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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Orangeburg County
The Honorable Diane S. Goodstein, Post-Conviction Relief Judge
The Honorable James C. Williams, Jr., Trial Court Judge

Appellate Case No. 2015-001438

ANTIONELLE LaTROY OWENS,

Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

- I. The post-conviction relief court erred granting Owens relief and remanding his case to the court of general sessions for a new trial based on its finding trial counsel was ineffective for failing to object to the trial court's refusal to conduct an inquiry into the identification pursuant to Neil v. Biggers and the victim's subsequent identification of Owens during her trial testimony.
- II. The post-conviction relief court erred granting Owens relief and remanding his case to the court of general sessions for a new trial based on its finding trial counsel was ineffective for failing to adequately prepare for and challenge the State's gunshot residue evidence.

STATEMENT OF THE CASE

Procedural History

During its April 2010 term, the Orangeburg County Grand Jury indicted Antionelle LaTroy Owens for assault and battery with intent to kill (2006-GS-38-1449) and attempted first degree burglary (23006-GS-38-1186). Robert D. Mellard, Esquire, and Margaret E. Hinds, Esquire, represented him. On August 10, 2009, Owens proceeded to jury trial before the Honorable James C. Williams, where the jury convicted Owens as indicted. Judge Williams sentenced Owens to fifteen years' imprisonment for each conviction, with the sentences to be served concurrently.

Owens filed a timely notice of appeal and Appellate Defender Elizabeth A. Franklin-Best, Esquire, represented Owens. Following briefing by both parties, the South Carolina Court of Appeals affirmed Owens's convictions and sentences. State v. Owens, Op. No. 2011-UP-220 (Ct. App. filed May 18, 2011). The Court of Appeals sent the Remittitur on June 3, 2011.

Thereafter, Owens filed a timely application for post-conviction relief on December 1, 2011, alleging ineffective assistance of trial counsel. The State made its Return on May 25, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the application was convened November 1, 2013, at the Dorchester County Courthouse before the Honorable Diane S. Goodstein. Owens was present at the hearing, represented by Christopher S. Leonard, Esquire. The State was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Owens proceeded forward on two allegations: (1) trial counsel was ineffective for failing to consult with and call a gunshot residue expert to testify at trial, and (2) trial counsel was ineffective for failing to object to the trial court's refusal to conduct an

inquiry into the identification pursuant to Neil v. Biggers² and the victim's subsequent identification of Owens during her trial testimony. Owens did not testify at the hearing but presented testimony from testimony from South Carolina Law Enforcement Division (SLED) Gunshot Residue Expert John Roberts (who testified at trial) and trial counsel Robert D. Mellard (hereinafter Mellard). The State presented testimony from Owens's Applicesecond trial counsel, Margaret E. Hinds (hereinafter Hinds).

At the conclusion of the evidentiary hearing, this Court instructed both parties to prepare proposed orders for the Court's consideration as to whether counsel was ineffective for failing to object to the trial court's refusal to conduct an inquiry into the identification pursuant to Neil v. Biggers and the victim's subsequent identification of Owens during her trial testimony. The court ruled on the record that counsel was not ineffective as to the gunshot residue evidence, stating Owens could not establish any prejudice. (App. 368).

The State submitted its proposed order of dismissal on March 3, 2014. Owens submitted his proposed order granting post-conviction relief on the same date. On October 7, 2014, the post-conviction relief court signed Owens's order granting post-conviction relief as to both allegations raised, despite its previous finding on the record that Owens could not establish any requisite prejudice as to the gunshot residue issue. This order was filed with the Orangeburg County Clerk of Court on October 7, 2014.

On October 17, 2014, the State served its Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRPC, on Owens and the post-conviction relief court. Owens filed his reply to the State's motion on March 5, 2015. On March 16, 2015, the post-conviction relief court denied the State's motion to reconsider, alter, or amend its

² Neil v. Biggers, 409 U.S. 188 (1972).

previous order. That order was filed on March 20, 2015, and was subsequently received by the State on June 23, 2015.

The State served its notice of appeal on July 2, 2015. This Petition for a Writ of Certiorari follows.

