



ALAN WILSON
ATTORNEY GENERAL

March 25, 2015

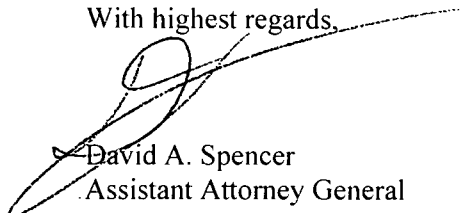
The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Shawn Phillips v. State of South Carolina
Appellate Case No. 2014-000304
Lower Court Case No. 2011-CP-10-7028

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving the petitioner with this Return to Petition for Writ of Certiorari.

With highest regards,


David A. Spencer
Assistant Attorney General

RECEIVED

MAR 25 2015

S.C. Supreme Court

ARW/arh
Enclosures

cc: Laura Bear, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

RECEIVED

MAR 25 2015

S.C. Supreme Court

SHAWN PHILLIPS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

ARGUMENTS

 I. The PCR court did not err in finding counsel was not ineffective as counsel vigorously challenged the admission of a prior robbery from which Petitioner and his co-defendant acquired the murder weapon, and the later- discovered discrepancy concerning the color of the gun was merely impeaching and does not require reversal of Petitioner’s convictions.10

 II. The PCR court did not err in denying relief on the grounds that counsel was ineffective for not investigating whether a witness could provide beneficial testimony where the prosecutor could not locate the witness and the witness did not testify at the PCR hearing.....14

 III. Trial counsel pursued reasonable trial strategy in not objecting to an in-court identification of Petitioner where trial counsel used the witness’ prior misidentification to try and bolster Petitioner’s statement to law enforcement. Further, Petitioner was not prejudiced by the in-court identification since two other codefendants testified about his involvement in the robbery and he admitted being involved in the robbery in his statement to law enforcement.16

CONCLUSION.....21

STATEMENT OF ISSUES ON APPEAL

I.

The PCR court did not err in finding counsel was not ineffective as counsel vigorously challenged the admission of a prior robbery from which Petitioner and his co-defendant acquired the murder weapon, and the later- discovered discrepancy concerning the color of the gun was merely impeaching and does not require reversal of Petitioner's convictions.

II.

The PCR court did not err in denying relief on the grounds that counsel was ineffective for not investigating whether a witness could provide beneficial testimony where the prosecutor could not locate the witness and the witness did not testify at the PCR hearing.

III.

Trial counsel pursued reasonable trial strategy in not objecting to an in-court identification of Petitioner where trial counsel used the witness' prior misidentification to try and bolster Petitioner's statement to law enforcement. Further, Petitioner was not prejudiced by the in-court identification since two other codefendants testified about his involvement in the robbery and he admitted being involved in the robbery in his statement to law enforcement.

STATEMENT OF THE CASE

Petitioner Shawn Phillips was indicted for murder, armed robbery, and criminal conspiracy. Phillips was tried by jury before the Honorable James C. Williams, Jr., on August 5-7, 2008. Phillips was found guilty on all charges. Judge Williams sentenced Phillips on September 24, 2008, to concurrent terms of forty years imprisonment for murder, thirty years imprisonment for armed robbery, and five years imprisonment for criminal conspiracy.

Phillips appealed. The Court of Appeals dismissed the appeal pursuant to Anders v. California, 3886 U.S. 738 (1967). Phillips then filed an application for post-conviction relief. A hearing on the application was heard at the Charleston County Courthouse before the Honorable Stephanie P. McDonald on July 26, 2012. Petitioner was represented by Leigh Hunter, Esquire. While the ruling was pending, Ms. Hunter passed away. Mark L. Archer, Esquire was then appointed as counsel. Judge McDonald issued an order denying relief on January 21, 2014.

STATEMENT OF FACTS

Victim was found dead on the bed in his room at the Budget Inn on November 8, 2006. There was a hole in the pillow that was placed over his face. Copious amounts of blood covered Victim's face and the bed. A muzzle imprint indicated the bullet entered the left temple; the bullet travelled out the right temple. App. pp. 164-168; p. 194; p. 587.

Angela Agagas testified as a cooperating co-defendant. At the time of the shooting, she was Phillips' girlfriend. She birthed Phillips' baby in jail. Phillips, Lennie Mickey, and Agagas checked into a Travel Lodge on November 6, 2006. Phillips and Mickey went to the store and returned with Alana Niesen, aka "China" or "China Doll." They all did some drugs, and after prodding, China offered the name of someone they could rob in the hotel next to them. App. pp. 259-267.

