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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Trial Judge
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

Appellate Case No. 2014-001870

Tra'Vaughn La'Roi Thomas,.....Petitioner;

v.

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

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Whether the PCR court erred in concluding Petitioner did not establish ineffective assistance of trial counsel based on her failure to preserve for appellate review the issue of the propriety under the Sixth Amendment of the trial court's exclusion of Petitioner's relatives and neighbors and where the trial court excluded them based merely on the Solicitor's hearsay allegation that some of them threatened a witness?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the December 2009 term of General Sessions for armed robbery (2009-GS-23-1867). (App.pp.247-48). Dorothy A. Manigault, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty of the charge as indicted. On September 15, 2010, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to twelve (12) years imprisonment. (App.p.162).

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.165-76). The court of appeals affirmed Petitioner's conviction and sentence. State v. Thomas, Op. No. 2012-UP-361 (S.C. Ct. App. filed June 13, 2012). (App.pp.192-93).

Petitioner filed an application for post-conviction relief (PCR) on June 10, 2013 (2013-CP-23-3233). (App.pp.194-201). A hearing was held at the Greenville County Courthouse on June 17, 2014. (App.pp.207-36). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order dated July 25, 2014 and filed July 31, 2014. (App.pp.238-46).

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); Rule 71.1(e), SCRPC.

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective because she did not make a specific objection when several people were asked to leave the courtroom during one witness’s trial testimony.

Petitioner argues he satisfied his burden of proving trial counsel was ineffective because she did not make a specific objection when several of his relatives and neighbors were asked to leave the courtroom during Jerry Tyrone Morehead’s trial testimony. Petitioner’s argument is without merit, however, as he failed to meet his burden of proving both that trial counsel’s representation was deficient and that he suffered prejudiced as a result.

A.

Prior to Jerry Morehead taking the stand as a State witness, the trial judge memorialized the substance of an earlier bench conference between the parties:

All right. I was informed by the Solicitor in the presence of [trial counsel] that the family – the relatives of [Petitioner] have been saying or making threats to Jerry Tyrone Morehead. Now, I don’t know whether that’s true or not. But I need for you to understand that if that is true, then that constitutes threatening a witness in the case and is a very serious felony

and is punishable by a long prison term. And if that is true, I will not condone it. And I hope you understand that.

Now, for that reason, I'm going to take this witness' testimony out of your presence. So, at this time, you can excuse yourself and wait out in the hallway.

(App.pp.74-75).

Trial counsel noted her objection for the record, stating "[w]e don't have any sworn affidavits by the witness that's coming up or any sworn affidavits by the State."

(App.pp.75-76). The trial judge stated "[a]ll right. I understand." (App.p.76).

Immediately before Morehead took the witness stand, the assistant solicitor asked the trial judge to exclude two of Petitioner's neighbors from the courtroom as well.

(App.p.79). Trial counsel stated "[y]our Honor, they all live in the same community. It's a small community. There's no evidence that there are threats made by them."

(App.p.80). The trial judge replied, "I'm going to ask them to step out in the hallway."

(App.p.80).

The trial judge allowed Petitioner's relatives and neighbors to return to the courtroom after the conclusion of Morehead's testimony. (App.p.107).

B.

At the PCR hearing, Petitioner acknowledged trial counsel objected when the trial judge asked his family members and neighbors to step out of the courtroom.

(App.p.213). Petitioner argued, however, that trial counsel did not make a specific objection and the State did not show any prejudice that would result from not closing the courtroom.

(App.p.214). Petitioner argued the outcome of his trial would have been

different if trial counsel had made a specific objection “because [Morehead] acted like he didn’t want to talk in front of my family at all. He just sat there. When they called him up to the stand, he just sat there.” (App.p.215). Petitioner admitted the courtroom was not closed and that “they just made them get rid of – my family had to leave out and two of my neighbors had to leave. My ex-girlfriend had to leave. Everybody else stayed in, it was just my family.” (App.p.214).

Trial counsel testified the issue of threats against Morehead came up during the trial itself. (App.pp.228-29). Trial counsel testified “the information presented to the Court was Jerry Morehead said that the family had threatened him, [Petitioner]’s family had threatened him and that was sufficient for the Court.” (App.p.228). Trial counsel testified there was a partial closure of the courtroom because it was only members of Petitioner’s family that were asked to leave during Morehead’s testimony. (App.p.229). Trial counsel testified she did not see a basis to object to a partial closure of the courtroom. (App.p.229).