Factual History

Shortly after 6:00 a.m. on the morning of June 5, 2006, the victim, Irene Shannon (hereinafter "Shannon"), was leaving her home on Hillsborough Road to go to work. After stepping outside her door, Shannon saw a masked man come running around the corner of her home from behind a parked vehicle. The man pointed a gun at Shannon's head and demanded she open the door to her home. Shannon's husband and three young children were inside the home at the time. Shannon attempted to open the door, but she fumbled with her keys and was unable to open it quickly. Her assailant then pushed her up against the wall and shot her in the leg. The masked man then ran from Shannon's carport and fled down nearby Broughton Street.

As her assailant fled, Shannon went inside her home where her husband was already on the phone with a 911 operator. She was able to give a description of the suspect's clothing and revealed the direction in which he had fled. She described her attacker as a tall and slender black male with a good deal of hair under his mask. He was wearing a mask, a black t-shirt, and dark-colored jeans while armed with a revolver. Shortly thereafter, police officers and an ambulance arrived at Shannon's home.

Officer Reginald Conyers of the Orangeburg Department of Public Safety arrived on the scene within minutes of the shooting. He found Shannon with a gunshot wound to her right thigh area. (R. p. 36). He located blood in her carport, home, and the vehicle

where she was sitting. The officer was able to obtain a description of the suspect and the location he had fled after the incident.

Corporal Jimmy Jones also responded to the scene and was notified that a person matching the suspect's description was observed in the vicinity of a cemetery only one-eighth of a mile from the victim's residence. Officers Gerald Hoffman and John Caddell began canvassing the surrounding area looking for the suspect. The officers approached the woods towards the rear of the cemetery and heard a noise. As they investigated the sound, the suspect emerged and took off running. The officers pursued and were able to locate the suspect hiding in a ditch next to the woods. The suspect, who was wearing a black shirt and jeans, was hand-cuffed and taken into custody. Officer Hoffman was certain the man who initially fled was the same person located hiding in the ditch. The captured suspect, who was sweating profusely at the time of his arrest, was Owens. During their early morning search, the officers did not see or encounter any other individuals other than Owens. Owens was apprehended within fifteen minutes of the initial response to the shooting.

Subsequently, Owens was taken back to Shannon's residence. Shannon was still at her residence being treated by paramedics when Owens was returned to the scene. Officers escorted Owens, who was hand-cuffed at the time and was no longer wearing a mask, for Shannon to identify. Based on his clothing and physical build, she alerted the officers Owens was the person who shot her.

Prior to trial, Owens requested a Neil v. Biggers hearing to address the issues related to the identification evidence. The solicitor asserted Shannon would not be identifying Owens from the witness stand. Instead, the solicitor indicated Shannon was only going to testify the person brought back to the scene matched the physical build and

clothing of the assailant. The trial court then determined a pre-trial hearing was unnecessary based on the circumstances of the case.

Subsequently, during trial, Shannon testified about her viewing of Owens at the scene. Shannon testified she identified the man shown to her at the scene as the person who shot her based on his clothing and physical build. Trial counsels for Owens did not object to any of Shannon's testimony regarding the show-up procedure.

During trial, the State called SLED Agent John Roberts, who was qualified as an expert in trace analysis and gunshot residue, to testify regarding gunshot residue evidence collected from Owens. Agent Roberts testified he analyzed the gunshot residue kit that was collected from Owens within approximately two hours of the attack. He testified on the right back of Owens's hand, the gunshot residue test was inconclusive, but that a round lead particle was identified. He went on to testify that although this was not a positive reading for gunshot residue, round lead particles are very rarely found absent gunfire. He listed the handling of "cheap Chinese Christmas lights," making your own fishing weights, or reloading your own lead bullets as some of the other instances when round lead particles might be found. On cross-examination, trial counsel elicited from Agent Roberts several times that no gunshot residue was found on Owens's hands.