According to Agagas, China did not want to be involved, so they called Sandra Barnes, aka "B.G." China called Victim and told him that she had a girl for him and would send her over. China took Phillips, Mickey, and Barnes over to the hotel, and then they all came back. Phillips, Mickey, and Barnes left for Victim's hotel room to commit the robbery while China and Agagas stayed behind at the Travel Lodge. App. pp. 268-270. Barnes came back and let them know that Phillips and Mickey were in the hotel room. Phillips and Mickey returned five to ten minutes later, "as white as a ghost" and said Mickey shot Victim. Phillips and Agagas left in Agagas' red Tracker, while Barnes, China, and Mickey left in a red Durango. App. pp. 271-272.

Alana "China" Niesen testified she met Victim through her dope dealer and actually helped Victim check in at the Budget Inn. She gave Victim a ride to the Budget Inn in her

red Durango and helped take his luggage to his room. China later met Phillips and Mickey at American Hotel, two other people were in the back seat of the red Tracker they were driving. They indicated they were staying at the Travel Lodge, which was the next hotel over. App. pp. 329-337.

China went to their hotel room. She testified that Phillips, Mickey, Barnes, and Agagas were all there. The girls were getting high. Meanwhile, Phillips and Mickey wanted to rob people. China told them about Victim. China did not want to go over to the hotel room, but Barnes agreed to go over in her place. So China called Victim and told him that she had a girl for him. Barnes, Phillips, and Mickey left for Victim's room. Barnes returned first to say that Phillips and Mickey were in the hotel room. Then Mickey and Phillips returned and said they committed the robbery and left Victim in the bathroom. They appeared nervous. App. pp. 337-346.

On cross-examination, China admitted that Mickey, rather than Phillips, was doing most of the talking. China also testified about how one time Mickey punched China and put a gun to the back of her head and was ready to shoot, but Phillips got the gun away. App. pp. 365-366. On redirect, China testified that Phillips knew about the robbery plan and was fine with going over to Victim's hotel. App. p. 395.

Sandra Barnes testified she met Phillips about two weeks prior to the murder. Phillips was aware that Barnes was a prostitute, and Barnes gave Phillips her phone number in case he had any business. Barnes identified Phillips at the onset of her direct examination. Then next time Barnes saw Phillips was the night of the murder. She only knew Phillips as "D" at the time of the murder and not by his other nickname "Pit." Phillips called Barnes

while she was in the middle of business at her hotel. Phillips told her he wanted to pick her up to go tricking. Mickey, Phillips, and Agagas picked Barnes up and brought her to their hotel room. Mickey talked about what they really wanted to do, rob some of Barnes' Mexican clients. Barnes said her clients did not have money between paychecks. Mickey gave her a rock of crack cocaine to entice her to provide names but Barnes told the jury she did not "roll like that." App. pp. 408-415.

At one point, they all left the hotel to go to the store, which is when they ran into China and exchanged phone numbers. China came over to the hotel room later, and they asked about any of her clients they could rob. After giving China a rock of crack cocaine, she told them about Victim, a "carney," who had a lot of cash and crack cocaine. They made plans to rob him. China did not want to go to the hotel room, so Barnes agreed to go. The deal was her and China would get half of the money and all the crack from the robbery. App. pp. 415-419.

Barnes went over to Victim's hotel with Mickey and Phillips. Barnes testified that she approached the door to Victim's hotel room to knock, but Victim was already opening the door. Mickey and Phillips rushed past Barnes and inside the hotel room, closing the door behind them. Barnes returned to Travel Lodge. Barnes testified that when Mickey and Phillips returned to Travel Lodge, Mickey was panicking while Phillips remained cool. Mickey wanted to leave. App. pp. 420-423.

They claimed they left Victim tied up in the bath tub after they robbed him. Mickey wanted to hide the Tracker, so they met up at another parking lot, left the Tracker behind, and searched for more people to rob, because according to Mickey, they only got fifty dollars and

no crack. Eventually though, they gave up on further robbery and returned to the Tracker and split up. China dropped Mickey off, then dropped Barnes off at her hotel. App. p. 424. She testified that she was arrested December 14. Barnes picked Mickey, Agagas, and China out of a photographic lineup.

