STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Paul M. Burch, Circuit Court Judge

NOAH C. MUMFORD,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT

APPELLATE CASE NO. 2015-000544

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT-PETITIONER

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PETITIONER'S QUESTIONS PRESENTED

1.

Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for failing to object to portions of Corporal Scott's testimony where the testimony could not have reasonably affected the jury's verdict?

2.

Is certiorari warranted to review the post-conviction relief judge's finding there are multiple errors of trial counsel forming a cumulative prejudicial effect where the doctrine of cumulative error has not been recognized in this state and where the post-conviction relief judge only found counsel ineffective in a single respect?

COUNTER QUESTIONS PRESENTED

1.

Whether ample evidence supports the PCR judge's finding that Mumford was prejudiced by Corporal Scott's testimony regarding Mumford's military training and that someone can "bleed out" if shot in the leg?

2.

Certiorari should not be granted to consider the applicability of the cumulative error doctrine in this case. Alternatively, if the Court decides to grant certiorari on this issue, it should also grant certiorari on the issues raised in Mumford's petition for certiorari and determine whether each issue, standing alone, require a new trial and, if not, whether the accumulation of prejudice from all of trial counsel's errors requires a new trial.

STATEMENT OF THE CASE

On February 7, 2011, a Chesterfield County grand jury indicted respondent-petitioner Noah Mumford ("Mumford") for attempted murder. Supp. App. 5. On October 24, 2011, Mumford was tried before the Honorable Thomas A. Russo and a jury. App. 1. Kernard E. Redmond and Chris Jones represented the State. App. 1. Larry W. Knox represented Mumford. App. 1. The jury acquitted Mumford of attempted murder. App. 366, l. 15 – 367, l. 4. The jury convicted Mumford of the lesser included offense of assault and battery of a high and aggravated nature. App. 366, l. 15 – 367, l. 4. Judge Russo sentenced Mumford to ten years' imprisonment. App. 379, ll. 20 – 25. Mumford withdrew his appeal. App. 382.

On February 28, 2013, Mumford filed a PCR application. App. 384. On May 13, 2013, Mumford filed an amended application. App. 391. On July 31, 2014, a hearing was held before the Honorable Paul M. Burch. App. 402. Jack Swerling represented Mumford. App. 402. Joshua Thomas represented the State. App. 402. On November 21, 2014, Judge Burch granted Mumford a new trial. App. 543. In his Order granting post-conviction relief, Judge Burch denied multiple grounds raised by Mumford. App. 543-79. Both the State and Mumford filed motions pursuant to Rule 59(e) and Judge Burch denied both parties' motions. App. 580-87. Both parties filed notices of appeal and this return to the State's petition follows. A petition for certiorari is also being filed separately by Mumford along with this return.

ARGUMENT

1.

Ample evidence supports the PCR judge's finding that Mumford was prejudiced by Corporal Scott's testimony regarding Mumford's military training and that someone can "bleed out" if shot in the leg.

Introduction

The State appears to concede that the PCR court correctly found that trial counsel's performance was deficient. The State's entire argument for reversal rests on a narrow construction of the prejudice prong. The State argued that Corporal Scott's testimony was relevant only to an element of Attempted Murder, of which Mumford was acquitted. In fact, the PCR Court held not only that Corporal Scott's testimony allowed the jury to speculate about the seriousness of the injury, but was relevant to Mumford's state of mind in this closely contested self-defense case. The PCR court held that Corporal Scott's testimony "could infer to a jury that, because of his military training, the Applicant's state of mind was to kill Mr. Funderburk. . . ." Mumford's state of mind and intent were highly relevant to whether Mumford acted in self-defense or committed a crime. Because the State has admitted deficient performance and the PCR court's conclusion regarding prejudice is correct, this Court should deny certiorari.

Factual Background

Mumford was honorably discharged after serving seven years in the military, including a tour in Iraq. App. 258, l. 23 – 259, l. 25. He was a high school graduate and worked for the Chesterfield/Marlboro County E.O.C. weatherizing homes and making them more energy efficient. App. 257, l. 18 – 258, l. 22. Mumford also owned a garage where he worked on cars. App. 260, ll. 3 – 16. Mumford had no criminal record. App. 370, ll. 8 - 16.

