STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

RECEIVED
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S.C. Supreme Court

Appellate Case No. 2013-002789

Kenneth M. Workman, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the PCR judge err in finding trial counsel was effective after he failed to object to the Allen[1] charge?

2. Did the PCR judge improperly rule that no prejudice resulted from trial counsel's failure to join co-defendants motion for a full and fair cross examination of State's witness?

[1] Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896).

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the August 2008 term of General Sessions for assault and battery of a high and aggravated nature (2008-GS-23-5528), conspiracy (2008-GS-23-5529), armed robbery (2008-GS-23-5530, count 1), and possession of a weapon during the commission of a violent crime (2008-GS-23-5530, count 2). (App.pp.400-01; pp.404-05; pp.409-10). Scott D. Robinson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On January 15, 2009, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of 30 days for the lesser-included offense of simple assault, 5 years for conspiracy, 25 years for armed robbery, and 5 years for possession of a weapon during commission of a violent crime. (App.pp.267-68).

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[2] brief. (App.pp.306-18). The Court of Appeals dismissed the appeal. State v. Workman, Op. No. 2012-UP-048 (S.C. Ct. App. filed Jan. 25, 2012). (App.p.319).

Petitioner filed an application for post-conviction relief (PCR) on April 5, 2012 (2012-CP-23-2386) and an addendum on June 20, 2013. (App.pp.320-38; p.344). A hearing was convened at the Greenville County Courthouse on October 23, 2013. (App.pp.345-80). Petitioner was present and represented by Susannah C. Ross, Esquire.

[2] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order filed November 26, 2013. (App.pp.390-98).

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. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have objected to the Allen charge.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have objected to the Allen charge in this case. While Petitioner argues the trial judge directed comments to the minority voters on the jury, this argument is without merit.

A.

The jury began deliberations in this case at 10:31 a.m. (App.p.229). After the jury sent out a note, they reentered the courtroom at 10:56 a.m. in order to listen to Timothy Wright's testimony again. (App.p.230). Once this testimony was replayed, the jury returned to deliberations at 11:36 a.m. (App.p.254). After sending out a second note, the jury reentered the courtroom at 1:15 p.m., the trial judge stated he could not

answer factual questions, and they resumed deliberations at 1:17 p.m. (App.pp.255-56). The jury reentered the courtroom at 2:50 p.m. after sending out a third note indicating they could not reach a unanimous decision. (App.p.256). The trial judge gave an Allen charge and the jury resumed deliberations at 2:58 p.m. (App.pp.256-60). There were no objections to the Allen charge. At 4:47 p.m., the jury rendered its verdict in this case. (App.p.261).

B.

At the PCR hearing, Petitioner argued trial counsel "didn't even put up a fight towards the Allen charge." (App.p.354). Trial counsel confirmed he did not object to the Allen charge. (App.pp.364-65).

In denying Petitioner's application for post-conviction relief, the PCR judge found "the trial judge's statement to the jury did not involve the type of language usually seen in an improper Allen charge" and concluded "the trial judge's statement cannot be considered to be unduly coercive in nature." (App.p.396).

C.

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)).

D.

Trial counsel was not ineffective for failing to object to the Allen charge because the Allen charge was not coercive. Petitioner argues the following language of the charge was directed towards the minority voters on the jury:

> I tell you that it is the duty of each of you to tell the others how you feel and why you feel that way. However, I also tell you that if the much larger number of your panel are in favor of one particular verdict, then a decenting [sic] juror or jurors would consider whether or not his or her or their positions is a reason one which makes no impression upon the minds of the majority.
>
> In other words, if a majority of you are for one particular form of verdict, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the judgment of the majority.

(App.p.258, lines 6-16).

> . . . in order to bring twelve minds to a unanimous decision as you are required to do you must examine the questions submitted to you with candor and with a proper regard to and respect for the opinions of each other.

(App.p.258, lines 20-24).

This Court has found the factors to be applied to determine whether an Allen charge is coercive are: (1) whether the charge speaks specifically to minority jurors; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an inquiry into the jury's numerical division; and (4) the time between the Allen

charge and the return of the verdict. Tucker v. Catoe, 346 S.C. 483, 492, 552 S.E.2d 712, 716 (2001) (citing Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546 (1988)). "Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances." Id. at 491, 552 S.E.2d at 716 (citation omitted); see also State v. Jones, 320 S.C. 555, 559, 466 S.E.2d 733, 735 (Ct. App. 1996) (noting the Allen charge was reviewed as a whole to determine whether it was coercive). Using this analysis, it is clear the entirety of the Allen charge does not render it coercive.

First, the charge was not directed specifically to minority jurors. As noted supra, the trial judge does note dissenting or minority voters should consider the judgment of the majority. (App.p.258, lines 7-16). The trial judge, however, stated it was the duty of each juror to discuss their feelings with the others and that each jury member "must examine the questions submitted to you with candor and with a proper regard to and respect for the opinions of each other." (App.p.258, lines 6-7 and lines 20-24). The judge also properly stated "every juror has a right to his or her own opinion and he or she need not give it up merely for the purpose of being in agreement." (App.p.258, lines 1-3). The court of appeals, in State v. Hale, 284 S.E.2d 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985), held this language was not coercive. The trial judge also cautioned "the verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions and not a mere acquiescence in the conclusion of his or her fellow jurors." (App.p.258, lines 17-20). The court of appeals, in State v. Jones, 320 S.C. at 559, 466 S.E.2d at 735, held this language was not coercive. When reading the Allen charge as a whole, it is clear it was not directed towards minority voters on the jury.

