

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2015-000758

TREMAINE WRAY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The post-conviction relief court properly determined counsel performed effectively in his handling and examination of State's witness Ricky Jacobs.

STATEMENT OF THE CASE

Procedural History

In August of 2007, the Richland County Grand Jury indicted Petitioner and his co-defendant Taurus Watts for murder following the shooting death of Dumuria “Hank” Johnson. Jack B. Swerling, Esquire, and Arie D. Bax, Esquire, represented Petitioner. On October 5, 2009, Petitioner and Watts proceeded to a jury trial before the Honorable J. Michelle Childs. Assistant Solicitors Vanessa C. Shipley and Joanna A. McDuffie of the Fifth Circuit Solicitor’s Office prosecuted the case on behalf of the State. On October 15, 2009, the jury convicted Petitioner and Watts as indicted. Judge Childs sentenced Petitioner to forty years imprisonment.

A notice of appeal was filed and an appeal was perfected on Petitioner’s behalf by Appellate Defender Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense—Division of Appellate Defense. Following briefing and argument, the South Carolina Court of Appeals affirmed Petitioner’s conviction and sentenced by unpublished opinion. State v. Wray, 2012-UP-477 (S.C. Ct. App. filed August 8, 2012). The Remittitur was issued on August 27, 2012.

Petitioner filed an application for post-conviction relief on November 29, 2012. Respondent made its Return on February 19, 2013, requesting an evidentiary hearing. Thereafter, Petitioner, through counsel, filed an amended application on July 7, 2014, alleging the following specific allegations:

1. Ineffective assistance of trial counsel for failure to call a gunshot residue expert to refute the State’s expert;
2. Ineffective assistance of trial counsel for failure to call initial responding officer Weldon Gregory;
3. Ineffective assistance of trial counsel for failure to call eyewitness

- Timothy Weldon;
4. Ineffective assistance of trial counsel for failure to object to the State's vouching for the credibility of a witness during its closing argument;
 5. Ineffective assistance of trial counsel for failing to interview or investigate the initial responding officer Weldon Gregory or his handwritten police report;
 6. Brady violation against the State for its submission of the handwritten report of Officer Gregory with his name cut-off of the bottom;
 7. Ineffective assistance of appellate counsel for failure to raise issues regarding gunshot residue in Petitioner's appellate brief; and
 8. Ineffective assistance of trial counsel for failure to impeach State's witness Ricky Jacobs with Officer Gregory's report.

An evidentiary hearing into the matter was convened November 3, 2014, at the Richland County Courthouse before the Honorable J. Mark Hayes, II. At the hearing, Petitioner proceeded forward on these grounds as listed in his amended application at the evidentiary hearing. Petitioner was present at the hearing and was represented L. Marshall Coleman Newton, Esquire. Respondent was represented by Assistant Attorney Generals Megan Harrigan Jameson and J. Clayton Mitchell of the South Carolina Attorney General's Office.

At the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from initial responding officer Weldon Gregory and Firearms Examiner Kelly Fite. Respondent presented testimony from trial counsels Swerling and Bax and appellate counsel Franklin-Best. Respondent also presented the following exhibits:

1. Respondent's Exhibit No. 1: Swerling's Handwritten notes labeled "Tim Weldon;"
2. Respondent's Exhibit No. 2: MacDougall Investigative Notes/Memorandum Packet;
3. Respondent's Exhibit No. 3: Clark Memorandum of Interview Packet;
4. Respondent's Exhibit No. 4: SLED Gunshot Residue Corrected Report dated October 2, 2009

5. Respondent's Exhibit No. 5: Micro Analytical Packet, including "Questions Related to Gunshot Residue Analysis" and the Curriculum Vita of Jeffrey M. Hollifield;
6. Respondent's Exhibit No. 6: Investigator McRae's Notes; and
7. Respondent's Exhibit No. 7: Richland County Sheriff's Department Incident Report handwritten by Officer Weldon Gregory.

Following the evidentiary hearing, the post-conviction relief court requested post-hearing memorandum from both parties solely addressing the allegation of ineffective assistance of appellate counsel. After reviewing these memorandums and all testimony and other evidence presented at the hearing, along with a review of all records provided to the court, the post-conviction relief court found there were no constitutional deprivations or other grounds on which to grant relief and denied and dismissed this application with prejudice. The post-conviction relief court signed an Order of Dismissal on February 2, 2015, which was filed on February 12, 2015.

