STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001694

Jeff A. Webb, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Is the grant of Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove that counsel was ineffective for failing to object to the Trial Judge's purported improper jury instruction on the accomplice liability "hand of one is the hand of all" theory of guilt?

2. Is the grant of Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove that counsel was ineffective for failing to object to solicitor's isolated and purported burden shifting comment made during the State's closing argument?

STATEMENT OF THE CASE

Petitioner was indicted for two (2) counts of armed robbery and possession of a weapon during the commission of a violent crime (2009-GS-37-1279; -1282), and for discharging a firearm into a dwelling. (App.pp.398-402). Daniel Day, Esq. represented Petitioner.

After the State called the case to trial, Petitioner was found guilty as indicted on all offenses excluding discharging a firearm into a dwelling, where the jury returned a verdict of not guilty. (App.pp.1-265). On March 16, 2010, the Honorable Alexander S. Macaulay sentenced Petitioner to concurrent terms of twenty (20) years imprisonment. (App.pp.266-73).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esq., perfected the appeal pursuant to Anders v. California[1]. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Jeffrey A. Webb, Op. No. 11-UP-566 (filed on December 20, 2011).

Petitioner filed an application for post-conviction relief (PCR) on July 12, 2012 (App.pp.275-81). A hearing was convened at the Anderson County Courthouse on May 6, 2013. (App.pp.307-74). Petitioner was present and represented by Rodney Richey, Esq. Walt Whitmire, Esq, of the Office of the Attorney General represented Respondent. The Honorable R. Lawton McIntosh denied relief in an order dated July 23, 2013. (App.pp.385-96).

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

STANDARD OF REVIEW

The proper standard for review of 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where the PCR Judge correctly found Petitioner failed to meet his burden to prove counsel's failure to object to a permissible jury instruction constituted deficiency or prejudice because an objection here held no merit.

At the PCR hearing, Petitioner argued counsel was deficient for failing to object to the Trial Judge's jury instruction on "hand-of-one" accomplice liability. (App.p.313-15). He stated that his co-defendant was charged with the lesser offense of strong armed robbery. (App.p.313). He testified that it was improper for the Trial Judge to issue this instruction because the State chose to proceed on the more serious offense against him. (App.p.313).

Counsel testified that although he did regale in the Trial Judge's decision to instruct the jury on accomplice liability, the facts of the case supported the instruction in question. (App.pp.344-45).

In denying Petitioner's application for post-conviction relief, the PCR judge found Applicant failed to meet his burden to prove an objection to the accomplice liability instruction was merited. (App.p.394). The PCR Judge agreed with counsel's reasoning that the facts of the case "clearly supported the jury charge." (App.p.324). The PCR Judge noted that Applicant's argument was not supported by current case law. In readily denying and dismissing this allegation of ineffective assistance of counsel, the PCR Judge importantly noted that Applicant's interpretation on the propriety of an accomplice liability jury instruction was certainly not viable at the time of trial. (App.p.324).

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). It is not ineffectiveness to fail to request an instruction contrary to law. U.S. v. Anderson, 850 F.2d 563, 565 (9th Cir. 1988). Disagreement with the use of objections, without more, will not establish ineffectiveness. Salerno v. U.S., 870 F.Supp. 549 (S.D.N.Y. 1994).

"The South Carolina Supreme Court has stated that under the hand of one is the hand of all accomplice theory of guilt, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 515 S.E. 2d 98 (1998). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Pitman, 373 S.C. 527, 647 S.E.2d 144 (2007). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002).

Discussion

The PCR judge did not err in finding Applicant failed to prove counsel's performance was ineffective for choosing not to make an unmeritorious objection the Trial Judge's jury instruction on accomplice liability, the "hand of one is the hand off all." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) is instructive to the present case. The Mattison Court recently discussed the accomplice liability framework.

It is well settled that a defendant may be convicted on a theory of accomplice

> liability pursuant to an indictment charging him only with the principal offense. State v. Dickman. Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. State v. Condrey
>
> Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act. State v. Langley, (quoting Austin).
>
> In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." State v. Leonard, see Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) (Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime.).

State v. Mattison, 388 S.C. 469, 479-80, 697 S.E.2d 578, 584 (2010) (internal citations and quotations omitted).

In the present case, the Record is clear that Petitioner, his co-defendant Elliott, and their two companions, Smith and Villegas, entered the McCalls' residence where Petitioner and Elliott acted in concert in committing the offenses. Victim Nathan McCall testified that both Petitioner and Elliott were armed when they entered his room. (App.p.57; p.84). Victim Nathan testified Petitioner struck him in the head with a firearm, and stole a pistol from him. (App.p.64). When Petitioner left the room, Elliott remained present and held Victim Nathan at gunpoint; during the encounter, Elliott eventually firing a warning shot. (App.p.70). Companion Villegas testified that both Petitioner and Elliott entered the residence with the intent to resolve a past debt. (App.p.123). Companion Smith testified Petitioner was armed with a firearm owned by Elliott. (App.p.44).

Concerning the second armed robbery, Victim Jason McCall testified Petitioner entered his room, armed, and stole $125 from his nightstand while Elliott stood guard over his brother Victim Nathan in a separate part of the residence. (App.p.89). Victim Jason witnessed Elliott hand Petitioner a gun during the commission of the offenses. One of the culprits fired a shot into the McCalls' residence when they fled the scene. Victims Nathan and Jason were uncertain who fired

the final shot. (App.p.69; p.92). Elliott testified that he did not recall firing the final shot. (App.p.137). Counsel thoroughly cross-examined him on the matter. (App.pp.141-44). In contrast, Petitioner's statement was admitted into evidence. In Petitioner's version, he never fired a shot during the incident; the statement also implied that Elliott was the principle actor. (App.p.188).

Last, Petitioner's girlfriend, Meadows, testified that Petitioner and Elliott both absconded to her residence after the crimes. She testified they were "talking crazy." (App.p.154). Petitioner made an admission of guilt to her. (App.p.154). When the police arrived at her residence, both Petitioner and Elliott fled into the nearby woods. They were headed in the same direction. (App.p.155). During the defense's closing argument, counsel commented that Petitioner was only guilty of entering the home and forcibly taking methamphetamine from the victims; counsel commented the remainder of the criminal culpability belonged to Elliott. (App.pp.231-33). The State presented ample testimony and evidence that showed Petitioner was the most culpable principle offender during incident. However, contrasting testimony and evidence showed Elliott acted as a principle offender during the incident. Certainly, the "hand of one is the hand of all" jury instruction was appropriate in light of Petitioner's self-serving statement that purportedly absolved his liability in place of Elliott's criminal liability. Certainly Petitioner opened the door to the inclusion of the instruction when counsel stridently commented the culpability rested with Elliott in his closing argument. See State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003).

In the alternative, Petitioner's argument that the Trial Judge erred in instructing the jury on accomplice liability where Elliott was charged with a lesser offense is without merit. "A trial judge has the duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence." State v. Peer, 320 S.C. 546, 466 S.E.2d 375, 380 (Ct. App. 1996). The State's discretional decision to charge Elliott with strong armed robbery instead of armed

robbery simply does not negate the convincing evidence of either his or Petitioner's guilt for armed robbery. See State v. Thrift, 312 S.C. 282, 307, 440 S.E.2d 341, 355 (1994) ("The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record."). Therefore, the PCR Judge correctly found that Petitioner failed to show that counsel's performance was ineffective here. Simply, counsel has no duty to make an objection for the sake of making an objection where the Trial Judge's decision to instruct the jury on "hand of one is the hand of all" accomplice liability theory of guilty did not constitute objectionable error. See Thornes v. State, 320 S.C. 306, 309-10, 426 S.E.2d 765, 765 (1993).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

II.

Certiorari is not warranted where the PCR Judge correctly found Petitioner failed to meet his burden to prove counsel's failure to object to the solicitor's purported improper burden shifting comments made during the State's closing argument constituted deficiency or prejudice because an objection here held no merit.

At the PCR hearing, Applicant argued that counsel was ineffective for failing to object to to purported comments by the Solicitor during the State's closing argument on page 218 of the trial transcript that read,

> They all blamed him, too; but the big finger pointed right back at the defendant right there, [Petitioner]. He was the mastermind, he was the ringleader. I'm not excusing what Shane Elliott did, but he's the one that did it (pointing to [Petitioner]). And there was no evidence to the contrary. They all saw it. Even though, like I say, some of them have sketch memories.