At the conclusion of the State's case, Owens moved for a directed verdict and the trial court denied the motion. Owens then requested a jury instruction on identification, which the court charged to the jury. Subsequently, the jury convicted Owens as indicted.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether “any evidence of probative value” exists to sustain the lower court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court should reverse the post-conviction relief court if there is no probative evidence to support the lower court’s ruling or if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), *cert. denied*, 552 U.S. 944 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining

counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

- I. The post-conviction relief court erred granting Owens relief and remanding his case to the court of general sessions for a new trial based on its finding trial counsel was ineffective for failing to object to the trial court's refusal to conduct an inquiry into the identification pursuant to Neil v. Biggers and the victim's subsequent identification of Owens during her trial testimony.**

Its order granting relief, the post-conviction relief court found trial counsel ineffective for "withdraw[ing] the request for a Neil v. Biggers hearing." Additionally, the post-conviction relief court found trial counsel was ineffective for "fail[ing] to object to this testimony, fail[ing] to renew the motion, and fail[ing] to make a motion for mistrial once the testimony was presented," as well as failing to preserve an objection for appellate review. The post-conviction relief court further found "the show-up [identification] used in this case was unduly suggestive," "the motion to suppress the identification [would have been] meritorious," and therefore, "the identification was constitutionally inadmissible as a matter of law." The court concluded that Owens was prejudiced by the admission of the victim's identification testimony because "there is a reasonable likelihood that [Owens] would not have been convicted" without the identification.

The post-conviction relief court erred in its grant of post-conviction relief to Owens, as counsel was not deficient because Shannon's testimony did not amount to an in-court identification of Owens. Furthermore, counsel vigorously cross-examined Shannon on her ability to view the suspect and her memory of the events. Additionally, even if the testimony in question was an identification, Owens cannot establish any requisite prejudice as it was not unduly suggestive and is inherently reliable. Therefore, this Court should grant certiorari and ultimately reverse the post-conviction relief court's grant of a new trial to Owens.

Prior to the start of trial, trial counsel requested a Neil v. Biggers hearing as to an anticipated in-court identification of Owens by victim Irene Shannon. (App. 36). The prosecutor replied a hearing was necessary because Shannon's identification would be limited to physical build and clothing similarities. (App. 36-37). Based on this representation of the Shannon's anticipated testimony, the trial court determined a Neil v. Biggers hearing was not necessary. (App. 37-38). Trial counsel replied he wanted to be sure that there would not be an in-court identification of Owens. (App. 38). A hearing was not held.

During trial, Shannon testified the assailant was "tall and slender" and she "knew from the mask on his head that he had a lot of hair." (App. 74). She elaborated "this part of [his] face was like a big part where I could see his lips and see his eyes." (App. 74) She elaborated the assailant was black and had "big lips" with a "big part protrusion." (App. 74-75). She then went on to describe the clothing the assailant was wearing. (App. 75) When describing the incident to the jury, she referred to the attacker as "Mr. Owens" one time. (App. 71) Additionally, Shannon identified two photographs (introduced as State's Exhibits No. 5 and No. 6) as her assailant; however, the photographs were never identified as Owens. Trial counsel did not raise any objections to this testimony and did not move to a mistrial.

The post-conviction relief court erred in finding trial counsels' performance deficient. Before the trial began, counsels moved for a Neil v. Biggers hearing. The trial court declined to conduct a hearing based on representations from the prosecutor Shannon would not provide an in-court identification of Owens, but rather, would give a description of her assailant based on physical build and clothing. A review of Shannon's testimony reveals she limited her description to physical build and clothing of her

assailant, describing facial features, amount of hair, and attire. Shannon did not make an in-court identification of Owens. Furthermore, the two photographs Shannon identified as matching her descriptions of the suspect (State's Exhibits No. 5 and No. 6) were not identified as Owens. This testimony does not amount to an in-court identification of Owens. Cf. State v. Frazier, 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011) (finding three witnesses' identifications following show-up lineups were not impermissibly suggestive).