On February 24, 2015, Petitioner served his "Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCF" on Respondent and the post-conviction relief court. Respondent filed its return to this motion on or about February 27, 2015, asking that this motion be summarily dismissed without argument, citing its lack of specificity, and supporting authority. On March 24, 2015, the post-conviction relief court signed an order denying and dismissing Petitioner's motion; this order was filed March 27, 2015.

Petitioner filed a Notice of Appeal on April 9, 2015. Petitioner filed a Petition for Writ of Certiorari and Appendix on December 21, 2015. This Return follows.

Summary of Facts Adduced at Trial

On the early morning of June 30, 2007, Petitioner Tremaine Wray and his co-defendant Taurus Watts fired multiple shots outside of the H & J Club in Richland

County, fatally wounding Dumuria "Hank" Johnson. Johnson suffered a single gunshot wound to his left leg. (App. 1429-30). The bullet lacerated the left popliteal artery. (App. 1430). Johnson died as a result of bleeding to death from the lacerated artery. (App. 1430).

On June 29, 2007, the victim Dumuria "Hank" Johnson traveled with his friends Travis Malone and Lamont Goodwin from St. Matthews to Columbia. (App. 523-24). The group was meeting with Travis' sisters Verda Roberts and Stephanie Boston, and Travis' nephew Charlie Bates to celebrate Travis' upcoming deployment to Iraq. (App. 390-92, 429, 524). After spending a few hours at Stephanie's house, the group decided to go to the H & J Club, a bar in northeast Columbia. (App. 429-30, 454-55, 525). The group travelled in two vehicles. Verda and Stephanie rode in Verda's white GMC Envoy; Travis, Charlie, Lamont, and the victim rode in a vehicle Travis had rented for the weekend. (App. 393, 431, 457-58, 525-26). They parked in a car wash stall near the bar. Verda parked in the front of the stall and Travis parked behind her. (App. 395, 430, 431, 456-57, 545).

While inside the club, Charlie ran into his ex-girlfriend, Jalicca "Lisa" Johnson. (App. 398-99, 432, 460-61, 564-65). At some point during the evening, Charlie and another club patron were involved in an altercation revolving around Lisa Johnson. (App. 399-400, 432-34, 443, 462-64, 475-77, 527, 566). A fight inside the club ensued. (App. 399-401, 432-34, 465-66, 477-78, 491-93, 527, 546-47, 566-68, 637-39). Verda testified that it felt like her group was fighting for their lives to get out of the club, and it was like the whole club was against them. (App. 400). Charlie also testified that it appeared the whole club was fighting against their group. (App. 466).

The group escaped from the inside of the club. (App. 400-01, 466). Verda testified the victim was standing outside against a wall and was urging them to run. (App. 401, 422). As they were running, they reached a small brick wall between the club and the car wash. (App. 401). Verda testified that as they arrived at the brick wall, she heard shots. (App. 401). She then jumped across the brick wall, ran to her vehicle, and opened it up. (App. 401). However, she did not get into the vehicle immediately because she was afraid of being shot. (App. 401). Verda also noted that her brother jumped on top of her to protect her. (App. 401).

Stephanie testified that as they were leaving the club, Hank got out of the car. (App. 434). He was standing beside the car and they were walking towards him. (App. 434). As they were getting into the cars, Stephanie heard gunshots. (App. 434-35). She recalled they were coming from the front. Stephanie jumped into the car. She recalled hearing Hank saying he was hit. (App. 435). Stephanie testified that Charlie, Lamont, and Travis put Hank into the car. (App. 435).

Charlie testified that he ran into Hank as they were leaving the club. (App. 466). He noted that it looked like Hank was coming from the car. (App. 466). As they started making their way back to the vehicles, Charlie heard gunshots. (App. 467). Charlie indicated that when the shots were fired, Verda and Stephanie were by her vehicle, while he, Lamont, and Hank were by Travis' vehicle. (App. 467). Charlie remembered helping Hank open Travis' door. (App. 468). Charlie initially jumped into the front of the car, and then into the back seat. (App. 468). He recalled that Hank jumped into the front seat and said that he had been hit. (App. 468). Lamont eventually got into the car. (App. 469). Charlie also noted that Travis had covered Verda. (App. 469).

