

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
The Honorable Casey L. Manning, Circuit Court Judge

Appellate Case No. 2014 – 000786
Lower Court Case No. 2011-CP-40-0190

RECEIVED

AUG - 7 2015

John J. Moore, Jr., #326455,

S.C. Supreme Court

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

- I. Is there any evidence of probative value which support the PCR courts [sic] conclusion that counsel was not ineffective for failing to request a jury instruction explaining how the jury must evaluate the “use of a vehicle as deadly weapon” in determining the weight of the evidence and credibility of the witnesses in evaluating each self-defense elements previously charged to the jury by the trial judge under the beyond a reasonable doubt standard?
- II. Is there any evidence of probative value which supports the PCR courts [sic] conclusion that counsel was not ineffective for failing to object and request voir dire to examine the jurors or otherwise move for mistrial on the basis that several jurors fell asleep during the course of the defendant’s trial and in doing so comprised the defendant’s right to impartial and mentally competent jurors to insure [sic] a fair trial?
- III. Is there any evidence of probative value to support the PCR courts [sic] conclusion that counsel was not ineffective for failing to properly investigate and prepare Applicant’s case where the PCR court proffered Applicant’s affidavit evidence into the record but did not consider Applicant’s affidavits evidence in its determination of this ineffective assistance of counsel allegation?
- IV. Is there any evidence of probative value which supports the PCR court’s conclusion that counsel was not ineffective for failing to object to the jury instruction given an accomplice liability and “jointly at fault in bringing on the difficulty” where there is no evidence in the record the defendant aided, abetted, or acted in concert with Kerwyn Phillips in any of the elements of his convictions?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the April 2006 term of the Richland County Grand Jury for Murder, Use of a Firearm During the Commission of a Violent Crime, and Unlawful Possession of a Pistol by a Person Under 21 Years of Age (2006-GS-40-02203,-11738, -11739). Doug Strickler, Esquire, and Greg Collins, Esquire, represented him on the charges. On January 28, 2008, Applicant proceeded to a jury trial before the Honorable William P. Keesley. After a five day trial, Applicant was found guilty of the two weapon charges as indicted, as well as the lesser included Voluntary Manslaughter. Judge Keesley sentenced Applicant to thirty (30) years' imprisonment for Voluntary Manslaughter, five (5) years' imprisonment to run concurrently for Possession of a Weapon During the Commission of a Violent Crime, and five (5) years imprisonment to run consecutively for Possession of a Pistol by a Person under 21.

A notice of appeal was filed and an appeal was perfected. Applicant was represented by Joseph Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. After briefing, the South Carolina Court of Appeals reversed Applicant's conviction for Possession of a Pistol by a Person under 21 and affirmed all others. State v. Moore, Op. No. 2010-UP-409 (S.C. Ct. App. filed September 16, 2010). The Remittitur was issued October 5, 2010.

Petitioner then filed an application for post-conviction relief on January 13, 2011. Respondent filed a Return on February 15, 2011. An evidentiary hearing was held on May 23, 2012, at the Richland County Courthouse. Petitioner was represented by Rowland P. Alston, III, Esquire. The State was represented by Robert D. Corney of the South Carolina Attorney

General's Office. Judge Manning issued an Order of Dismissal on January 8, 2014, denying relief. Petitioner then filed a Motion to Alter or Amend a Judgment on January 15, 2013. Respondent submitted a return on January 24, 2013. Judge Manning issued an order denying the motion on April 7, 2014.

Petitioner filed a notice of appeal on April 14, 2014. A Petition for Writ of Certiorari was submitted by Benjamin J. Tripp, Esquire on January 5, 2015. Petitioner filed a Motion to Relieve Counsel, Withdraw the Petition for Writ of Certiorari, and Proceed *Pro Se*. This Court issued an Order on February 18, 2015, giving Petitioner twenty (20) days to decide whether he would like to proceed *pro se* or continue to be represented by Counsel Tripp. This Court issued an Order on March 10, 2015, granting Petitioner's motion to proceed *pro se*. The Petition for Writ of Certiorari submitted was withdrawn. Petitioner filed his *pro se* Petition for Writ of Certiorari on May 7, 2015. This Return follows.

