

STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2015-000095

Marques Antonio Hudson, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Did the PCR court err in holding that Petitioner's trial counsel was not ineffective in failing to make a contemporaneous objection to the trial court's procedure in a Batson¹ challenge?
2. Did the PCR court err in holding that Petitioner's trial counsel was not ineffective in failing to move to strike the pediatric ophthalmologist's hearsay testimony?
3. Did the circuit court err in holding that Petitioner's trial counsel was not ineffective in failing to call certain witness and did the PCR court err in failing to consider the witness statements at the PCR Hearing?

¹ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the November 2004 term of General Sessions for child abuse with great bodily injury (2004-GS-23-8143). Richard H. Warder, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On October 10, 2007, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to 15 years imprisonment. (App.p.312; p.346).

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Hudson, Op. No. 2010-UP-141 (S.C. Ct. App. filed Feb. 22, 2010). Petitioner filed a petition for writ of certiorari at the South Carolina Supreme Court, the petition was granted, and the parties submitted briefs. The Supreme Court dismissed the petition as improvidently granted. State v. Hudson, Op. No. 2012-MO-053 (S.C. Sup. Ct. filed Dec. 12, 2012). The remittitur was sent December 28, 2012.

Petitioner filed an application for post-conviction relief (PCR) on May 22, 2013 (2013-CP-23-2903). (App.pp.329-36). A hearing was convened at the Greenville County Courthouse on August 27, 2014. (App.pp.377-468). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable James R. Barber, III denied relief in an order filed October 21, 2014. (App.pp.315-25). Petitioner

filed a motion to alter or amend judgment on November 3, 2014 and Respondent filed a return. (App.pp.368-70; pp.371-73). Judge Barber denied the motion by order filed December 22, 2014. (App.pp.374-75).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

- I. **The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have made a contemporaneous Batson objection and that he was prejudiced as a result.**

Petitioner argues trial counsel was deficient in not objecting to the State’s decision to strike the sole black juror. Petitioner argues there was a legitimate Batson challenge to be made and that he was prejudiced by the lack of a proper objection. This argument is without merit.

At the PCR hearing, Petitioner argued he trial counsel should have contemporaneously objected when the State struck the sole black juror from the jury panel. (App.p.389). Petitioner argued trial counsel later made an objection and the State said this juror was struck because he was a criminal defense attorney. (App.pp.390-91). Petitioner argued there were two other lawyers were seated as jurors (and were white).

(App.pp.389-90). Petitioner argued he later learned one of these white attorneys (Carpenter) had previously been a prosecutor. (App.pp.391-92).

Trial counsel testified he had “very little recollection of the jury selection.” (App.p.445).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner “failed to meet his burden of proving trial counsel should have made a Batson motion.” The PCR judge found Petitioner failed to prove the other juror “was an attorney who practiced criminal law, that this information was known to trial counsel, or that his inclusion on the jury defeats the assistant solicitor’s race-neutral reason for having struck the black juror.” (App.pp.320-21).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of

proving both that trial counsel was deficient and that he was prejudiced as a result. The sole black juror was struck from the panel by the State. (App.p.18). Though trial counsel did not immediately object, trial counsel did object later. The State provided a race-neutral reason for striking this juror. The State noted this juror was a criminal defense attorney. (App.pp.22-23). Petitioner now argues trial counsel should have attacked the State's race-neutral reason because the stricken juror was not the only attorney on the jury panel who was a criminal defense attorney. Petitioner, however, failed to present any credible evidence to corroborate his assertion. Cf. Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to prove prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the PCR hearing that the victims and witnesses had criminal records). As such, Petitioner failed to meet his burden of proving trial counsel's lack of a contemporaneous Batson objection was prejudicial in his case. See Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have moved to strike the pediatric ophthalmologist's testimony and that he was prejudiced as a result.

Petitioner argues that, as trial counsel's objection to hearsay testimony from Dr. Anthony Johnson was sustained, he was deficient in failing to move for a curative instruction or a mistrial. Petitioner argues he was prejudiced as a result. This argument is without merit.

At the PCR hearing, Petitioner noted trial counsel objected to Dr. Johnson's testimony about his team at the hospital. Petitioner argued this was sustained as hearsay but that trial counsel did not move to strike the testimony, request a curative instruction, or move for a mistrial. (App.p.394). Petitioner noted, however, that he did not believe the jury considered Dr. Johnson's testimony. (App.p.395).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have moved for a curative instruction or mistrial after his objection to Dr. Johnson's testimony." (App.p.322).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel was deficient and that he was prejudiced as a result. At trial, Dr. Johnson testified as an expert witness in pediatric ophthalmology for the State. During direct examination, Dr. Johnson stated "the team would like nothing more than to find some other explanations other than a non-accidental injury. None of the team wants to find that and, therefore, all of the – ." Trial counsel objected to Dr. Johnson "speaking

for the team” and the trial judge said “[l]et’s move on to what specifically he did. I think you’ve gone far enough.” (App.p.181). Petitioner now argues trial counsel was deficient because he did not seek a curative instruction or move for a mistrial. Petitioner, however, has failed to demonstrate that such would have been necessary in this case. Dr. Johnson’s mention of “the team” were very general in nature and did not involve any recitation of anything someone on the team may have said. Further, the trial judge clearly indicated they should simply move past Dr. Johnson’s testimony on this point. As such, Petitioner failed to demonstrate trial counsel should have requested a mistrial or a curative instruction. This is especially true because Petitioner cannot demonstrate he suffered any prejudice. See, e.g., State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) (“In order to receive a mistrial, the defendant must show error and resulting prejudice.”).

Petitioner cannot demonstrate he suffered prejudice as the result of trial counsel’s representation because the State presented overwhelming evidence of guilt at trial. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the defendant’s guilt); 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). In the order of dismissal, the PCR judge specifically found Petitioner could not demonstrate prejudice in his case because there was overwhelming evidence of his guilt:

The State presented overwhelming evidence of [Petitioner]’s guilt. The victim was injured while no other adults were present. The victim had three whip marks on her back, a busted lip and numerous bruises, and severe brain injuries. While [Petitioner] claimed these injuries were the

result of a slip in the bathtub followed by the two of them falling down the stairs, [Petitioner] did not have any bruises, injuries, or abrasions at the emergency room. As there was substantial evidence of [Petitioner]'s guilt, there is no reasonable probability of a different result in this case if trial counsel had performed differently.

(App.p.323).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have called several witnesses and that he was prejudiced as a result.

Petitioner argues trial counsel should have called Carrie Smith, Felicia Almodovar, and Lisa Rayle as witnesses at trial. Petitioner also argues the PCR judge erred in not considering statements from Almodovar and Rayle, and that he was prejudiced as a result. This argument is without merit.

At the PCR hearing, Petitioner argued Smith, Almodovar, and Rayle should have been called as witnesses at trial in order to corroborate his story. (App.p.398). Petitioner stated Smith was called as a State witness but could have testified for the defense that the victim was afraid of the water at bath time (which would have supported his trial testimony). (App.pp.399-400). Petitioner stated trial counsel should have called

Almodovar and Rayle as witnesses at trial because they had given statements that would have supported his testimony. (App.pp.401-02; pp.405-08).

Carrie Smith confirmed she had given a statement to police and that she testified both at the DSS trial and Petitioner's trial. Her statement was admitted into evidence. (App.pp.383-85; p.470).

Trial counsel testified he received Almodovar's and Rayle's statements in the discovery package. (App.p.442). Trial counsel testified he was sure they tried to contact these individuals and could not think of a reason he would not have tried to contact them about their statements. (App.p.443).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have investigated potential defense witnesses." The PCR judge noted that, while he had reviewed Almodovar's and Rayle's statements, he "cannot speculate as to what these alleged witnesses would have testified about **at trial** because they did not testify **at the PCR hearing**." (emphasis in original). (App.p.320).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel was deficient and he was prejudiced as a result. Petitioner moved Almodovar's and Rayle's statements into evidence at the PCR hearing. (App.p.399). Neither individual, however, testified at the PCR hearing. As such, they were not subjected to the crucible of cross-examination and the PCR judge was not able to judge their credibility as witnesses. Cf. Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the

credibility of witnesses). As these individuals did not testify at the evidentiary PCR, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original). Petitioner failed to demonstrate either that trial counsel erred in not calling Almodovar or Rayle as witnesses at trial or that he was prejudiced as a result because neither person testified at the PCR hearing. As such, the PCR judge did not err in finding Almodovar’s and Rayle’s statements were insufficient to meet Petitioner’s burden of proof on this issue.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

February 26, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2015-000095

Marques Antonio Hudson,..... Petitioner,

v.


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

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Brian P. Johnson, Esquire
522 North Church Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.
This 26th day of February, 2016.


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ATTORNEY FOR RESPONDENT



ALAN WILSON
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February 26, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Marques Antonio Hudson v. State of South Carolina
Appellate Case No: 2015-000095
Lower Court Case No: 2013-CP-23-2903

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FEB 26 2016
SC SUPREME COURT

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. I would note that, contrary to the procedure set forth in the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings," the Appendix appears to contain unredacted personal data identifiers, including the name of the minor victim and various home addresses.

If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Brian P. Johnson, Esquire
Trisha Allen, Victim Services (without enclosure)