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 objected when the trial judge asked [Petitioner]’s family and neighbors to vacate the courtroom.” The PCR judge found “trial counsel did not err in not making a specific objection and arguing whether there was an overriding interest in asking these individuals to leave the courtroom.” The PCR judge found the courtroom was not closed in this case but that this was a partial closure supported by a “substantial reason” articulated by the State. (App.p.242).

C.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of trial 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). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066. 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)).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective because she did not make a specific objection when his relatives and neighbors were excused from the courtroom during Morehead's testimony. Petitioner failed to demonstrate both that trial counsel's performance was deficient and that he was prejudiced as a result of her representation. See Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) (holding an applicant must show both error and prejudice to win post-conviction relief) (citation omitted).

Error

Petitioner failed to meet his burden of proving trial counsel was deficient in not making a specific objection (to the lack of an articulated overriding interest in closing the courtroom) because there was not a closure of the courtroom in this case.

Both the United States and South Carolina constitutions guarantee a criminal defendant will receive a public trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. This protection is for both the benefit of the defendant, so the public may see he is dealt with fairly, and that the public's presence may keep his triers aware of the importance of their functions. See Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984). "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, 558 U.S. 209, 215, 130 S. Ct. 721, 725 (2010). "[A] closure of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 257 P.3d 624, 629 (Wash. 2011).

Trial counsel did not err in failing to make a specific objection to the trial judge's decision to ask Petitioner's relatives and neighbors to leave the courtroom during Morehead's testimony. It was not incumbent upon trial counsel to have asked the trial judge to articulate an overriding reason to take this action because the trial judge did not close the courtroom to the public. The courtroom in Petitioner's trial was not closed to all spectators and one cannot reasonably draw an inference that Petitioner did not receive a public trial merely because several of his supporters were excused from the courtroom during the testimony of a single witness. In Presley, the trial judge closed the courtroom

to all spectators and members of the public during the pre-trial jury voir dire. The United States Supreme Court found that defendant's right to a public trial had been violated and reversed his conviction. In Petitioner's case, members of the public – except for Petitioner's relatives and neighbors – were allowed to be present during the entire court proceeding (and those excluded individuals were only excused from the courtroom for a limited period of time). See Lormor, 257 P.3d at 629. Thus, Petitioner's trial was clearly a public trial and not a "secret trial" as prohibited by the federal and state constitutions. See In re Oliver, 333 U.S. 257, 266-73, 68 S. Ct. 499, 504-07 (1948) (discussing the long-standing fear of secret trials as the foundation for the Sixth Amendment right to public trials); see also Caudill v. Peyton, 368 F.2d 563, 565 (4th Cir. 1966) (disapproving of an in camera trial held in the judge's chambers).

Accordingly, since there was not a total "closure" of the courtroom to all members of the public, Petitioner's constitutional rights to a public trial were not violated and there was no basis for trial counsel to have made a specific constitutional objection.

Prejudice

Regardless, Petitioner also failed to meet his burden of proving he was prejudiced as the result of his relatives' and neighbors' absence from the courtroom during Morehead's testimony.

In reversing the defendant's conviction in Presley, the United States Supreme Court noted:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate

to support the closure.

Presley, 558 U.S. at 214, 130 S. Ct. at 724 (quoting Waller v. Georgia, 467 U.S. at 48, 104 S. Ct. at 2216). This standard, however, is not applicable in Petitioner's case because there was not a complete closure of the courtroom to any and all spectators. Rather, the circumstances of Petitioner's trial illustrate this was a partial and temporary closure of the courtroom that was limited to just a few individuals for the duration of one witness's testimony.

In situations of partial and temporary courtroom closures, a "substantial reason" for the closure is required rather than the "overriding interest" set forth in Presley and Waller. See, e.g., Bucci v. United States, 662 F.3d 18, 22 (1st Cir. 2011) ("In partial closure cases - i.e., where courtroom access is restricted but some members of the public are permitted to attend - this court and several of our sister circuits have held that a substantial interest, rather than a compelling one, will justify partial closure."); Woods v. Kuhlmann, 977 F.2d 74 (2d Cir. 1992) (adopting "the less stringent substantial reason test to determine whether a defendant's right to a public trial was violated by a partial closure of the proceedings"); United States v. Rivera, 682 F.3d 1223, 1236 (9th Cir. 2012) (holding a "less rigorous standard applies where a partial closure is at issue: A partial closure is justified where the trial judge had a substantial reason for the closure, and where the closure was narrowly tailored to exclude spectators only to the extent necessary to satisfy the purpose for which it was ordered."); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989) (adopting the "substantial reason" test); Judd v. Haley, 250 F.3d 1308, 1315 (11th Cir. 2001) ("[I]n the event of a partial closure, a court need merely find a

'substantial' reason for the partial closure, and need not satisfy the elements of the more rigorous Waller test").