On cross-examination, Barnes admitted she originally identified another individual from a photograph as “D.” She testified she was high at the time she was shown the photograph. App. p. 430. Counsel made this initial identification a major point of focus in his cross-examination, even though the State did not present evidence of the show-up identification on direct examination. App. p. 431; pp. 436-439.

Detective Eric Jourdan testified that he found Barnes and brought her to the North Charleston Police Department for questioning. Barnes picked out Agagas, China, and Mickey as participants in the robbery. However, Barnes identified Dominick Ballou as “D” from a single person photograph that showed Ballou’s side and front view. Later, when Phillips was in the interior room for questioning, Investigator Jourdan brought Barnes to view Phillips through a two-way mirror, and she identified Phillips as “D.” App. pp. 447-453.

Phillips was arrested and gave a statement to law enforcement. Phillips told law enforcement he was with Mickey, Agagas, Barnes, and China at Travelers Inn.¹ According to Phillips, Mickey said he needed some money, and Barnes told them about a guy who worked at the fair and had money and crack cocaine. China said the guy was her friend and did not want to rob him. Mickey said, “Fuck that, either I’m going to start popping mother fuckers

¹ It appears he was confusing Travellers Inn with Travel Lodge, the hotel identified by the State’s witnesses.

in here or we're going to have to get that money." App. p. 540 (direct quote, p. 540, lines 19-22). Mickey looked at Phillips while he was holding a gun, Phillips said it appeared to be a .38 special revolver. App. p. 540, lines 22-24. Phillips told law enforcement that Mickey "told me to come with him. I thought, I know that if I didn't go with him he was going to shoot me." App. p. 540, line 24 - p. 541, line 1.

Phillips told law enforcement that he went with Mickey and Barnes to the Budget Inn. Mickey and Barnes got out of the car and told Phillips that he better not leave. Just then, "as [Mickey] and [Barnes] were getting out of the car D walked up." App. p. 541, lines 2-10.

Phillips told law enforcement the following:

[Mickey] threw D a black cap and said, you know what time it is. [Mickey] walked back to the truck and told me that I looked nervous and that I'd better not leave him. [Mickey, Barnes, and D] walked through the breeze-way out of my sight. About three minutes later I heard a pop like a gun shot. I started to leave and I saw [Mickey] and D run up to the truck and get in. [Mickey] was made [sic] because I started to leave. I left the parking lot and [Mickey] was telling me to hurry up and get back to the room. [Mickey] gave D five and said, my toy worked real well. D said, Man you shouldn't have shot the dude. D wanted to get out of the truck and [Mickey] put the gun on him and told him he wasn't going a fucking place. When we arrived back at the Travelers Inn [Mickey] searched D and made sure he didn't have anything valuable on him from the robbery. . . .

App. p. 541, line 10 – p. 542, line 1. Subsequently, Phillips picked Mickey out of a photographic lineup. App. p. 543.

Phone records showed a series of calls between China's cell phone and Budget Inn and between China's and Phillips' cell phones. App. p. 633.

Defense counsel called two witnesses. One was Mary Robinson, who testified

Agagas told her that she needed to testify against Phillips or face thirty years. Robinson testified that Agagas said she was mad at Phillips. App pp. 724-729. Phillips' sister, Octavia Ancrum, testified that Mickey was very aggressive, and Phillips was afraid on Mickey. App. p. 736, p. 739.

In Townes Suites robbery

Evidence of a prior robbery committed by Mickey and Phillips was admitted into evidence following an in camera hearing. In front of the jury, Agagas testified that the gun Mickey used for the robbery was a gun they stole from a robbery that Mickey and Phillips committed a couple of days earlier at the InTownes Suites. App. pp. 264-266. Agagas described the gun as "short and silver, and it had the rounds on the side." App. p. 264, lines 16-17.

The victim of the InTownes Suites robbery, Alec Browne, testified he was watching television when two black males opened the door to his room and robbed him. Browne testified the two men wore ski masks. They stole a Colt Detective .38 special with three rounds of Star Fire hollow point ammunition and three rounds of semi-wad cutter. App. pp. 304-305.