Lamont testified that as they were heading back towards the cars, he heard gunshots coming from the road. (App. 528). He did not see who was shooting. (App. 529). He could not say how many shots were fired. (App. 529, 542). He indicated it sounded like one gun, but he was not sure how many weapons were fired. (App. 530, 542).

Verda testified that she heard more than five shots, and more than one gun was fired. (App. 408-09, 412). She did not see who was shooting. (App. 412). Stephanie testified she heard at least three shots, but she did not know exactly how many were fired. (App. 437). She did not see who was shooting. (App. 437). She also indicated she thought more than one gun was being fired. (App. 437-38). Charlie did not recall how many shots were fired. (App. 471). He said at the time that it was ten or more shots. (App. 472). Charlie also could not tell where the bullets were coming from. (App. 468).

After they stopped hearing shots, Verda told everyone to get into a vehicle and go. (App. 402). The group planned to meet and regroup at a local Waffle House. (App. 402). When the group arrived at Waffle House, Travis informed his sisters that Hank was shot. (App. 402, see App. 435, 469-70, 529-30). The group then drove to Providence Northeast Hospital. (App. 403, 436, 470, 530).

Lisa testified that she heard gunshots as she was getting to the kitchen door of the club. (App. 570). She could not say how many shots she heard because they were too fast. (App. 572). One witness indicated that neither Applicant nor Watts were inside the club during the fight. (App. 639-40, 643). However, Lisa Johnson testified she thought she saw Watts inside the club that night/early morning. (App. 613, 620). Ricky Jacobs also indicated that he saw both Applicant and Watts inside the club that night, although

this was information he had not mentioned prior to his trial testimony. (App. 704-05, 758, 763).

Ricky Jacobs, the owner of H & J club, testified that after the fight, he closed the club early. (App. 665). He had the DJ stop the music and turned the lights up. (App. 665). Jacobs then walked outside and headed across the street to move his car. (App. 665-66). As he walked under the canopy where the old gas pumps were at the convenience store beside the club, Jacobs saw Watts and Applicant walking towards the club. (App. 668). Jacobs told the two men that the club was closing, and there was no need for them to go back. (App. 668). He noted that Watts said okay, and turned around to leave. (App. 668). Jacobs then observed Watts walking towards a tan or champagne colored Suburban. (App. 669). Both Applicant and Watts got into the Suburban, with Applicant getting into the driver's seat. (App. 668-815). Jacobs noted that he had seen Applicant drive that vehicle before. (App. 669-70).

Jacobs saw Watts had a black gun, and Watts' hand was covered in cloth. (App. 670-71, 815). Jacobs testified that Watts said "I've got something for that" to Jacobs when Jacobs saw the gun. (App. 770). Jacobs was able to identify the type of gun in court. (App. 671-72). Jacobs also identified Applicant and Watts in photographic lineups, and identified the Suburban in a photo. (App. 684, 687, 688-90, 697-98, 1117-20).

Jacobs testified that the Suburban pulled out and headed down Hardscrabble Road towards Farrow Road. (App. 672, 815). He heard a shot, and then heard rapid fire. (App. 672-73, 815-16). He could not tell how many shots were fired. (App. 673). He saw the shots were being fired from the driver's side of the Suburban. (App. 674, 815-16). They were being fired towards the club. (App. 674, 815-16). He could not see who was

shooting. (App. 674, 815-16). Jacobs then saw a white Isuzu Rodeo leave the scene. (App. 676). He saw two guys in the Rodeo. (App. 678). Jacobs indicated the passenger of the Rodeo sat up on the door, and then shot a pistol into the air one time. (App. 679-80, 789-90, 793, 820).

An Isuzu Rodeo was pulled over by law enforcement shortly after the shooting. (App. 830-36). The two occupants were identified by Jacobs as being the ones in the Isuzu Rodeo that left the club parking area after the Suburban. (App. 685, 1108-10). Swabs were taken from the vehicle and tested for gunshot residue; no gunshot residue or any component thereof was found in this vehicle. (App. 1510-18).

A projectile was recovered from the victim at the hospital. (App. 883-85, 888, 889). Round lead particles, a crucial component of gunshot residue was recovered from various locations inside of Applicant's Suburban. (App. 962-65, 1009-10). SLED Agent Michael Moskal testified that the gunshot residue components found were consistent with a weapon being fired from the driver's area of the Suburban. (App. 1507, 1510, 1535, 1572).