On December 23, 2010, Mumford got a phone call from Amos Nivens and Todd Harrell ("Harrell") asking if he wanted to race motorcycles. App. 261, ll. 2 – 11. Mumford and Harrell sometimes bet on their motorcycle races. App. 264, ll. 5 – 12. Even though their prior bets were usually for a hundred dollars, Harrell told Mumford to "bring the house payment" because Harrell and several others wanted to make a big bet. App. 264, l. 1 – 265, l. 5. Mumford took $5,000 in cash to Harrell's house. App. 263, ll. 11 – 23. Steven Teal ("Teal") and Frank Cranford ("Cranford") went with Mumford. App. 263, ll. 16 – 17.

When Mumford got to Harrell's house, Amos Nivens, Corey Williams ("Williams"), Antonio Sellers ("Sellers") and Funderburk were present with Harrell. App. 60, l. 23 – 61, l. 3. The group who were already at Harrell's were "pretty good friends." App. 61, ll. 4 – 6. Funderburk and Harrell worked together. App. 107, ll. 3 – 4. Funderburk was the only one drinking. App. 119, l. 18 – 120, l. 9. He was drinking a twenty-four ounce bottle of Heineken. App. 72, l. 9 – 73, l. 11. App. 76, ll. 15 – 17. Funderburk claimed the large bottle of Heineken was the only beer he drank that evening. App. 72, l. 25 – 73, l. 3.

Trash talking was a normal part of their motorcycle races. App. 108, ll. 4 – 11 (Harrell). App. 140, ll. 24 – 25 (Sellers). App. 233, ll. 5 – 17 (Cranford). App. 76, ll. 1 – 4 (Funderburk). App. 267, l. 23 – 268, l. 2 (Mumford). Mumford and Funderburk started talking trash to each other, but Funderburk took it personally. App. 140, l. 10 – 141, l. 21. Funderburk took a step toward Mumford. App. 141, ll. 14 – 16. Sellers tried to defuse the situation and stepped between Mumford and Funderburk. App. 141, ll. 14 – 16. Sellers told them they needed to concentrate on the race. App. 141, ll. 17 – 21. Funderburk told Mumford, "When I finish this beer we're going to see." App. 141, ll. 17 – 21.

Teal saw Funderburk "turn [his] beer up." App. 215, ll. 17 – 21. Teal said, "I knew what time it was when [he] turned it up." App. 215, ll. 17 – 21. Funderburk then attacked Mumford with the beer bottle. App. 215, ll. 17 – 21.

Everyone agreed that Funderburk was the aggressor and attacked Mumford. App. 215, ll. 17 – 21 (Teal). App. 236, ll. 10 – 22 (Cranford). App. 271, ll. 1 – 13 (Mumford). App. 110, ll. 9 – 12 (Harrell). App. 141, ll. 17 – 21 (Sellers). Even Funderburk admitted he was the aggressor:

Q. Prior to you swinging at Mr. Mumford did he hit you or touch you or anything?

A. No, he did not.

Q. He did not. He was just talk trash—trash talking?

A. Yes, sir.

Q. So you were the aggressor by swinging that 24 ounce Heineken beer bottle at Mr. Mumford?

A. If you say so.

Q. You were the aggressor. So you started all of this?

A. No, sir.

Q. Okay. But you do admit and it is your testimony that first swung at Mr. Mumford with this beer bottle?

A. Yes, sir.

Q. This was your weapon of choice?

A. That was the beer that I was drinking.

Q. Do you consider this a weapon?

A. It could be used as a weapon.

Q. Did you use it as a weapon that night?

A. No, sir, I didn't.

Q. What were you using it for?

A. I used it for a weapon, but does not—used it as a weapon.

Q. You used it for a weapon?

A. Yes, sir.

App. 80, l. 13 – 81, l. 11 (emphasis added). The witnesses at trial disagreed whether Funderburk actually managed to hit Mumford with the bottle. Funderburk and his friends claimed the bottle missed Mumford. App. 84, l. 19 – 85, l. 10 (Funderburk). App. 110, ll. 13 – 14 (Harrell). App. 153, ll. 12 – 19. Teal and Cranford said the bottle hit Mumford. App. 215, ll. 17 – 21 (Teal). App. 236, ll. 19 – 22. Mumford said Funderburk swung the bottle at his head, but missed and hit him somewhere on the body. App. 272, ll. 2 – 5. App. 279, l. 19 – 280, l. 4. Mumford had a metal plate in his head and was afraid of serious injury if he were struck in the head. App. 190, ll. 11 – 17. App. 272, l. 22 – 273, l. 1. App. 279, ll. 19 – 23.

Funderburk, who was 6'2' and over 200 pounds, then grabbed and "got into a tussle" with Mumford.[1] App. 65, l. 3 – 66, l. 6. App. 280, ll. 16 – 18. Funderburk claimed he pushed Mumford down and as he turned around to walk off, Mumford "came from behind me and started shooting." App. 66, ll. 3 – 15. Funderburk's initial description of his injuries did not support the notion that Mumford fired from behind him:

> Entry wound under my right butt cheek. Come out the front of the thigh. **Entry wound in my left kneecap. Goes out the back** and comes out the side of my kneecap. And two in my lower right ankle.

[1] Funderburk admitted he was "much bigger" than Mumford. App. 81, ll. 16 – 18. Mumford said, "I had no way to repel him. He is 200 something pounds and I'm 170." App. 280, ll. 16 – 18.

App. 67, ll. 6 – 11. Funderburk's description of his wounds more closely matched Mumford, Teal, and Cranford's description of the shooting. Mumford said after he fired into the ground, Funderburk first turned, but then "turned around and came back to me." App. 272, l. 2 – 273, l. 17. Cranford said Mumford "shot twice at the ground, and then [Funderburk] come back at him again and that's when he fired again." App. 239, ll. 11 – 17. Teal also said Funderburk turned around, came back, and "went back off on Noah, and Noah stopped him before he got hurt." App. 219, ll. 13 – 24.

Harrell agreed that Mumford's first shot was pointed at the ground, but agreed with his friend Funderburk that Funderburk had pushed away and was "still in the motion of going back" when Mumford shot him. App. 112, ll. 1 – 22. App. 129, ll. 6 – 9. In Sellers' version, the two had separated from their tussle and "just glazed [sic] at each other for a second, and when [Mumford] pulled the gun out [Funderburk] went to turn, and Noah started firing." App. 141, l. 22 – 142, l. 6.

Because of the conflict in the testimony about whether Funderburk was facing Mumford when Mumford began firing, the solicitor sought permission to recall Funderburk as a reply witness. App. 296, l. 19 – 305, l. 12. The solicitor admitted he had not presented Funderburk's doctor as a witness during his case, but wanted Funderburk to testify about the wounds he received. App. 296, l. 19 – 297, l. 11. The solicitor argued this testimony was "relevant based on the assertions of the Defense witnesses." App. 297, ll. 4 – 11. The trial judge agreed to allow the reply testimony, stating, "It all boils down to credibility and believability." App. 304, ll. 6 – 7.

During his reply, Funderburk changed his testimony and claimed he was shot, "Back of the knee, come out the side in the back of the knee." App. 306, ll. 9 – 16. This directly contradicted his earlier testimony when Funderburk said "Entry would in my left kneecap. Goes out the back and comes out the side of my kneecap." App. 67, ll. 6 – 11. Trial counsel did not cross-examine Funderburk on the reversal of his testimony. App. 309, l. 9 – 310, l. 5. Trial counsel did not point out the change in his testimony in his closing argument. App. 315, l. 12 – 328, l. 21.