STANDARD OF REVIEW

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

ARGUMENT

I. Certiorari is not warranted where the jury charge on self-defense was proper and where giving a charge that a vehicle is a deadly weapon would be an improper charge on the facts of the case.

Petitioner argues the PCR court erred in failing to find Counsel ineffective in not requesting a jury instruction that a vehicle can be a deadly weapon in support of his self-defense theory. Respondent submits there is clearly probative evidence to support the PCR court's ruling. First, this would be an improper comment on the facts of the case. Second, this was argued in Counsel's closing arguments.

How the issue was raise below

At trial, the State proceeded on the theory that Petitioner shot and killed Victim in a road rage incident on I-20. (App. p. 694-97). The State argued Petitioner and codefendant Kerwyn Phillips mistook Victim throwing cigarettes out of the window as giving an obscene gesture directed towards them. *Id.* Counsel argued in closing arguments that Victim and her fiancé, Gene Derrick, were attempting to swerve their car into Petitioner's car. (App. p. 717, lines 13-20). Counsel made the argument that Petitioner was acting in self-defense when shooting at Victim and Derrick. Counsel testified that his primary strategy was to argue to the jury that codefendant Phillips was the shooter and that Petitioner was not involved and relied on self-defense as an alternative theory. (App. p. 867, lines 13-18).

Petitioner argued at the PCR hearing that Counsel was ineffective in failing to request a jury charge that the use of a vehicle constituted a deadly weapon in support of his self-defense argument. The PCR court found that Counsel was not ineffective as Petitioner failed to present any relevant case law or authority to support such a charge. (App. p. 932-33). The court also ruled that Petitioner failed to show that any such instruction would have been given had it been

requested. Id. Petitioner also failed to prove prejudice because the jury was instructed on self-defense, Counsel made these specific arguments, and the jury still convicted Petitioner.

Discussion

The PCR court did not err in failing to find Counsel ineffective for not requesting a jury instruction that a vehicle can be a deadly weapon in support of his self-defense argument. When reviewing jury instructions for error, the reviewing court must consider the trial court's charge as a whole in light of the evidence and issues presented at trial. State v. Miller, 397 S.C. 630, 635, 725 S.E.2d 724, 727 (Ct. App. 2012) (citing State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct., Ap. 2003)). "Errors, including erroneous jury instructions, are subject to a harmless error analysis." Miller, 397 S.C. at 639, 725 S.E.2d at 729. A judge's charge to a jury is sufficient if, as a whole, it is substantially correct and covers the law applicable to the case. State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990).

Respondent submits there was no basis for Counsel to request the trial court to make a charge on the facts. The self-defense charges given by the trial court were all proper and are not at issue. Viewing the charges as a whole and considering the ample evidence implicating Petitioner, Respondent submits the jury charges are proper.

First, the trial court could not have instructed the jury as Petitioner argues. The trial court would be making an improper charge on the facts of the case. The South Carolina Constitution provides that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. The South Carolina Supreme Court's decision in State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000),¹ is on point. In Hughey the Court noted that "[a] trial judge's refusal to provide specific jury instructions is not reversible error if the general

¹ Overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

instructions are sufficiently broad to enable the jury to understand the law and the issues involved.” Id. at 452, 529 S.E.2d at 728. Petitioner wanted the trial court to instruct the jury that the Victim and Derrick’s vehicle was a deadly weapon. This would clearly be an inappropriate charge on the specific facts of the case.