While the murder weapon was not recovered by law enforcement, three witnesses testified about the disposal of the firearm. (See App. 1302-81).¹ Rashonda Simpson, who was married to Applicant's cousin, testified that on July 1, 2007, she got into an argument with her husband, Jarrell Dansby, because he was digging a hole in their backyard to purportedly bury the murder weapon. (App. 1030-33). She later saw Dansby walk over to

¹ These witnesses were not located until the start of Applicant's original trial date in trial in May of 2009, when Brian Watson, contacted the solicitor's office and indicated that he had information regarding the disposal and location of the murder weapon. Based on this information, the court granted the State's motion for continuance over Applicant's objection to allow the State additional time to locate the murder weapon. Despite numerous attempts and tactics, including a dive team, the murder weapon was never found.

her uncle, Brian Watson. (App. 1034, 1043). Simpson testified that Watson took the gun apart. (App. 1035, 1043-44). Watson and Dansby then put the gun back into a book bag and left home. (App. 1035). When they returned approximately forty-five minutes later, they did not have the book bag or the gun. (App. 1035, 1045-46). Simpson also noted that Dansby informed her that they had thrown the gun into a river. (App. 1045).

Dansby testified that on the Saturday either before or after July 4, 2007, Applicant asked if he could hide his gun at Dansby's house because Applicant did not have time to hide it from his grandmother. (App. 1069-70). Dansby was not home when Applicant left the gun in the underpinning of Dansby and Simpson's trailer. (App. 1069-72). Dansby testified that he thought about calling the police regarding the gun, but Watson talked him out of it. (App. 1074). Dansby indicated he never actually saw the gun; instead, he showed Watson where it was hidden. (App. 1074-75, 1107). Watson got the bag with the gun inside and left. (App. 1077). Watson returned between one hour and one and one-half hours later, and Watson told Dansby not to worry about the gun. (App. 1077, 1105). Dansby testified that he did not go with Watson to get rid of the gun, and he did not ask Watson where he disposed of the gun. (App. 1077, 1106). Dansby did note that Watson confirmed he got rid of the gun. (App. 1078).

Watson testified that on June 30, 2007, Dansby came to him and asked for assistance. (App. 1144-45). Watson went over to Dansby's home, and Dansby showed Watson a Mac 10 gun that was inside a book bag. (App. 1145, 1148). Watson indicated that Dansby wanted assistance in getting rid of the gun. (App. 1148). They banged on the gun with a hammer. (App. 1148-49, 1179). Watson testified that Dansby got Simpson to

drive the two to get rid of the gun. (App. 1149-50, 1182-83). Watson testified that he threw the gun and the clip into a creek. (App. 1150).

Law enforcement did recover seven nine-millimeter Winchester Luger shell casings and three nine-millimeter RP Luger shell casings from the crime scene. (App. 1212-23). Two projectiles were recovered from the car wash stalls by the club. (App. 1343-44). There were also several bloodstains in the area. (App. 1348-51). All three projectiles, (i.e. the one recovered from the victim and the two found at the scene) were determined to be fired by the same gun. (App. 1343-68, 1598, 1599-1600). Also, all ten shell casings recovered from the crime scene were fired by the same gun. (App. 1594, 1598, 1599-1600). David Collins, the firearms and toolmarks examiner, testified that the firing pin impressions on the casings were consistent with an M-11 type firearm, which he referred to as a MAC 10 styled weapon. (App. 1581-94). Collins could not tie the shell casings to the recovered projectiles because no weapon was provided for comparison. (App. 1598-99).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). 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) (emphasis added). The reviewing court should reverse the post-conviction relief court only 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), SCRPC; 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). 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. The United States Supreme Court has cautioned "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

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

The post-conviction relief court properly determined counsel performed effectively in his handling and examination of State's witness Ricky Jacobs.

Petitioner alleges the post-conviction relief court erred in refusing to find trial counsel ineffective for failing to cross-examine State's witness Ricky Jacobs fully. Specifically, Petitioner alleges trial counsel neglected to question Jacobs about his initial failure to identify Petitioner and co-defendant Watts by name despite knowing them for years. Additionally, Petitioner contends trial counsel failed to question Jacobs adequately regarding the similarities between his initial description to law enforcement and the two men stopped in a white SUV shortly after the shooting. Petitioner asserts this information from Jacobs's initial statement to law enforcement came from the handwritten report of Weldon Gregory, the first officer who arrived on the scene shortly after the shooting. Petitioner avers it was deficient for trial counsel not to investigate Gregory's initial report and question Jacobs about this report. Petitioner further asserts he was prejudiced by counsel's alleged deficiency because the use of Gregory's report would have highlighted inconsistencies in Jacob's testimony and intimates it could have led to a third party guilt claim. However, Petitioner's claims are specious, particularly in light of the thorough cross-examination of Jacobs by both Petitioner's counsel and Watts' counsel. The post-conviction relief court properly denied this claim and there is ample probative evidence to support this ruling. This petition should be denied.

