

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Florence County
Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

NOV 17 2014

S.C. Supreme Court

Tracy Willard Daniels,

Petitioner,

vs.

State of South Carolina,

Respondent.

2013- 002572

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 58671

Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3727

ATTORNEYS FOR RESPONDENT

INDEX

Issue Presented.....1
Statement of the Case.....1
Argument2
Conclusion7

ISSUES PRESENTED

The PCR court did not err in finding counsel was not ineffective for failing to cross-examine the State's witness with the witness's prior recorded statement where it mostly corroborated the witness's trial testimony and where additional cross-examination would not have produced a different result.

STATEMENT OF THE CASE

Petitioner Daniels was indicted for murder (2000-GS-21-977). Daniels proceeded to jury trial before the Honorable Paul M. Burch and Daniels was found guilty of voluntary manslaughter. Judge Burch sentenced Daniels to twenty-six years imprisonment. Daniels appealed and the Court of Appeals affirmed the conviction and sentence. State v. Daniels, Op. No. 2004-UP-394 (S.C. Ct. App. filed June 22, 2004). This Court subsequently denied Daniel's petition for writ of certiorari.

Daniels then filed an application for post-conviction relief (PCR) on September 19, 2006. An evidentiary hearing was held before the Honorable Benjamin H. Culbertson on December 18, 2008. Harry Devoe, Esquire represented Daniels and the State was represented by Assistant Attorney General Julie M. Thames. At the hearing, Daniels alleged trial counsel was ineffective for failing to utilize a taped statement of State's witness Mary McDougal during trial. Only after the PCR court orally ruled adversely to Daniels did Mr. Devoe ask for a copy of the tape to be admitted, which apparently was outside the courthouse in his car. The PCR court denied this delinquent request and the case became final by the PCR court's February 6, 2009 order denying relief.

Daniels appealed the denial of relief. Daniels filed a petition for writ of certiorari on November 23, 2009. The State subsequently filed its return. On February 7, 2011, this Court remanded the matter to allow Daniels to introduce the taped statement. A hearing was held on March 2, 2012, before Judge Culbertson to introduce the tape. With the tape now introduced into evidence, Judge Culbertson took the matter under advisement and then denied relief in an amended order issued on November 13, 2013. Daniels appealed once again and filed his petition for writ of certiorari. The State's return now follows.

ARGUMENT

The PCR court did not err in finding counsel was not ineffective for failing to cross-examine the State's witness with the witness's prior recorded statement where it mostly corroborated the witness's trial testimony and where additional cross-examination would not have produced a different result.

Daniels shot his friend for reasons only known to him.¹ Daniels alleges the PCR court erred in denying relief on the ground that counsel should have used a taped statement by State's witness Mary McDougal to cross-examine McDougal. McDougal was Daniels' neighbor who saw the shooting from her window. Specifically, McDougal testified that Daniels took a step back before raising the gun and shooting the victim (Victim) – McDougal does not mention that Daniels took a step back in the recording. App. p. 488. However, the recording bolsters McDougal's testimony, because she confirms that Daniels held the gun up and also that he aimed before shooting Victim.

¹ Daniels told law enforcement that he got in an argument with Victim, shoved Victim out of the house, and shot him. App. pp. 126-127. At trial, he claimed it was an accident.

Counsel's performance was not deficient and no prejudice ensued from his failure to utilize a taped interview that mostly corroborates the witness.

In order to prove ineffective assistance of counsel, petitioner 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. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to show prejudice, a PCR applicant must prove that "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. 115, 117-18, 386 S.E.2d 624, 625 (1989).

Daniels shot his friend dead. Mary McDougal, Daniels' neighbor testified she saw Daniels arguing with his friend (Victim) and heard Daniels tell Victim to "get the fuck out of my yard." App. pp. 472-476. McDougal was not looking out her window when she heard a gunshot, but looked outside and saw Daniels holding a gun pointed upwards. App. p. 478, lines 10-13.

The argument lay dormant under an aura of calmness. Victim stood in the yard, picked up a grill, and put a lid on it. McDougal saw Daniels come out of the trailer with the gun open. App. pp. 479-482. Daniels handed Victim the gun, Victim took a shell out. Victim appeared to drop something on the ground and pick it up. Note Victim was found with a shell in his hand later. App. p. 168, lines 8-12; pp. 483-485. Victim closed the gun, opened it up and gave it to Daniels. App. pp. 487-488.