SLED Agent Suzanne Cromer testified as an expert in firearms identification. She examined a fired bullet from the crime scene and found it was consistent with a .38 special or a 357 magnum. The bullet was a jacketed hollow point with a closed base. The bullet was consistent with Stare Fire ammunition. Based on the bullets physical characteristics, Agent Cromer was able to narrow down to eight brands of firearms that might have fired the bullet. Two of those weapons were derringers, while six were revolvers. Agent Cromer determined

in her opinion that the weapon that fired the bullet was more likely a revolver than a derringer and eliminated the derringers as possible weapons. Agent Cromer testified that a Colt .38 special was one of the guns that could have fired the bullet. Agent Cromer testified that none of the six possible revolvers were common. The Colt was the most common. Further, Star Fire ammunition was a rather rare kind of ammunition that is no longer manufactured. App. pp. 311-316.

Per counsel's request, the trial court gave the jury a limiting instruction on the proper use of evidence of the prior robbery. App. p. 252; p. 797.

ARGUMENT

I.

The PCR court did not err in finding counsel was not ineffective as counsel vigorously challenged the admission of a prior robbery from which Petitioner and his co-defendant acquired the murder weapon, and the later-discovered discrepancy concerning the color of the gun was merely impeaching and does not require reversal of Petitioner's convictions.

Phillips complains he is entitled to a new trial because the victim of the InTownes Suites robbery testified his gun was blue, while Agagas testified the stolen gun was silver. Phillips does not challenge the finding that counsel was not ineffective, but claims he is entitled to a new trial. Phillips' claim is not proper for review and he failed to show that the discrepancy in testimony between two witnesses meets the requirements for granting a new trial.

One of the two prosecutors in the case, Bruce Durant, testified as the first witness at the PCR hearing. Durant was asked about his recollection of evidence about a prior armed robbery at In Town Suites that was admitted at trial. Durant described the circumstances as follows:

[T]he connection was that one of the prostitutes that testified for us, I believe Angel Agagas, indicated that the murder weapon in this case had come from that InTowne Suites armed robbery where your client and Lennie Mickey had robbed a guest at the hotel, and during the robbery had stolen the .38 caliber revolver was used in the murder of the victim in the other case.

App. p. 891, lines 5-15.

Durant explained that co-defendant Lennie Mickey was tried first. Because they

could not secure Browne's attendance, the prosecution did not present evidence about the InTowne Suites robbery at trial. That trial ended in mistrial. Phillips was tried next. Browne testified at Phillips' trial about the InTowne Suites' robbery, but was never asked to describe the color of the gun. Next, Mickey was tried again, and it was only then that the discrepancy in the color of the gun came to light. App. pp. 892-893. Durant explained: "We didn't find out about it until the third trial. And we found out about it the same time everybody else did. As a matter of fact, that information was elicited by us." App. p. 293, lines 16-20.

Durant testified as follows about the significance of the discrepancies in color provided by Brown and Agagas:

Q: Is it fair to say that in descriptions of, say, automobiles or clothing that they – that a witness will give –

A: I would tell you this.

Q: -- differing testimony as to the actual color of these items?

A: I will tell you this, that in 30 years of doing this, descriptions you get are the least probative evidence you will ever receive in any kind of case.

App. p. 903, lines 12-23. Durant noted, "I didn't view the discrepancy in the description of the weapons as being a major point at all, quite frankly. I think it would have been more unusual if they described it exactly the same way." App. p. 906, lines 7-10.

Trial counsel found the evidence was not critical or damaging to his defense.

Speaking on the evidence of the InTownes Suites robbery, counsel testified as follows:

I wasn't worried about it, to be honest with you. It didn't matter to me whether this guy testified or not. To me it didn't

have anything to do with whether or not my guy was under duress, or whether he was a material part of this robbery, this murder.

App. p. 919, lines 7-12.

The PCR court found Durant's testimony credible. App. p. 996. The PCR court also noted, "Discrepancies, such as the color of objects like guns or automobiles, are common in trial settings and may be an issue of the quality of a witness' recollection rather than their veracity." App. p. 996. The PCR court also found that counsel was not ineffective in challenging the admissibility of the InTowne's Suites robbery and found that it would have been preserved for review if challenged on appeal. App. p. 997.

In his petition, Phillips does not state a theory to support relief. Phillips does not claim counsel was ineffective. It appears that Phillips is claiming a new trial was warranted based on after-discovered evidence, even though Phillips never explicitly makes this argument. However, the PCR court never ruled on whether the evidence constituted after-discovered evidence, so this Court should refrain from granting review of the issue. Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) ("Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred.").

In Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983), this Court held that:

A party requesting a new trial based on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching.

Granting a motion on after-discovered evidence is not favored and reviewing courts

will not disturb the trial court's denial absent an error of law or abuse of discretion. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998). “[I]mpeaching must mean that which is outside the evidence already given, and impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony.” Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938).

In the instant case, the robbery was admitted to tie the stolen gun and its ammunition to Mickey and Phillips for purposes of proving identity. App. pp. 245-246. Agagas' testimony is corroborated by the forensic evidence, and it is speculative at best that the trial court would have excluded the evidence based on this minor discrepancy. Phillips put himself at the scene of the crime and other witnesses testified to his involvement, so exclusion of evidence of the InTownes Suites robbery is unlikely to have affected the outcome of the trial. Additionally, evidence of the robbery established the travel of the murder weapon, but the discrepancy in the description of the weapon between its owner and Agagas is not material to guilt in this case. Further, the discrepancy is merely impeaching and does not prove that Agagas made up the robbery or that Mickey and Phillips did not steal the weapon from InTownes Suites and use it in the robbery and murder. It only shows a defect in her recollection. Accordingly, the PCR court did not err in denying Phillips a new trial. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (finding the PCR court's denial of an application for post-conviction relief will be upheld when supported by probative evidence).

II.

The PCR court did not err in denying relief on the grounds that counsel was ineffective for not investigating whether a witness could provide beneficial testimony where the prosecutor could not locate the witness and the witness did not testify at the PCR hearing.

Phillips complains that counsel was ineffective for failing to investigate a statement that Dora Perkins gave to law enforcement. Dora Perkins did not testify at the PCR hearing. Durant testified that the prosecution was unable to locate Perkins. App. p. 900. Further, Durant related a conversation with the officer that spoke to Perkins in which the officer indicated that Perkins did not appear to be mentally stable. App. pp. 902-903.

At the time of the PCR hearing, counsel did not have a clear recollection of Dora Perkins' statement, but noted that his position was that Phillips was in the car when the robbery was committed by Mickey and another person nicknamed "D." Counsel's position is that when they returned to the car, they forced Phillips to drive at gunpoint. So he felt Dora Perkins' statement was not likely relevant to his defense. App. pp. 909-13; p. 938.

The PCR court correctly found counsel was not ineffective. No evidence indicates that any attempt to locate Dora Perkins would be successful, and the failure to present Perkins as a witness at the PCR hearing renders it speculative at best that Perkins' testimony would have been beneficial if she testified at trial. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Also Counsel's testimony constitutes reasonable trial strategy, since it does not appear that Dora Perkins would have provided testimony beneficial to Phillips' duress defense. The PCR court's findings are supported by probative evidence. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624

(1989) (finding the PCR court's denial of an application for post-conviction relief will be upheld when supported by probative evidence).

III.

Trial counsel pursued reasonable trial strategy in not objecting to an in-court identification of Petitioner where trial counsel used the witness' prior misidentification to try and bolster Petitioner's statement to law enforcement. Further, Petitioner was not prejudiced by the in-court identification since two other codefendants testified about his involvement in the robbery and he admitted being involved in the robbery in his statement to law enforcement.

Duress was the best defense for Phillips in a case with no good defenses. Key to that strategy was admitting the misidentification by Sandra Barnes of a third person as "D" even though Barnes subsequently identified Phillips as "D" in a police show-up. Evidence of the misidentification meant the door was opened to evidence of the subsequent identification of Phillips as "D."² So as a matter of trial strategy, counsel was not ineffective. Further, Barnes identification was cumulative to the testimony of the other two prostitutes, who readily identified Phillips and testified about his involvement in the robbery.

Speaking on the misidentification, counsel testified as follows:

Yeah, it helped us. In my opinion, it was yet another reason that the jury should believe our written statement was to what happened because it verified that here was another guy named D, and Sandra had picked out a guy named D that was different than my client.

App. p. 946, lines 1-5.

Counsel acknowledge that Phillips' defense was his statement to police, which would stand alone without evidence that Barnes initially identified another person as D. Counsel

²"When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012).

testified, “I wanted them to understand that this is what happened. What he put in writing is what happened. As verified by the fact that you’ve heard testimony that there was another guy named D there.” Tr. p. 946, lines 19-23. As counsel noted, “And she wrote on here, this is the guy I know as D. And that’s what I wanted the jury to know.” App. p. 946, lines 24-25. Counsel agreed that admitting testimony of the misidentification opened the door to the subsequent identification of Phillips by Barnes. App. p. 947, lines 1-5.