Additionally, during cross-examination, Mellard vigorously challenged Shannon on the veracity of her description of the perpetrator and highlighted the assailant was wearing a ski mask, she observed him briefly in the early morning hours in poor lighting while she was looking down at her keys with a gun pointed at her, and she made her identification while receiving medical treatment for a gunshot wound. (App. 81-89). Moreover, Hinds emphasized the factors tending to adversely affect the reliability of Shannon's identification based on these factors during Owens's closing argument. (App. 169-178). Based on the foregoing, Counsel's performance was not deficient and the post-conviction relief court erred in its determination otherwise.

Furthermore, Owens failed to establish any resulting prejudice resulting from this alleged deficiency. The post-conviction relief court's ruling to the contrary is not supported by the record and is controlled by an error of law. To establish prejudice on a claim that counsel was ineffective regarding the admittance of evidence, Owens must show that had his trial attorney challenged the evidence, there is a reasonable probability that he would have prevailed and the evidence in question would have been excluded. Rollison v. State, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). Here, had trial counsel objected to Shannon's testimony or had a Neil v. Biggers hearing been held, the testimony would not have been excluded because the lineup was not unduly suggestive.

Similarly, any mistrial motion on this ground would not have been granted. Moreover, had this issue been preserved for appellate review, Owens's convictions would have been affirmed on appeal. Therefore, there is no reasonable probability that the result of the proceeding would have been different. Cherry, supra.

Additionally, the post-conviction relief court's finding that the show-up identification was "unduly suggestive" is controlled by an error of law. Single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, identifications obtained from show-ups are not automatically excluded and may be admissible if found to be sufficiently reliable. Id. In State v. Brown, the Court of Appeals thoroughly analyzed the show-up identification procedure:

[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the subject has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching. The closer in time and place to the scene of the crime, the less objectionable is a showup. A show-up may be proper even though the police refer to a suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime.

Single person show-ups are disfavored because they are suggestive by their nature. However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. Suggestiveness alone does not mandate the exclusion of evidence. Reliability is the linchpin in determining the admissibility of identification testimony.

356 S.C. 496, 503-504, 589 S.E.2d 781, 785 (Ct. App. 2003) (internal citations omitted).

In determining the admissibility of evidence of an out-of-court identification, a court must conduct a two-prong inquiry into the matter. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Govan, 372 S.C. at 558, 643 S.E.2d at 95; see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (“Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.”). A trial judge should only exclude the identification evidence if there is “ ‘a **very substantial** likelihood of irreparable misidentification.’ ” Perry v. New Hampshire, ___ U.S. ___, ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Significantly, the exclusion of evidence is a “drastic sanction” and should be “limited to identification testimony which is manifestly suspect.” Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983).

Amongst the various identification procedures, single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, “[m]ost eyewitness identifications involve some element of suggestion[,]” and suggestiveness alone does not mandate the exclusion of identification evidence. Perry, 132 S. Ct. at 727; see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) (“Suggestiveness alone does not mandate the exclusion of evidence.”). Accordingly, there is no bright line rule concerning

show-ups, and the admissibility of an identification made during a show-up is controlled by the particular facts and circumstances of each individual case. Gibbs v. State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013); see Perry, 132 S. Ct. at 720 (“An identification infected by improper police influence, our case law holds, is not automatically excluded.”).

If a show-up is conducted, the show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness’ memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785; see also Willis v. Garrison, 624 F.2d 491, 493-494 (4th Cir. 1980) (acknowledging show-ups are inherently suggestive but recognizing prompt on-the-scene show-up identifications can promote fairness by enhancing the reliability of the identifications and permitting the expeditious release of innocent suspects). The use of a show-up is less objectionable the closer the show-up is in time and proximity to the scene of the crime. Brown, 356 S.C. at 504, 589 S.E.2d at 785. Furthermore, a show-up may even be proper where the police refer to the suspect as a suspect and the suspect is handcuffed and in the presence of law enforcement officers. Id.

However, even assuming the particular show-up procedure used in a case is found to be unduly suggestive, the witness’ identification may still be admissible if the State can prove by clear and convincing evidence that the identification is reliable notwithstanding the suggestiveness of the show-up. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. “Reliability is the linchpin in determining the admissibility of identification testimony.” Brown, 356 S.C. at 504, 589 S.E.2d at 785. To determine whether the

identification is reliable, a court must look to: (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 by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 132 S. Ct. at 720.

In State v. Mansfield, 343 S.C. 66, 69-70, 538 S.E.2d 257, 259 (Ct. App. 2000), this Court considered whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor witnessed a man later identified as Mansfield attempting to break into a home in his neighborhood in the middle of the afternoon. Id. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as the attempted burglar. Id. at 71, 538 S.E.2d at 259. Subsequently, Mansfield sought the exclusion of the

neighbor's identification of him as the perpetrator of the crime, the motion was denied, and Mansfield appealed. Id. at 71-72, 538 S.E.2d at 259-260. On appeal, this Court affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at 79-80, 538 S.E.2d at 263-264. In reaching that conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description of Mansfield was generally consistent even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id.

Likewise, in State v. Govan, 372 S.C. at 555, 643 S.E.2d at 93, this Court again considered the admissibility of identification evidence obtained through the use of a show-up identification procedure. In that case, law enforcement officers responded to the scene of an armed robbery, and one of the victims described the suspect to the officers as a black male wearing a black jacket and a black hat or rag. Id. at 555, 643 S.E.2d at 94. Roughly forty-five minutes after the robbery, Govan, who fit the description of the armed robbery suspect, was apprehended after abandoning evidence and attempting to flee from the police. Id. at 556, 643 S.E.2d at 94. Following Govan's arrest, the victim was transported to Govan's location and identified him as the perpetrator of the robbery. Id. Subsequently, during trial, Govan moved to exclude any identification evidence, the trial judge denied his motion, and Govan appealed. Id. at 558, 643 S.E.2d at 95. On appeal, this Court initially found the victim's out-of-court identification of Govan was not unduly suggestive in light of the fact that it occurred near the scene of the crime shortly after the

crime was committed. Id. at 558-559, 643 S.E.2d at 95. Thereafter, this Court found the identification was reliable even if the show-up identification procedure was unduly suggestive because the victim viewed Govan in a well-lit building from close proximity during the robbery, the victim had heightened attention due to the circumstances of the crime, the show-up occurred shortly after the crime, and the victim expressed certainty regarding his identification. Id. at 559-560, 643 S.E.2d at 96. For those reasons, this Court found the show-up was not unduly suggestive and was reliable under the totality of the circumstances and affirmed the trial judge's decision to admit the identification evidence. Id. at 560, 643 S.E.2d at 96.

In Owens's case, the testimony from Shannon would not have been excluded had trial counsel objected or had a Neil v. Biggers hearing been conducted. Initially, Owens was not directly identified in-court as the victim's assailant. The victim merely testified she identified a suspect during a show-up procedure based on his attire and physical build. Since her out-of-court identification was focused on the clothing as opposed to the individual, it is questionable whether a pre-trial hearing on this evidence was required. Cf. State v. Frazier, 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011) (finding three witnesses' identifications following show-up lineups were not impermissibly suggestive).

However, even if Shannon's testimony could be considered identification evidence, the testimony would not have been excluded. Applying the factors outlined in Govan, Shannon's identification of Owens during the show-up procedure was reliable. Shannon had a good opportunity to view her assailant during the crime as he was directly in front of her in close proximity. Her attention was certainly elevated by the stress of the situation and the presence of the firearm. Furthermore, her description of the suspect's clothing was extremely accurate and directly matched the clothing Owens was discovered

in within fifteen minutes of the incident less than half a mile from the scene of the crime. Also, her physical description of the suspect matched Owens's physical characteristics and appearance. Additionally, Shannon was entirely certain regarding her identification of the shooter's clothing, and the show-up procedure occurred less than an hour after the shooting. Based on the circumstances of the procedure employed in this case, Shannon's out-of-court identification was clearly reliable and would not have been excluded. Owens cannot establish prejudice from counsel's purported deficiency.

