STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2014-001189

Jaleel Vaughn Page..... Petitioner,

v.

State of South Carolina..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the PCR court properly hold that Petitioner failed to meet his burden of proving that he was prejudiced by Counsel's failure to object to Detective Robbins' testimony, especially in light of the fact that the South Carolina Court of Appeals ruled on this exact issue on direct appeal?

STATEMENT OF THE CASE

Respondent adopts the Statement as presented by Petitioner.

ARGUMENT

I. The PCR court properly held Petitioner failed to meet his burden of proving that he was prejudiced by Counsel's failure to object to Detective Robbins' testimony, especially in light of the fact that the South Carolina Court of Appeals ruled on this exact issue on direct appeal.

Petitioner asserts trial counsel erred by failing to object to Detective Sara Robbins' testimony concerning a non-testifying co-defendant's statement and that this testimony was "highly prejudicial and compounded the Confrontation Clause violation at trial." This issue has already been ruled upon on Petitioner's direct appeal and therefore, it is not properly before this Court. Nevertheless, Petitioner cannot prove resulting prejudice. This testimony was already found to be harmless, as it was cumulative and corroborated by other witnesses.

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). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 104 S.Ct. 2052, 2064(1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, Petitioner 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, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced Petitioner 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.

Moreover, post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). "Error is harmless where it could not reasonably have affected the trial's outcome." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). "No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. "In considering whether error is harmless, a case's particular facts must be considered along with various factors including:

> ... the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

Id. at 484, 663 S.E.2d at 360 (citing State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 635 (1994)).

On Petitioner's direct appeal, the Court of Appeals held:

> While we recognize the discretionary authority of the trial judge in this area, we believe he erred in finding that Page's counsel's zealous representation of his client required the admission of this inadmissible evidence in order to rehabilitate Detective's investigative techniques. Nevertheless, we find any error resulting from the admission of the unredacted statement was harmless.

Id. at 483, 663 at 360.

The Court of Appeals also held, "an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached."" Id. at 484, 663 at 361.

The Court of Appeals then held, "[a]pplying the Van Arsdall[1] factors to the case at hand, we note that all of McKnight's statement mentioning Page was either cumulative or corroborated by other witnesses." Id. at 484, 663 S.E.2d at 361. The Court of Appeals further stated, "[a]s the [United States] Supreme Court has stressed on several occasions, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Id. at 485, 663 S.E.2d at 361. The Court of Appeals lastly held "that any error allowing the introduction of Page's non-testifying co-defendant's statement implicating Page to the police was harmless beyond a reasonable doubt." Id.

After a full evidentiary hearing, the PCR court found that the Court of Appeals "has already ruled upon this issue and therefore it is not properly before this Court." (App. p. 822). It also found, "While [Petitioner] has carried his burden of proof as to trial counsel's error in "opening the door" for Ms. Robbins testimony, [Petitioner] has failed to prove that he was prejudiced thereby. In fact, an Appellate Court of this State has affirmatively found Applicant was not prejudiced by the introduction of McKnight's unredacted statement." (App. p. 823). While Petitioner claims that had Counsel objected to Detective Robbins' testimony, the issue would have been preserved for appeal, the Court of Appeals clearly considered this testimony in deciding that the error was harmless, as it was cumulative or corroborated by other witnesses. As such, there is no reasonable probability that the Court of Appeals would have reversed Petitioner's conviction had Counsel objected to this statement.

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1 Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986).

As this issue was ruled upon during Petitioner's direct appeal, the PCR court correctly found this issue was not properly before it. As a result, the PCR court properly concluded Petitioner failed to meet his burden of proving he was prejudiced by the admission of McKnight's statement through testimony from Detective Robbins.

CONCLUSION

For all the foregoing reasons stated above, Respondent respectfully requests the judgment of the lower court be affirmed.

Respectfully submitted,

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February 2, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
The John C. Hayes, III, Circuit Court Judge

JALEEL PAGE,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
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This 2nd day of February, 2016.

ELIZABETH McCLELLAN
LEGAL ASSISTANT