McDougal then testified as follows:

Q: And the victim has handed it back to the defendant, is that correct?

A: Yes.

Q: All right. And you're still observing? What do you see?

A: He takes the gun and then he closed it. Steps back. You want to show that, too?

Q: Please if you would?

A: He closed it and stepped back and pointed it at him.

Q: All right. And then what?

A: Then a second later he fired it.

Q: Okay. Have a seat. Thank you. Mary, after he shot [Victim], what did you observe? What happened – What did you do when he fired that gun?

A: I ducked.

Q: All right. What if anything did you hear?

A: I heard the pellets hitting the side of my trailer.

App. p. 488, line 7-23. Counsel cross-examined McDougal extensively on the lighting around the area during the shooting, her distance from Daniels and Victim, the positioning of Daniels and Victim as the events unfurled, and her ability to perceive the events as they occurred. App. pp. 498-510.²

² Counsel demonstrated how to make a State's witness a defense witness, and argued during closing argument to the jury: "I didn't know about Mary McDougal, but thank goodness I don't know where she came from, who brought her, but thank goodness somebody got her to come home that night when she did. . . . Thank goodness for Mary McDougal and what she saw." App. p. 747, lines 8-16. McDougal was beneficial to the defense because her testimony put Daniels and Victim close together, in contrast to Daniels' extremely damaging statement to law enforcement. As counsel explained to the jury, "[Daniels] had said that they were far enough away for it to be murder. She said that they were close enough and not only were they close enough for there to be some other way that this thing occurred, not only were they close enough but

In the taped statement, McDougal describes in relevant part the following: ‘It appeared to me that maybe things had calmed down and they were getting over it or something, and maybe, you know, it was gonna be okay. When he handed the gun back to Tracy, that’s when Tracy said something, which I couldn’t hear, he snapped it shut and then sho – **held it up** and shot him.’ App. p. 961 (emphasis added). McDougal explains further in the statement: “It was like he handed the gun back to Tracy. Tracy was like calm with it, and then when he made a comment, as soon as he made the comment, that’s when he snapped it shut, **pointed it at him** and he fell.” App. 961 (emphasis added).

Daniels wishes to call this a discrepancy. The PCR court noted it was no discrepancy at all, just detail left out of the statement. App. pp. 950-951. McDougal’s trial testimony is bolstered by her statement that Daniels “held [the gun] **up**”³ when he shot Victim, implying preparation and intent in contrast to an allegation of accident or involuntary manslaughter. The taped statement hurts, not helps Daniels. It bolsters, not impeaches McDougal. And counsel’s supposed omission is undoubtedly non-prejudicial as cross-examination on this point was extremely unlikely to have changed the result of trial, especially in consideration of trial counsel’s thorough cross-examination and Daniels’ damaging admission to law enforcement. Huggler v. State, 360 S.C. 627, 602 S.E.2d 753 (2004) (finding counsel was not ineffective for failing to cross-examine witnesses with their statements where inconsistencies between

more importantly they weren’t arguing.” App. p. 748, lines 1-10.

³ This statement would have supported a quoted portion of the prosecution’s closing argument that appears in Daniels’ petition: the prosecutor exclaims, “So they don’t want you to believe that he raised that gun up, held it up, and fired.” App. p. 774, lines 4-6. If admitted on the case in chief by the prosecution, undoubtedly Daniels would now be claiming that it was improper bolstering. See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) (finding prior consistent statement was improper bolstering).

written statements and testimony were not substantial enough to warrant further cross-examine witnesses and finding no prejudice from the alleged deficiency). The PCR court's ruling is supported by probative evidence. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (finding the PCR court's rulings will be upheld if supported by any probative evidence); see Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (burden is on the PCR applicant to prove his allegations of ineffective assistance of counsel).

For the above reasons, certiorari should be denied.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.
If this Court sees fit to grant the petition, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Columbia, South Carolina
November 17, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

The Honorable Benjamin H. Culbertson. Circuit Court Judge

TRACY WILLARD DANIELS,

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:

Appellate Defender Katherine H. Hudgins
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 17th day of November, 2014


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

November 17, 2014

VIA HAND DELIVERY

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

RECEIVED
NOV 17 2014
S.C. Supreme Court

RE: Tracy Willard Daniels v. State of South Carolina
Appellate Case No: 2013-002572

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)