(App.p.218, ln. 11-18). Petitioner gave his "erudite" opinion that he took this limited passage of the solicitor's closing to infer, "[the solicitor's] saying I didn't put up evidence." (App.p.316, ln. 10-11).

Counsel testified at the PCR hearing on the matter. Based upon Petitioner's examination of the rational for not objecting to this limited portion of the solicitor's entire closing, counsel second-guessed the efficacy of his performance here. (App.pp.343-44). The question posed induced counsel's testimony that isolated comment in retrospect appeared to be a improper burden shift and warrant an objection. He testified that in hindsight, he would have objected to the Solicitor's comment here. (App.p.344).

In denying and dismissing this allegation, the PCR Judge found Petitioner failed to prove that failure to object to the solicitor's comment in question constituted ineffective assistance of counsel. (App.p.393). The PCR Judge correctly addressed the issue in the context of the entire trial transcript and found that the solicitor's comment was made in reference to Petitioner's statement

that was introduced a trial. (App.pp.393-94). Regardless, the PCR Judge found Petitioner failed to meet his burden to prove Strickland's prejudice prong where any error in counsel's failure to object here would have constituted harmless error at most. (App.pp.393-94).

Effective Assistance of Counsel

A criminal defense attorney may be found deficient and ineffective for failing to object to a solicitor's comments made during the State's closing argument. Von Dohlen, 360 S.C. 598, 613–14, 602 S.E.2d 738, 746 (1996). "Such self-proclaimed admissions have been regarded with skepticism. Counsel's self-serving statements (I didn't research the law) need not be accepted as true." Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000). "The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive." Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999), Eberts v. Gaetz, 610 F.3d 415 (7th Cir. 2010) (an attorney's reflection about what should have been done after the fact is irrelevant to the question of ineffective assistance.).

"An accused has a right to remain silent and the exercise of that right cannot be used against him." Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). "Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." State v. Cooper, 334 S.C. 540, 514 S.E.2d 589 (1999).

Discussion

The PCR Judge correctly found Petitioner failed to prove counsel's failure to object to the permissible comment by the solicitor here constituted deficient performance. Furthermore, Petitioner failed to prove that the purported objected comment overcame a harmless error analysis. McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000) is instructive and distinguishable to the present case. McFadden's case reached this Court on appeal from the

Circuit Judge's dismissal of his PCR action. McFadden's trial attorney failed to object during the solicitor's closing argument. Id. at 640, 539 S.E.3d at 393. The solicitor explained to the jury that the State only had one opportunity to argue the case in the closing argument because McFadden did not present a defense. Id. The solicitor further connected the failure to present a defense with McFadden's guilt. Id. The McFadden Court found the comment constituted a Doyle violation. Id. at 642, 539 S.E.3d at 394.

In the present case, the solicitor did not explicitly comment on Petitioner's silence nor did he implicitly comment on it. "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." Johnson v. State, 321 S.C. 318, 468 S.E.2d 620 (1997). The solicitor's comment "there is no evidence to the contrary" was made in the context of the evidence presented at trial; that the eyewitness and Elliott testimony denoted Applicant as the causal connection to the victims and scene of the offense.

> Officer Arnold talked to every single one of them, and like I say, every single one of them was fairly consistent in what they say happened. And the finger on every single one of them was fairly consistent in what they say happened. And the finger on every single one of them, it did not point at [Elliott] they all blamed [Elliott]. But the big finger pointed right back at the defendant right there, [Petitioner]. He was the mastermind, he was the ringleader. I'm not excusing what [co-defendant] did, but [Petitioner's] the one that did it (pointing to defendant). And there was no evidence to the contrary. They all saw it. Even though, like I say, some of them have sketchy memories.

(App.p.218, lines 7-18). Therefore, the alleged Doyle violation was nothing more than the solicitor's summary of the eyewitness testimony. A solicitor's closing argument must stay within the record and the reasonable inferences from it. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Id. Here, there is no impropriety that would have

necessitated an objection. Therefore, this Court must find solicitor's statement in question did not constitute a Doyle violation.

Regardless, Petitioner failed to meet Strickland's prejudice prong here. "When a Doyle violation has occurred, the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal." Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). The analysis is bifurcated. The reviewing court will employ a harmless error analysis, and it will determine if the trial judge's jury instruction cured the error. In the present case, any alleged Doyle violation was harmless. Furthermore, the Trial Judge's jury instructions cured any alleged error.

First, the reviewing court applies enumerated factors to determine if the error is harmless: "(1) the purported reference to the Petitioner's right to remain silent was a single reference, which was not repeated or alluded to; (2) the solicitor did not tie the Petitioner's silence directly with his summary of the State's evidence; (3) instead he summarizied Petitioner's version of the facts, detailed in his statement, that were incredible; (4) the evidence of Petitioner's guilt was overwhelming. McFadden, 342 S.C. at 641, 539 S.E.2d at 393. In the present case, the alleged implicit Doyle violation occurred only once. Second, the solicitor distinguished his summary of eyewitness and Elliott's testimony from Petitioner's purportedly exculpatory and self-serving statement that was admitted into evidence. See State's Exh. 4. (App.p.188). The solicitor's closing argument addressed the statement separate and apart from his summary of the eyewitness and co-defendant testimony. (App.p.223, lines 11-16). Third, Applicant's statement that he was at the wrong place at the wrong time buying drugs was implausible. Elliott, their two companions, the two victims, and Applicant's girlfriend provided testimony that was alien to Petitioner's version of the incident as detailed in his statement. Fourth, Petitioner's conviction was supported by overwhelming evidence of guilt. Numerous

eyewitnesses and the victims implicated Petitioner's central involvement in the armed robbery. Any error, at most, would have constituted harmless error.

Last, the Trial Judge gave thorough jury instructions regarding the matter prior and subsequent to the solicitor's closing argument. Again, McFadden v. State is instructive and distinguishable. McFadden, 342 at 642, 539 S.E.2d at 394. The McFadden Court found the circuit judge's instruction did not cure the error because "nowhere in his instructions did the trial judge inform the jury that the defendant was not required to present any evidence and that the jury could draw no adverse inference from his failure to do so." Id. However, in the present case, the Trial Judge offered the following instruction prior to the solicitor's closing argument.

> The assertion of the constitutional right not to testify or present evidence must not, must not be considered in your deliberations. Under your oath you are to draw no conclusions whatsoever from the fact that the defendant in this case did not testify or put up evidence. As I stated, the defendant is not required to prove his innocence and the burden of proof remains upon the state to prove guilt beyond a reasonable doubt. Now with that admonition, I now recognize the State for its closing argument.

(App.p.215, lines 12-21). Again, the Trial Judge subsequently charged the jury on the matter.

> Now, I instruct you and emphasize that the fact that the defendant did not testify or put up evidence is not a factor to be considered by you in any way in your deliberations and in your consideration of the question of whether the State has proven the defendant is guilty or not guilty of the charges in the indictment. It must not be considered by you in any manner whatsoever. The defendant has a constitutional right to remain silent and the assertion of the right must not be considered by you in your deliberations.
>
> I repeat: under your oath you are to draw no conclusion whatsoever from the fact the defendant in this case did not testify or present evidence. The fact that the defendant did not testify should not even be discussed in the jury room. The burden of proof, as I have stated to you, is on the state. The defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

(App.p.249, line 9—p.250, line 2). Thus, the Trial Judge's and charge cured any alleged Doyle violation. See State v. Northcutt, 372 S.C. 207, 228, 641 S.E.2d 873, 884 (2007) (citing State v. Ard, 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) ("Our jurisprudence unwaveringly provides that we are to presume that juries follow their instructions and that proper instruction of the jury by the court cures most errors."). Accordingly, Petitioner failed to prove the first prong of the Strickland test -- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: J. Wall
ATTORNEYS FOR RESPONDENT

Sept. 8th, 2014

ALAN WILSON
ATTORNEY GENERAL

September 8, 2014

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

RE: **Jeffery Webb v. State of South Carolina**
Appellate Case No: 2013-001694

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Wanda H. Carter, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

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S.C. Supreme Court

Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2013-001694

JEFFERY WEBB,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
1330 Lady St., Suite 401
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This 8th day of September, 2014

Ashley Haworth
LEGAL ASSISTANT for the Respondent