In his amended application for post-conviction relief and at the evidentiary hearing, Petitioner presented this claim as a failure of trial counsel to call Gregory as a witness. See App. 2074 ("Trial counsel was ineffective in not calling to the stand the

initial responding officer [Weldon Gregory] to the scene who authored the handwritten incident report. . . . Weldon Gregory's incident report and testimony would have contradicted the state's eyewitness Ricky Jacobs. At the scene, Ricky Jacobs told Officer Weldon Gregory that the suspects in the white car shot towards the club. Then Ricky Jacobs told Officer McCrae that the suburban was the car that shot towards the club. At trial Ricky Jacobs said that he had only spoken to one officer, and neglected to reveal that he had spoken to Weldon Gregory.”)

At the evidentiary hearing, trial counsel Swerling testified he would not have called Gregory as a witness on Petitioner's behalf, explaining that based on his decades of experience, it is extremely risky to call a member of law enforcement as a defense witness as the witness is often hostile and uncooperative, resulting in testimony that is more harmful than helpful to a defendant. (App. 2277-78). He testified he was able to impeach Jacobs with so many other inconsistencies that there simply was no need to impeach him with testimony from Gregory. (App. 2276-78). Additionally, Swerling testified Gregory's report is devoid of substantive information and highlighted a lack of subject descriptions in Gregory's report. (App. 2276-78). He expounded Gregory's primary role at the scene was security and preservation, not investigation. (App. 2274-75). He testified he was able to better impeach Jacobs with the numerous other police reports that were prepared with an investigative focus. ((App. 2265-74). He testified he made a strategic decision to focus his questioning of Jacobs on substantive issues from the investigation, not Gregory's report that he referred to as a "red herring." (App. 2276).

Swerling testified Ricky Jacobs was an important witness for the State and he was well prepared for his cross-examination of Jacobs. (App. 2264-65). He testified his

standard practice for cross-examination is to prepare an outline of questioning and key points he needs to elicit from a witness. (App. 2247, 2264-65). He testified his cross-examination of Jacobs was extensive, spanning more than fifty-five pages in the trial transcript. (App. 2260-64). He further noted his cross-examination of Jacobs followed the lengthy questioning of co-defendant Watts' counsel Johns. (App. 2260-64). He testified he does not like to ask the same questions on cross-examination that co-counsel has already asked, so he avoided duplicative questions and subjects already covered successfully by Johns. (App. 2260-61, 2262-64). He testified he was able to use several documents to impeach Jacobs, including previous statements given to law enforcement, police reports, and investigative reports. (App. 2265-74). He testified he was able to get Jacobs to admit to numerous inconsistencies, including: his location during the shooting; the timeline of before, during, and after the shooting; whether Petitioner and his co-defendant said anything to him as they were walking first towards, then away from the club; how long he had known Petitioner and his co-defendant; whether other club patrons had guns; and whether Petitioner or his co-defendant had a gun and if it was concealed or wrapped in any manner. (App. 2265-74). He testified Jacobs admitted he was not forthright with law enforcement and his story changed several times in several different ways. (App. 2274). He testified that co-defendant Watts' counsel fully questioned Jacobs about his first report to Gregory that shots were fired from a white Isuzu SUV and how it was inconsistent with his later reports. (App. 2275-76). He testified he was also able to elicit testimony from Jacobs that he claimed to have known Petitioner and his family for more than twenty years but failed to provide law enforcement with Petitioner's name until late the next day. (App. 2262). He testified he was able to show the jury that Jacobs

was evasive, if not a liar, and not to be believed, which was beneficial to Petitioner. (App. 2265-74).