Corporal Scott's Testimony

The State called Corporal Daniel Scott ("Scott") as a witness because he took Mumford's statement after Mumford turned himself in to the police. App. 180, l. 20 – 184, l. 23. After testifying about his role in the investigation, Corporal Scott was asked, "What did you charge him with?" App. 187, ll. 13 – 14. Corporal Scott explained that they decided to charge Mumford with attempted murder because at the time they "did not know the condition of Mr. Funderburk." App. 187, ll. 13 – 19. Corporal Scott explained that they only knew that Funderburk had been shot four times and "didn't know if he was shot in the main artery in the leg that you can actually bleed out of and die." App. 187, ll. 13 – 19. Trial counsel did not object.

Responding to Corporal Scott, the solicitor said that sometimes "thoughts pop into my head" and that he had served as a corpsman in the Navy. App. 187, ll. 20 – 24. The solicitor then asked Scott about military training that he and Mumford had received. App. 187, l. 20 – 188, l. 2. The solicitor asked, "Are y'all trained to know as it relates to handling weapons that if you shoot somebody in the leg or any part of the body that you can hit an artery and kill

somebody?" App. 187, l. 20 – 188, l. 2. Corporal Scott replied, "We are taught to eliminate the threat by any means necessary." App. 188, ll. 3 – 4. Trial counsel did not object.

The solicitor asked again whether in military training it is taught "that I can shoot you in the leg, but if I bleed—if I hit the artery it can kill you?" App. 188, ll. 5 – 9. Corporal Scott replied, "You can bleed out." App. 188, l. 10. Trial counsel did not object. The solicitor asked whether Mumford had the same training and Scott replied, "All military personnel have the same identical training." App. 188, ll. 19 – 20. Trial counsel did not object.

Discussion

The PCR court's ruling is amply supported by the evidence. "On certiorari in a PCR action, this Court applies an 'any evidence' standard of review." Sanders v. State, 412 S.C. 611, 614, 773 S.E.2d 580, 581 (2015). "Accordingly, the Court will affirm the PCR court's findings if any evidence of probative value exists in the record." Id.

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. The State has conceded deficient performance because it only argues that the PCR court erred in its consideration of prejudice.

The State's argument attempts to convert the PCR court's finding into an error of law. The State construes the PCR court's holding too narrowly to reach this artificial conclusion. The State argues that Corporal Scott's testimony could only have been relevant to the attempted murder charge.

The PCR court's holding is more broad. The PCR judge aptly recognized that in a self-defense case, the defendant's state of mind is of paramount importance. App. 577-78. The PCR court ruled that Corporal Scott's testimony would allow the jury to infer that Mumford's state of mind was not to act in self-defense, but to kill Funderburk. App. 577-78. This state of mind finding is of crucial importance to whether Mumford acted reasonably in self-defense, or, as argued by the solicitor, shot Funderburk as he was moving away. See State v. Commander, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011) (holding that forensic pathologists may not testify regarding the state of mind or the guilt of the accused). The solicitor also argued that Mumford used excessive force and Corporal Scott's testimony was relevant on this point. The first words the jury heard from the solicitor in his opening statement were, "Noah Mumford brought a gun to a fist fight." App. 53, ll. 18 – 19.

Allowing a lay witness to testify and give opinions has been held reversible error. Corporal Scott was not qualified as an expert witness. In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), the Supreme Court reversed and ordered a new trial because a police officer testified outside of the scope of his qualifications. In Ellis, an officer was qualified as an expert in crime scene processing and fingerprint identification. Id. at 177-78, 547 S.E.2d at 491-92. The officer testified as to his conclusions concerning the location of the victim and the position of the body at the time of a shooting. Id. The Supreme Court stated that the officer was improperly allowed to give his opinion on the ultimate issue in the trial, which was self-defense. Id. "An officer's improper opinion which goes to the heart of the case is not harmless." Id. See also, Fordham v. State, 325 S.E.2d 755, 756 (Ga. 1985) (holding that an officer's opinion as to whether a defendant acted with malice required reversal).

Even an expert may only offer an opinion on the ultimate issue at trial if the expert is properly qualified. See State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991) (holding that a properly qualified psychiatrist could testify about state of mind in a battered woman's syndrome case); Ellis at 178, 547 S.E.2d at 491; SCRE 704. In the recent case of In re Thomas S 402 S.C. 373, 741 S.E.2d 27 (2013), the Supreme Court reversed because a social worker, who was not qualified to give an opinion on whether a sexually violent predator would reoffend, improperly gave such an opinion. The State attempted to avoid this problem by not qualifying the social worker as an expert. Id. Because Corporal Scott was not qualified as an expert and could not testify about Mumford's military training, which related to his state of mind, trial counsel's deficient performance prejudiced Mumford.

Ample evidence supports the PCR judge's finding of prejudice in this close case. Self-defense was the paramount issue in the case. Any testimony regarding Mumford's state of mind was prejudicial and could have reasonably affected the outcome of this trial. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). The PCR court was correct that this error deprived Mumford of his Sixth Amendment right to the effective assistance of counsel. Because the standard of review more than adequately controls this case, this Court need not grant certiorari to consider this issue. The State's petition should be denied.

2.

Certiorari should not be granted to consider the applicability of the cumulative error doctrine in this case. Alternatively, if the Court decides to grant certiorari on this issue, it should also grant certiorari on the issues raised in Mumford's petition for certiorari.

Certiorari is not required in this case to consider the PCR court's concluding paragraph regarding cumulative error. As shown above, the PCR court found that trial counsel's ineffective

assistance regarding Corporal Scott's testimony alone caused Mumford sufficient prejudice to grant him a new trial. The PCR court's holding on that ground alone is supported by the evidence and the standard of review controls. Because the PCR court found ineffective assistance on a single ground, this Court should not grant certiorari to consider cumulative error. Such a consideration is irrelevant and unnecessary in this case.

Furthermore, this case does not present an adequate vehicle for this Court to consider the applicability of cumulative error. Cumulative error is a complex question. See Benjamin Dudek, Note, Rebutting the "Strong Presumption of Reliability" for Effective Assistance: The Pursuit of Cumulative Analysis for Strickland Claims in South Carolina, 65 S.C. L. Rev. 685 (Summer 2014) (advocating the adoption of cumulative error analysis in South Carolina). This Court should ultimately adopt cumulative error in PCR cases, but true cumulative error analysis concerns the "accumulation of multiple nondeficient errors." Id. See also Lorenzen v. State, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008). In this case, the PCR court found that a single error was prejudicial. This Court should wait for a case where a PCR judge found "death by a thousand cuts" to consider this issue.

Furthermore, this case is not a good vehicle to consider cumulative error analysis because of the issues raised in Mumford's own petition for certiorari, which Mumford hereby incorporates into this Return by reference. Mumford raises four issues in his petition, each of which stand on their own as a reason to grant Mumford post-conviction relief. Trial counsel impeached his own witness with an inadmissible conviction and drug use. He failed to interview and call a favorable witness who witnessed the shooting. He failed to request specific charges on self-defense that were warranted by the evidence and made necessary by the solicitor's closing argument. He failed to request a lesser-included offense that should have been considered by the jury. Each of these

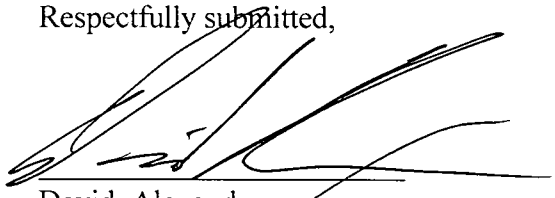
issues—standing alone—are meritorious and warrant relief. These errors are not of the numerous, individually nonprejudicial kind to which cumulative error analysis applies.

Should the Court ultimately determine to grant certiorari on this issue, then it should also grant certiorari to consider the issues in Mumford's petition. To the extent that this Court determines that it will review the cumulative error doctrine in this case, it should also consider these substantial errors and order further briefing. Because Mumford is entitled to a new trial both for the reason found by the PCR judge and for each of the reasons in Mumford's petition, certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for certiorari.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 29th day of October, 2015

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Noah C. Mumford, #348375, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 29th day of October, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 29th day
of October, 2015.

Maria Medina (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.