Second, the Allen charge does not contain coercive language demanding a verdict in this case.

Third, the Allen charge does not inquire into the jury's numerical division at that time.

Fourth, the jury had deliberated for almost four and one-half hours before the Allen charge was given and almost two hours after the charge. It is clear the jury was engaged in thoughtful deliberation and was not rushed to verdict by the issuance of the Allen charge.

E.

When viewing all four of the factors set out in Tucker v. Catoe, it is abundantly clear the language of the Allen charge was not directed towards minority jurors or coercive. As such, trial counsel cannot be considered ineffective for not objecting to the charge. 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 his 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.").

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving he suffered any prejudice because trial counsel failed to join the co-defendant's motion to reveal Timothy Wright's deal with the State.

A.

Prior to trial, counsel for Petitioner's co-defendant made "a motion to have the State reveal to me any deals that have been made between the State and Mr. Timothy Wright." (App.pp.12-13). The State responded that Wright has been sentenced and the other pending charges had been dismissed before he testified in the prior trial (which had resulted in a mistrial). (App.p.13). The State later moved to prevent any questioning of Wright as to the sentence he received. (App.p.26). The co-defendant's counsel argued he should be able to question Wright about the nature of the plea negotiations (that the State made a recommendation of 20 years). The trial judge stated he would allow cross-examine "that there were negotiations, but not what the recommendation or the sentence was." (App.p.27).

Wright subsequently admitted on direct examination that he had already pled guilty "to this offense" and a subsequent offense and that no promises were made when he pled guilty about the sentence he would receive. (App.pp.121-23). During the co-defendant's counsel's cross-examination, Wright admitted the prosecutor dismissed some of his charges the day he gave sworn testimony in the case. (App.p.135). During trial counsel's cross-examination, Wright stated he was testifying in order to tell the truth but agreed a number of his charges had also been dismissed. (App.p.139).

B.

At the PCR hearing, trial counsel confirmed he did not join co-defendant's counsel's motion to "reveal the deal" during the pre-trial motions hearing. (App.p.365).

In denying Petitioner's application for post-conviction relief, the PCR judge noted the co-defendant's attorney moved at the start of trial to have "any deals that have been made" with Wright to be revealed and that the trial judge ruled Wright could not be questioned about the sentence recommendation in his case. The PCR judge found "there was no prejudice resulting from the fact that trial counsel did not join this motion because the Court of Appeals affirmed the trial judge's ruling in the co-defendant's direct appeal." (App.p.395).

C.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he suffered prejudice from trial counsel not joining co-defendant's "motion to have the State reveal . . . any deals that have been made between the State and Mr. Timothy Wright." In order to demonstrate prejudice, Petitioner must prove "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. Petitioner cannot meet this burden of proof. Initially it should be noted that Petitioner and the co-defendant were aware Wright had charges dismissed, received a twenty-year sentence recommendation from the State, and had been sentenced prior to this trial. (App.pp.12-13; p.26). Thus, it does not seem there would have been much for the State to reveal to Petitioner and the co-defendant. Further, the parties were allowed to

question Wright about the negotiation process. Regardless, the very issue Petitioner complains of was addressed in his co-defendant's direct appeal. In that case, the South Carolina Court of Appeals concluded:

> although the trial court precluded [the co-defendant] from cross-examining a witness for the State regarding the specific sentence he received for charges arising from the same incident, the court allowed extensive cross-examination of the witness regarding every other aspect of potential bias arising from his cooperation with the State. Accordingly, we find that, to the extent the trial court erred by precluding evidence of the witness's specific sentence, the error was harmless because such evidence was cumulative and could not reasonably have affected the result of the trial.

State v. Robinson, Op. No. 12-UP-042 (S.C. Ct. App. filed Jan. 25, 2012). As such, trial counsel not joining in the co-defendant's motion did not undermine confidence in the outcome of the trial. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735. Petitioner cannot prevail on his claim of prejudice.

D.

Accordingly, Petitioner failed to prove there was a reasonable probability the result of his trial would have been different if trial counsel had joined the co-defendant's motion to reveal Wright's deal with the State, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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 issues discussed above.

Respectfully submitted,

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Attorney General

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By: _____
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November 26, 2014

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The Honorable Edward W. Miller, Circuit Court Judge

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Kenneth M. Workman, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susannah C. Ross, Esquire
330 East Coffee Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served. This 26th day of November, 2014.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

November 26, 2014

RECEIVED
NOV 26 2014
S.C. Supreme Court

VIA HAND DELIVERY

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

Re: Kenneth Workman v. State of South Carolina
Appellate Case No: 2013-002789

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Return to Petition for Writ of Certiorari. Please let me know if you have any questions: 803-734-4042.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

Enclosures

cc: Susannah C. Ross, Esquire
Trisha Allen