Weldon Gregory testified at the evidentiary hearing and recalled responding to the scene shortly after 4 o'clock in the morning. (App. 2182). He testified he was the first officer to arrive and his role was to secure the scene. (App. 2182, 2186-87, 2189, 2192). He testified he wrote the first page of a short, handwritten report later after other officers arrived upon learning the victim died at the hospital. (App. 2182-83, 2186, 2394-95; Respondent's Ex. No. 7). Gregory testified he spoke with Jacobs and Jacobs told him he spoke with the two suspects, told them the club was close, the suspects got into a white SUV (possibly a Nissan with a black stripe down the side) and fired shots over the top of the vehicle towards the club. (App. 2182-83, 2394-95; Respondent's Ex. No. 7). He testified Jacobs did not give him the names of the two suspects he described, but was unsure if Jacobs provided any names to investigators on the scene. (App. 2185-86). Gregory testified he is not an investigator, only received a basic description from Jacobs, and that investigators arrived on the scene within minutes of his arrival. (App. 2189-90).

In its Order of Dismissal, the post-conviction relief court denied and dismissed this claim, finding:

[Petitioner] has failed to establish any deficiency of trial counsel in regards to his allegations involving Weldon Gregory. Trial counsel testified that as a general rule, he does not like to call members of law enforcement as defense witnesses because it is more harmful than helpful to defendants based on his more than forty years of experience. Additionally, he testified that he was able to successfully cross-examine Jacobs without calling Gregory as a defense witness and was able to impeach Jacobs with other documents and testimony, including Gregory's incident report, although not all documents were admitted into the record at trial. This Court agrees with trial counsel's assessment as Jacobs was thoroughly examined as to his recollection of events and his identification

of [Petitioner] and his co-defendant. Therefore, this Court finds that trial counsel's performance was not deficient and that [Petitioner] has failed to meet his burden of proof.

Furthermore, this Court finds that [Petitioner] has also failed to show any resulting prejudice from this alleged deficiency. This Court finds that Gregory's testimony added very little to the overall presentation and likely would have had no impact on the result of the proceeding. As discussed above, trial counsel challenged the State's eyewitness Jacobs on virtually every aspect of his recollection. This Court is not convinced that testimony from Gregory would have had any impact on the jury's view of Jacobs or his credibility, much less the result of [Petitioner]'s trial. Consequently, this Court finds that [Petitioner] has failed to prove the requisite prejudice necessary for relief. Based on the foregoing, this Court finds that [Petitioner] has failed to establish either of the required prongs needed for relief and that this allegation must be denied and dismissed with prejudice.

(App. 2421-22). These findings are supported by ample evidence of probative value in the record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

In his petition, Petitioner alleges he was prejudiced by counsel's failure to cross-examine Jacobs adequately about his initial statement to Gregory because it would have aided in a third-party guilt defense. (PWC p. 11). In support of this contention, Petitioner cites to Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008). However, since Miller, this Court has reexamined third-party guilt claims, notably in State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) cert. denied, 135 S. Ct. 400, 190 L. Ed. 2d 289 (U.S.S.C. 2014).

The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, the South Carolina Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. Id. at 105, 16 S.E.2d at 534. Furthermore, to be admissible, evidence of third-party guilt must be

“limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence.” Cope, 405 S.C. at 341, 748 S.E.2d at 206 (citing Gregory at 104, 16 S.E.2d at 534 (internal quotations omitted)). Pursuant to this standard, Petitioner cannot establish the requisite prejudice necessary for relief, as Gregory’s testimony and report are not facts raising an inference or presumption of innocence because they are not facts or circumstances that tend to clearly point out someone else as the guilty party. Evidence of Jacobs initially informing the first responding officer that a passenger from a white SUV fired shots is not inconsistent with Petitioner’s guilt, nor does it raise a “reasonable inference”—and certainly not a presumption—of Petitioner’s innocence. See Id. Therefore, Petitioner cannot establish that he was prejudiced because such testimony would have aided his third-party guilt defense.

Based on the foregoing, these findings are supported by ample evidence of probative value in record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626. The post-conviction relief court properly determined counsel performed effectively in his handling and examination of State’s witness Ricky Jacobs. Furthermore, the post-conviction relief court properly found Petitioner failed to meet his requisite burden of establishing any prejudice from this alleged deficiency. This petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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April 26, 2016

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APR 26 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2015-000758

TREMAINE WRAY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

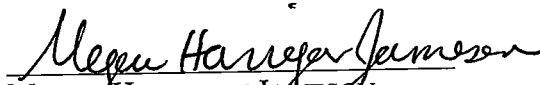
PROOF OF SERVICE

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

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 26th day of april, 2016.


MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

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