Second, Petitioner was unable to present any authority to support the propriety of a charge that a vehicle is a deadly weapon for purposes of his self-defense argument to the PCR court. Petitioner cites a number of cases that are not relevant to the issue at hand. Petitioner cites State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003), which addressed the issue of whether the defendant was entitled to a directed verdict on an assault and battery with intent to kill charge. Wilds is easily distinguishable. It held that the use of a deadly weapon gives rise to a permissive inference of malice. 355 S.C. at 277-78. The court ruled that the jury could have inferred malice from Wilds’s use of a vehicle in a threatening manner. Id. The case stands for the proposition that malice can be inferred from the use of a vehicle, not that defendants are entitled to jury charges that vehicles constitute deadly weapons in self-defense cases.

Finally, Petitioner cannot prove any resulting prejudice. This matter is at best peripheral to his guilt or innocence. The argument that Victim and Derrick’s vehicle was used to swerve into Petitioner’s vehicle and therefore Petitioner was acting in self-defense by firing shots at that vehicle was clearly made to the jury. Counsel argued that if the jury decided Petitioner was either the shooter or acting in concert with codefendant Phillips, then they should conclude that Petitioner was acting in self-defense. (App. p. 725, line 2 – p. 726, line 4). Petitioner has failed to show the PCR court erred in any manner in denying relief.

II. Certiorari is not warranted where the trial court determined that no juror ever actually fell asleep during the trial.

In the second issue, Petitioner argues Counsel was ineffective for failing to request voir dire of a juror who allegedly fell asleep during the State's closing arguments. He also argues Counsel was ineffective in failing to move for a mistrial on this basis. Respondent submits the PCR court properly denied the allegation that Counsel was ineffective for failing to move for a mistrial when a juror allegedly fell asleep.

How the issue was raised below

There were two instances where the trial court addressed concern with whether a juror may have fallen asleep. After the testimony of Investigator Stanley Richards, the trial court stated: “[B]ut I had one juror over there who kept shutting her eyes and I kept watching her rather intently because I had to stop if she was going asleep. She *never did*. She eventually opened her eyes up completely . . .” (App. p. 325, lines 20-24)(emphasis added). Then Deputy Solicitor Meadors commented: “I noticed the juror on the second row far left and it seemed like some of the jurors were noticing her, too. And I was trying to watch to see if she was sleeping, but I *did not see her doze off*.” (App. p. 326, lines 2-6)(emphasis added).

The second incident happened during the State's closing arguments. The trial court noticed that a juror may have had his eyes closed during the State's closing on the law. The trial court spoke to the jurors

[S]ince there's that noise going on, let me take this opportunity, folks, if y'all don't keep your eyes open, I've got to stop, okay. I know some folks think with their eyes closed, you have to keep your eyes open. If not, I'll have to send you in the jury room, let you get a little caffeine, a little break, whatever you need and then we'll start back, okay? Thank you.

(App. p. 691, line 25 – p. 692, line 7).

The trial court then gave the juror a break: “THE COURT: All right. I've got one juror fighting sleep. He *hasn't* gone to sleep, but he's fighting it pretty bad. So let's give them a break.

We're at ease." (App. p. 692, lines 18-21) (emphasis added). The juror who Petitioner argues fell asleep then sent a note to the trial court explaining that he had a sinus infection and had not fallen asleep:

While we're waiting, one of the jurors sent a note, I assume it was the same young man. He was just explaining he has a sinus infection and his face is swollen and it may cause his eyes to appear to be closed at times. He said he's fine to serve. And I've had that shown to the attorneys. I don't think that's an issue.

(App. p. 693, lines 2-9). No objections were made by either side.

Discussion

Petitioner argues the PCR court erred in failing to find counsel ineffective for not moving for a mistrial when jurors allegedly fell asleep during the trial. Respondent submits the trial court's comments on the record fully support the PCR court's ruling.

To the extent Petitioner argues the PCR court erred in failing to find Counsel ineffective in not requesting the juror be subject to voir dire, Respondent submits that issue is not preserved for this Court's review. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. The issue of whether Counsel was ineffective for failing to request examination of the juror was not ruled upon by the PCR court in its Order of Dismissal and is therefore not appropriate for this Court's review. The PCR court addressed the issue of whether Counsel was ineffective in failing to move for a mistrial, so Respondent now turns to that analysis.

Petitioner argues that the PCR court erred in its factual determination that no jurors actually fell asleep. These are issues properly addressed by the filing of a Rule 59(e), SCRPC,

motion at the circuit level. In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounded in factual conclusions, is without evidentiary support. Id. at 477-78, 716 S.E.2d at 93. The PCR court is free to judge the credibility and make factual determinations as it sees fit. Petitioner took great pains to point out that he disagrees with the PCR court's factual rulings and the court's reliance on the trial transcript.² The PCR court's factual rulings should not be disturbed as they are based on the findings made by the trial court contained in the trial transcript. See supra.

Petitioner argues that State v. Hurd, 325 S.C. 384, 480 S.E.2d 94 (1996) is exclusively controlling. Petitioner's reliance on Hurd is misplaced. In Hurd, the court reversed a defendant's conviction because the trial court failed to inquire of a juror who *had* fallen asleep. Hurd is not applicable here because the trial court made the determination that no juror actually fell asleep during the course of the trial. The trial court was keenly aware of when the two jurors looked as if they had their eyes closed and addressed the issue on the record both times. The prosecuting solicitor's comments also support the trial court's determination that no juror ever actually fallen asleep. The PCR court properly relied on the trial court's determination that no jurors had fallen asleep.

Nevertheless, Petitioner failed to present any evidence of prejudice whatsoever. It is apparent from the record that the trial court determined that no juror actually fell asleep. Counsel testified at the PCR hearing that he did not move for a mistrial or object when the male juror appeared to have his eyes closed during the State's closing because he was awake during the

² Petitioner also erroneously cites to Rule 201, SCRCP, in requesting this Court to take judicial notice of the fact that Counsel testified he believed a juror to have fallen asleep. Respondent submits that Counsel's testimony at the PCR hearing is before the Court, but that it would be improper for the Court to take judicial notice of a contested factual issue ruled upon by the PCR court.

defense's closing. (App. p. 872, lines 12-19). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). Even assuming that the male juror had fallen asleep during the State's closing, the PCR court was correct in finding that would be beneficial and not damaging to Petitioner. The PCR Court's ruling should be upheld.

III. Certiorari is not warranted where the PCR court properly excluded an inadmissible affidavit that contained expert opinion testimony.

Petitioner next argues that the PCR court abused its discretion in excluding an affidavit of Dr. Robert Bennett which gave expert opinion testimony as to the effects of methamphetamine and cocaine and how Victim and Derrick may have been affected by these substances.

PCR Hearing

PCR counsel attempted to admit an affidavit from Dr. Robert Bennett, who apparently is a forensic toxicologist. The affidavit was marked Plaintiff's Exhibit Number 3. The exchange at the PCR hearing went as follows:

MR. ALSTON [PCR counsel]: Your Honor, I'm marking as Exhibit 3 an Affidavit that was submitted for the Court's consideration by a forensic toxicologist that I think is probative of this issue.

THE COURT: Well, that may be fine but where is - - the State has a right to cross-examine this gentleman.

MR. CORNEY [AAG]: Judge, that would be our objection is that he's not here. I don't have an opportunity to cross-examine him on this Affidavit or where this information came from, what investigation he did, how he even came up with these findings.

THE COURT: Your objection is noted. You may proffer what you want – you can proffer this but there's a valid objection. I sustain it but I'm going to let you proceed. Go ahead, as a proffer.

(App. p. 857, lines 1-15).

Discussion

Petitioner argues that the PCR court actually admitted the affidavit, but he is mistaken.