Additionally, Owens cannot establish any resulting prejudice from trial counsel's purported error because there is overwhelming evidence of his guilt. Owens was found within one-eighth of a mile from the victim's residence within fifteen minutes of the shooting in the early morning hours profusely sweating, matched the description of the suspect's build and clothing, and had materials consistent with gunshot residue on his hand. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (finding an applicant cannot establish prejudice where there is overwhelming evidence of his guilt); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Based on the foregoing, the post-conviction relief court erred in granting Owens relief and remanding his case to the court of general sessions for a new trial based. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

II. The post-conviction relief court erred granting Owens relief and remanding his case to the court of general sessions for a new trial based on its finding trial counsel was ineffective for failing to adequately prepare for and challenge the State's gunshot residue evidence.

Its order granting relief, the post-conviction relief court found "the record reflects that trial counsel provided ineffective assistance of counsel in the preparation and cross-examination of the [State's] GSR expert." The court then elaborated: "In this case there was no vigorous cross-examination, there were nine questions asked [of Roberts] and none of them gave the jury any reason to discredit the State's expert. Trial counsel erred in being unprepared to cross examine the SLED expert." The court also found trial counsel was ineffective for failing to call a defense GSR expert to rebut Roberts. Respondent respectfully submits the post-conviction relief court's written ruling in its Order is in direct conflict with the oral ruling made at the conclusion of the evidentiary hearing denying relief on this ground. Furthermore, there is no evidence of probative value in the record to support these findings. Therefore, this Court should grant certiorari and ultimately reverse the post-conviction relief court's grant of a new trial to Owens.

At the conclusion of the evidentiary hearing, the post-conviction relief court found that Owens could not satisfy the requisite prejudice required for relief pursuant to Strickland: "I just don't think it was prejudicial. The reason that I don't think it was prejudicial is the way that it ended up because I just – the way that the cross-examination ended up, you could never ask that to ever be better in a trial . . . (App. 368). Based on this finding, Owens was not entitled to post-conviction relief and the court erred in its grant of relief. See Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (finding counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") Once this finding was reached, it was no longer necessary

for any inquiry as to whether counsel performed deficiently. See Strickland, 466 U.S. 668 (finding the standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged and court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies, for if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed).

Furthermore, the post-conviction relief court's written finding of prejudice is not supported by the record. Owens presented no evidence or testimony establishing that any independent expert or discussions with Agent Roberts before trial would have yielded a different result. Agent Roberts testified he was unable to say that the round lead particle found on Owens was due to contamination to a reasonable degree of scientific certainty. He testified that round lead particles, such as the particle found on the back of Owens's right hand, are the result of gunfire almost all of the time, but could also be caused by cheap Chinese Christmas lights, smelting lead, or contamination. He testified to the first two instances at trial but did not testify to the possibility of contamination at Owens's trial. However, he acknowledged contamination would be rare in the present case, as a gunshot residue kit was collected within two hours of the incident and there was no evidence supporting contamination. Ultimately, Roberts testified he could not determine if the round lead particle found on Owens's right hand was caused by contamination to a reasonable degree of scientific certainty. Based on the foregoing, the post-conviction relief court's finding of prejudice is not supported by the record. This Court should reverse the post-conviction relief court's erroneous finding of prejudice.

Additionally, the post-conviction relief court erred in finding trial counsel deficient. The cross-examination of Roberts by Mellard during Owens's trial was succinct and incredibly effective. Mellard was able to elicit from Roberts *six times* that no gunshot residue was found on Owens. (App 144-45). Furthermore, Hinds highlighted during Owens's closing argument that no gunshot residue was found on Owens. Tr. pp 177-78. Trial counsel performed proficiently and in accordance with professional norms.

Based on the foregoing, the post-conviction relief court erred in granting Owens relief and remanding his case to the court of general sessions for a new trial based. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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December 17, 2015

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STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

On Writ of Certiorari to Orangeburg County
The Honorable Diane S. Goodstein, Post-Conviction Relief Judge
The Honorable James C. Williams, Jr., Trial Court Judge

Appellate Case No. 2015-001438

ANTIONELLE LaTROY OWENS,

Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Christopher S. Leonard, Esquire
Kendrick & Leonard, P.C.
Post Office Box 886
Columbia, South Carolina 29202

I further certify that all parties required by Rule to be served have been served.
This 14th day of December, 2015.


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