In this case, the State presented a substantial reason to excuse Petitioner's relatives and neighbors because Morehead reported he had received threats from Petitioner's family. It is clear the trial judge agreed to partially close the courtroom during Morehead's testimony because he was concerned the presence of Petitioner's relatives and neighbors in the courtroom would inhibit Morehead's truthful testimony, considering he felt threatened by the improper pre-trial contact. Excusing Petitioner's relatives and neighbors in order to allow Morehead to testify more freely was within the trial judge's discretion. See State v. Bryant, 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007) ("[A] trial court is given enormous discretion in conducting a criminal trial."); see also State v. Hawkins, 300 S.C. 225, 226, 387 S.E.2d 251, 251 (1989) ("The wide discretion accorded presiding judges, embedded in the law of South Carolina, is essential to the orderly administration of justice.").

Here, the substantial reason justifying a partial closure was to ensure Morehead felt free to testify truthfully regarding the facts of Petitioner's case without being inhibited by the presence of persons by whom he felt threatened. Similar concerns have been held to be sufficiently compelling reasons justifying the partial closure of a court proceeding. See State v. Gee, 262 S.C. 373, 384-85, 204 S.E.2d 727, 731-32 (1974) (finding "no abuse of discretion on the part of the trial judge in excluding the public and all spectators from the courtroom while the confidential informer was testifying"); State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981) (holding the trial judge did not err in

excluding members of the public from the courtroom during the testimony of a minor victim); see also Woods, 977 F.2d at 76-78 (finding the defendant's right to a public trial "was not violated by the state trial judge's temporary exclusion of [defendant]'s family during the testimony of one witness"); United States v. Farmer, 32 F.3d 369, 371-72 (8th Cir. 1994) (holding the trial judge did not abuse his discretion in ordering a partial closure of the courtroom because the testifying victim had been threatened by the defendant and his family); Nieto, 879 F.2d at 753 (concluding the defendant's right to a public trial was not violated when the trial judge excluded the defendant's relatives from the courtroom during the victim's testimony).

The partial and temporary closure was limited to a small group of individuals for the length of a single witness's testimony. While the trial judge did not articulate an alternative to asking Petitioner's relatives and neighbors to leave the courtroom, it is unclear what kind of viable alternative could have existed in this case. It is, however, clear from the trial judge's ruling the basis upon which he excused these individuals from the courtroom – because Morehead had been threatened by Petitioner's family members. A more explicit ruling was unnecessary.

Regardless, even if this Court finds it was error for the trial judge to have partially closed the courtroom, this Court should conclude this error was too trivial to violate the Sixth Amendment. The Second Circuit Court of Appeals has found there is a "triviality exception" to the right to a public trial set forth in the Sixth Amendment. In Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996), that court identified the core values that the United States Supreme Court has found are advanced by the guarantee of a public trial: "1) to

ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.” Id. at 43 (citing Waller, 467 U.S. at 46-47, 104 S. Ct. at 2215-16). The Peterson court reviewed these core values and concluded the brief closure of the courtroom was trivial and did not breach that defendant’s Sixth Amendment rights. Several courts have adopted this “triviality exception.” See, e.g., Bucci, 662 F.3d at 27-28; United States v. Patton, 502 Fed. Appx. 139, 141-42 (3d Cir. 2012); Braun v. Powell, 227 F.3d 908, 918-20 (7th Cir. 2000); United States v. Ivester, 316 F.3d 955, 959-60 (9th Cir. 2003); United States v. Perry, 479 F.3d 885, 889-91 (D.C. Cir. 2007); Barrows v. United States, 15 A.3d 673 fn.14 (D.C. 2011); Kelly v. State, 6 A.3d 396, 406-11 (Md. App. 2010); Commonwealth v. Alebord, 953 N.E.2d 744, 750 (Mass. App. Ct. 2011).

A partial and temporary closure of the courtroom does not implicate the same constitutional concerns as does a total closure of a courtroom for the entire duration of a trial. In Petitioner’s case, the partial and temporary closure was too trivial to constitute a violation of his constitutional rights. The partial and temporary closure of the courtroom allowed Morehead to testify freely without being inhibited by the presence of persons by whom he felt threatened. As such, Petitioner cannot demonstrate he suffered any prejudice – sufficient to undermine confidence in the outcome of his trial – from the lack of a specific constitutional objection to the trial judge’s decision to exclude relatives and neighbors for the duration of one witness’s testimony. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

E.

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, 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.”).

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief judge's order and deny the requested relief.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail, addressed to:

Benjamin John Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 18th day of April, 2016.


KAREN C. RATIGAN, S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT