional effect demands exclusion of the evidence, that is not the test where Payne allows the admission of the impact of the victim's death upon the survivors. Altogether, the PCR Court properly found the testimony regarding the roll call and the funeral video were admissible as victim impact evidence at Mercer's trial. Thus, counsel was not deficient in not objecting to either the roll call testimony or the funeral video as improper victim impact evidence.² See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial); Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995) (“[T]he ‘performance of an attorney is not deficient for failure to object to admissible evidence.’”)(quoting Russell v. Jones, 886 F.2d 149, 152 (8th Cir.1989)). As a result, this claim for relief is denied.

Furthermore, the PCR Court properly found that Mercer was not prejudiced by counsel not objecting to the roll call testimony or the funeral video. Since the evidence was admissible victim impact evidence, an objection based upon those grounds would have been denied. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying

² Respondent would note that Mercer has relied upon Sapp v. South Carolina, 2006-CP-08-2204 in support of his allegations in this claim. This is not binding precedent on this Court.

evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari, Respondent-Petitioner respectfully requests this Court grant this petition for writ of certiorari and reverse the PCR Court's grant of post-conviction relief. Respondent-Petitioner further requests any other relief this Court deems appropriate.

Respectfully submitted,

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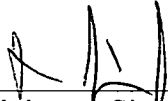
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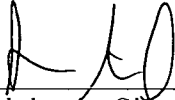
May 21, 2012

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the *Reply to Return to Petition for Writ of Certiorari*, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily Paavola, Esquire
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This, the 21st day of May, 2012



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