The affidavit was submitted as a proffer and not as substantive evidence. This is made clear in the PCR court's order of dismissal as well:

Applicant attempted to introduce an affidavit of Dr. Robert Bennett into the PCR record regarding the potential effects of Methamphetamine and Cocaine, and Dr. Bennett's opinion in correlating those side effects to this case. Respondent posed a contemporaneous objection to the introduction of the affidavit, which this Court sustained finding the affidavit not admissible on grounds of hearsay, a violation of Respondent's rights to cross-examine the witness, and as impermissible opinion testimony by a witness neither presented, nor qualified, as an expert by this Court. Accordingly, the affidavit was proffered into the record, but not considered by this Court in its determination of the current allegation.

(App. p. 928, fn. 1).

The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR Court's discretion and will not be reversed absent an abuse of discretion resulting in prejudice to a party. Simpson v. Moore, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006). The right to confrontation, although historically limited to criminal prosecution, has been applied in the civil context. South Carolina Department of Social Services ex rel. Texas v. Holden, 319 S.C. 72, 75, 459 S.E.2d 846, 849 (1995) citing Brown v. S.C. State Board of Education, 301 S.C. 326, 391 S.E.2d 866 (1990); State of S.C. v. Nest Egg Society Today, Inc., 290 S.C. 124, 348 S.E.2d 381 (Ct.App.1986).

The PCR court properly excluded the affidavit. First, the document was inadmissible hearsay, and PCR counsel was unable to articulate a valid exception for its admission. Second, Respondent did not have an opportunity to cross-examine or challenge the doctor's qualification, methods, or conclusions. Finally, Petitioner failed to lay the proper foundation for expert opinion testimony to be heard. See Rule 702, SCRPC. The PCR court did not abuse its discretion in excluding the affidavit.

IV. Certiorari is not warranted where the self-defense jury charge was proper and a correct charge on the law.

Next, Petitioner argues that the PCR erred in failing to find Counsel ineffective in not objecting to the use of the words “at fault or jointly at fault in bringing on the difficulty” in the self-defense charge given to the jury. The charge, when taken as a whole, is a correct statement of the law on self-defense. “The trial court is required to charge only the current and correct law of South Carolina.” Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010).

The charge that Petitioner takes issue with was given to the jury as follows:

Now, generally the elements of self-defense include the following things: First, the defendant had to have been without fault in bringing on the difficulty. If Mr. Moore was at fault or jointly at fault in bringing on the difficulty, he is not protected by self-defense even though the initial disagreement escalated beyond what may have been originally envisioned. The only way that someone who is at fault in bringing on the difficulty can be restored to the protections of self-defense is where before the shooting occurred, he had withdrawn from the conflict and tried in good faith to avoid further conflict and by his actions had made known to the other party that he was discontinuing and withdrawing from the dispute, okay. So the first thing on self-defense that you have to evaluate is whether the defendant was without fault in bringing on the difficulty.

This charge is unquestionably a correct statement of law. Petitioner takes issues with the words “or jointly at fault” and argues that the trial court did not have a basis to charge on the separate instruction of accomplice liability. Petitioner argues in great detail that the separate accomplice liability charge was improper. That issue was not ruled upon by the PCR court and is therefore not preserved. See Gee; Watts. Counsel cannot be ineffective for failing to object to the charge that explains the well settled law of self-defense. See State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014). Petitioner failed to present any evidence or argument as to why this charge was improper and therefore failed to meet his burden of proof.

Finally, Respondent submits there is overwhelming evidence of Petitioner’s guilt on the

voluntary manslaughter and weapons conviction as he made multiple statements that implicated his involvement in the case.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 7, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
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S.C. Supreme Court

JOHN J. MOORE, JR., #326455,

PETITIONER,

v.

THE 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:

John J. Moore, Jr. #326455
Broad River Correctional Institution
4460 Broad River Rd.
Columbia, SC 29210

This 7th day of August, 2015.


ELIZABETH MCLELLAN
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

August 7, 2015

RECEIVED

AUG - 7 2015

S.C. Supreme Court

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

RE: John J. Moore, Jr. v. State of South Carolina
Appellate Case No.: 2014-000786

Dear Ms. 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,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/ah
Enclosures

cc: John J. Moore, Jr., #326455
Trisha Allen, Victim Services