

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014-001870

Tra'Vaughn La'Roi Thomas, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether the PCR court erred in concluding Petitioner did not establish ineffective assistance of trial counsel based on her failure to preserve for appellate review the issue of the propriety under the Sixth Amendment of the trial court's exclusion of Petitioner's relatives and neighbors and where the trial court excluded them based merely on the Solicitor's hearsay allegation that some of them threatened a witness?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the December 2009 term of General Sessions for armed robbery (2009-GS-23-1867). (App.pp.247-48). Dorothy A. Manigault, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On September 15, 2010, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to twelve years imprisonment. (App.p.162).

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.165-76). The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Thomas, Op. No. 2012-UP-361 (S.C. Ct. App. filed June 13, 2012). (App.pp.192-93).

Petitioner filed an application for post-conviction relief (PCR) on June 10, 2013 (2013-CP-23-3233). (App.pp.194-201). A hearing was held at the Greenville County Courthouse on June 17, 2014. (App.pp.207-36). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed July 31, 2014. (App.pp.238-46).

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective because she did not make a specific objection when several people were asked to leave the courtroom during one witness’s trial testimony.

Petitioner argues he satisfied his burden of proving trial counsel was ineffective because she did not make a specific objection when several of his relatives and neighbors were asked to leave the courtroom during Jerry Morehead’s trial testimony.¹ Certiorari is not warranted in this case, however, because Petitioner’s argument is without merit. Petitioner failed to meet his burden of proving both that trial counsel erred and that he was prejudiced as a result.

A.

Prior to Jerry Morehead taking the stand as a State witness, the trial judge memorialized the substance of an earlier bench conference. (App.pp.74-75). The trial judge noted the assistant solicitor had advised that several of Petitioner’s relatives “have been saying or making threats to Jerry Tyrone Morehead.” (App.p.74). The trial judge

¹ Morehead testified for the State as a confidential informant.

did not comment on whether or not this statement was true, but advised he would not condone the threatening of a witness. (App.pp.74-75). The trial judge then asked these individuals to excuse themselves from the courtroom. (App.p.75). Trial counsel noted her objection for the record, stating "we don't have any sworn affidavits by the witness that's coming up or any sworn affidavits by the State." (App.pp.75-76). The trial judge stated "[a]ll right. I understand." (App.p.76). Immediately before Morehead took the witness stand, the assistant solicitor asked the trial judge to exclude Petitioner's neighbors from the courtroom as well. (App.p.79). Trial counsel stated "[y]our Honor, they all live in the same community. It's a small community. There's no evidence that there are threats made by them." (App.p.80). The trial judge replied, "I'm going to ask them to step out in the hallway." (App.p.80). The trial judge allowed Petitioner's relatives and neighbors to return to the courtroom after Morehead's testimony. (App.p.107).

B.

At the PCR hearing, Petitioner acknowledged trial counsel objected when the trial judge asked his family members and neighbors to step out of the courtroom. (App.p.213). Petitioner argued, however, that trial counsel did not make a specific objection. (App.p.214). Petitioner argued the State did not show any prejudice that would result from not closing the courtroom. (App.p.214). Petitioner argued the outcome of his trial would have been different if trial counsel had made a specific objection "because [Morehead] acted like he didn't want to talk in front of my family at all. he just sat there. When they called him up to the stand, he just sat there." (App.p.215).

Trial counsel testified the issue of threats against Morehead came up during the trial itself. (App.pp.228-29). Trial counsel testified Petitioner's family members were asked to leave for Morehead's testimony. (App.p.229). Trial counsel testified she did not see a basis to object to this partial closure of the courtroom. (App.p.229).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have objected when the trial judge asked [Petitioner]'s family and neighbors to vacate the courtroom." The PCR judge found "trial counsel did not err in not making a specific objection and arguing whether there was an overriding interest in asking these individuals to leave the courtroom." The PCR judge found the courtroom was not closed in this case and that the partial closure was supported by a "substantial reason" articulated by the State. (App.p.242).

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.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective because she did not make a specific objection when his relatives and neighbors were excused from the courtroom during Morehead's testimony.

Error

Petitioner failed to prove trial counsel was deficient in not making a specific objection (to the lack of an overriding interest in closing the courtroom) because the courtroom in this case was not closed. The Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution guarantee a criminal defendant a public trial. The United States Supreme Court held a trial judge erred in excluding spectators from even pre-trial jury voir dire, noting "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, 558 U.S. 209, 215, 130 S. Ct. 721, 725 (2010). "[A] closure of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wash.2d 85, 93, 257 P.3d 624, 629 (2011). The courtroom in Petitioner's trial was not closed to all spectators. Based upon the record, one cannot reasonably draw an inference that Petitioner did not receive a public trial merely because several of his supporters were excused from the courtroom during the testimony of a single State witness. As the

courtroom was not closed, there was no basis for trial counsel to have made a specific constitutional objection.

Prejudice

Regardless, Petitioner also failed to prove he was prejudiced as the result of his relatives' and neighbors' absence from the courtroom during Morehead's testimony. In

Presley, the United States Supreme Court noted:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Presley, 558 U.S. at 214, 130 S. Ct. at 724 (quoting Waller v. Georgia, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216 (1984)). This standard, however, is not applicable in Petitioner's case because there was not a complete closure of the courtroom to any and all spectators. Rather, the circumstances of Petitioner's trial illustrate this was a partial and temporary closure of the courtroom that was limited to a few individuals for the duration of one witness's testimony. In situations of partial and temporary courtroom closures, a "substantial reason" for the closure is required rather than an "overriding interest." See, e.g., Bucci v. United States, 662 F.3d 18, 22 (1st Cir. 2011) ("In partial closure cases - i.e., where courtroom access is restricted but some members of the public are permitted to attend - this court and several of our sister circuits have held that a substantial interest, rather than a compelling one, will justify partial closure."); Woods v. Kuhlmann, 977 F.2d 74 (2d Cir. 1992) (adopting "the less stringent substantial reason test to determine whether a defendant's right to a public trial was violated by a partial closure of the

proceedings”); United States v. Rivera, 682 F.3d 1223, 1236 (9th Cir. 2012) (holding a “less rigorous standard applies where a partial closure is at issue: A partial closure is justified where the trial judge had a substantial reason for the closure, and where the closure was narrowly tailored to exclude spectators only to the extent necessary to satisfy the purpose for which it was ordered.”); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989) (adopting the “substantial reason” test). In this case, the State presented a substantial interest in excusing Petitioner’s relatives and neighbors because Morehead reported he had received threats from Petitioner’s family. Excusing these individuals in order to allow Morehead to testify more freely was within the trial judge’s discretion. See State v. Bryant, 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007) (“[A] trial court is given enormous discretion in conducting a criminal trial.”); see also State v. Hawkins, 300 S.C. 225, 226, 387 S.E.2d 251, 251 (1989) (“The wide discretion accorded presiding judges, embedded in the law of South Carolina, is essential to the orderly administration of justice.”). The partial and temporary closure was limited to a small group of individuals for the length of a single witness’s testimony. While the trial judge did not articulate an alternative to asking Petitioner’s relatives and neighbors to leave the courtroom, it is unclear what kind of viable alternative could have existed in this case. It is, however, clear from the trial judge’s ruling the basis upon which he excused these individuals from the courtroom – because Morehead had been threatened by Petitioner’s family members. A more explicit ruling was unnecessary. As such, Petitioner cannot demonstrate he suffered any prejudice – sufficient to undermine confidence in the outcome of his trial – from the lack of a specific constitutional objection to the trial judge’s decision to exclude

relatives and neighbors during one witness's testimony. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Conclusion

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, 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: 
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June 29, 2015

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The Honorable Robin B. Stilwell, Circuit Court Judge

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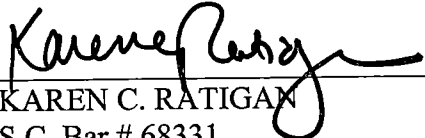
State of South Carolina,.....Respondent.

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 inter-agency mail and addressed to:

Benjamin John Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 29th day of June, 2015.


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