In order to prove counsel was ineffective, a PCR applicant must show counsel’s performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel’s performance will be deemed deficient if it falls “outside the wide range of professionally competent assistance.” Id. The applicant is prejudiced by the deficient performance if “there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” Id. at 695.

A review of counsel’s performance “must be highly deferential” and “every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689. “[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.” Id. at 689.

“There is a strong presumption that counsel rendered adequate assistance and

exercised reasonable professional judgment in making all significant decisions in a case.” Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Strickland). “Judicial scrutiny of counsel’s performance must be highly deferential.” Strickland, 466 U.S. at 689. “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Counsel’s lack of a challenge to Barnes’ identification of Phillips is the product of a reasonable trial strategy. Without testimony about Barnes’ earlier identification, there is no evidence of another “D.” Her mistake aligned fairly well with Phillips’ difficult-to-believe version of events. However, evidence of her first identification necessarily opened the door to the second identification, which counsel attacked thoroughly through cross-examination. Counsel took the best shot at a successful outcome in a situation where a successful outcome was unlikely.

Further, admission of the identification is merely cumulative to testimony from China and Agagas identifying Phillips as a robbery participant. Phillips’ statement also established his participation in the robbery. Admission of improper evidence is harmless where it is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989).

Finally, given the significant opportunity for Barnes to see Phillips during the robbery, it is speculative at best that a challenge to the identification would have been successful. A criminal defendant may be deprived of due process by an identification procedure that is so unnecessarily suggestive and conducive to irreparable mistaken

identification. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The in-court identification of the accused becomes inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

A two prong analysis is used to determine the admissibility of the out-of-court identification. The test is: 1) whether the identification process was unduly suggestive; and 2) whether the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, supra; Moore, supra. Courts employing the test should consider the totality of circumstances. Biggers. A reviewing court should reverse the trial court's admission of eyewitness testimony only upon an abuse of the trial court's discretion. Moore, supra.

"Suggestiveness alone does not mandate the exclusion of evidence." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000). Courts must consider the totality of circumstances and consider the following factors in deciding the likelihood of misidentification:

- 1) the opportunity of the witness to view the criminal at the time of the crime;
- 2) the witness's degree of attention;
- 3) the accuracy of the witness's prior description of the criminal;
- 4) the level of certainty demonstrated at the confrontation; and
- 5) the time between the crime and the confrontation.

State v. Washington, 323 S.C. 106, 473 S.E.2d 479, 481 (Ct. App. 1996). In the instant case, Barnes had met Phillips once before and she had an extended opportunity to view Phillips while the robbery was being planned and executed. Further opportunity occurred

while they fled and then searched for new robbery victims. Barnes initially identified another individual as "D." However, counsel noted that the photograph of this other person bore a lot of similarity to Phillips such that counsel did not want to place a picture of this person into evidence. App. p. 944. Therefore, even if challenged, the identification would have been admissible for the jury's consideration.

Accordingly, the PCR court correctly denied relief as probative evidence supports a finding that neither prong of Strickland was met. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (finding the PCR court's denial of an application for post-conviction relief will be upheld when supported by probative evidence).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied. If this Court sees fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY:



DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 25, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston
The Honorable Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-000304
Lower Court Case No. 2011-CP-10-7028

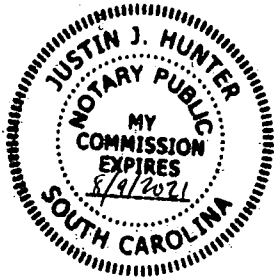
Shawn Phillips, Petitioner,

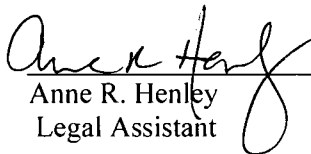
v.

STATE OF SOUTH CAROLINA, Respondent.

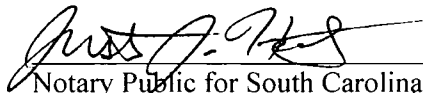
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari to The SC Supreme Court has been mailed to the opposing counsel Lara Bear, this 25th day of March 2015.




Anne R. Henley
Legal Assistant

SWORN to before me this
25th day of March, 2015.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 8/9/2021