

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2015-000620

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MAY - 4 2016

SC SUPREME COURT

MARK A. WATSON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. **There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish counsel was ineffective for failing to object to the State's closing argument.**

- II. **There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish counsel was ineffective for failing to object to State's witness Gilliam testifying about Junior Black.**

STATEMENT OF THE CASE

In December of 2007, the Richland County Grand Jury indicted Petitioner for distribution of cocaine—third offense following an undercover drug transaction with Officer Emmitt Gilliam of the City of Columbia Police Department. (App. 368-69). Cameron B. Littlejohn, Esquire, represented Petitioner. On July 9, 2009, Petitioner proceeded to a jury trial before the G. Thomas Cooper, Jr., where he was convicted as indicted. (App. 1-200). Judge Cooper sentenced Petitioner to the mandatory minimum sentence of fifteen years imprisonment. (App. 198-99).

Petitioner filed a notice of appeal. Following the submission of an Anders¹ brief, Petitioner elected to voluntarily withdrawal his appeal. The South Carolina Court of Appeals dismissed Petitioner's appeal and issued a remittitur on July 12, 2011. (Supp. App. 1-13).

Petitioner filed an application for post-conviction relief on February 23, 2012, making a general allegation of ineffective assistance of counsel without any supporting facts or allegations. (App. 201-08). Respondent made its Return on March 30, 2012, requesting an evidentiary hearing. (App. 209-15).

An evidentiary hearing into the matter was convened July 17, 2014, at the Richland County Courthouse before the Honorable L. Casey Manning. (App. 217-312). Petitioner was present at the hearing and was represented Tommy A. Thomas, Esquire. (App. 217-312). Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. (App. 217-312). At the evidentiary hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

1. Counsel failed to object to impermissible comments during the State's closing characterizing Applicant as a "breeder";
2. Counsel failed to request sequestration of the witnesses;

¹ Anders v. California, 386 U.S. 738 (1967).

3. Counsel failed to object to the State's witnesses referring to the material in question as "crack cocaine" before actually being tested;
4. Counsel failed to object to Applicant being referred to as "Junior Black";
5. Counsel failed to examine the drugs prior to admission into evidence;
6. Counsel failed to object to the presumptive drug test on the basis that it changed the overall drug weight;
7. Counsel failed to object to the unduly suggestive lineup;
8. Counsel failed to object to the drugs based on chain of custody discrepancies; and
9. Counsel failed to challenge the indictment.

(App. 217-312). Petitioner testified on his own behalf and presented testimony from his former girlfriend, Quatika Wright. (App. 217-312). Respondent presented testimony from trial counsel Littlejohn. (App. 217-312).

Following the evidentiary hearing, the post-conviction relief court found there was no constitutional deprivations or other grounds on which to grant relief and denied the application with prejudice. The post-conviction relief court signed an Order of Dismissal on September 26, 2014, that was filed with the Richland County Clerk of Court on September 29, 2014. (App. 333-52).

Thereafter, Petitioner filed a "Motion to Alter or Amend the Judgment" pursuant to Rule 59(e), SCRCF, on October 10, 2014. (App. 353-55). On October 31, 2014, Petitioner filed a "Supplement to Applicant's Motion to Alter or Amend Pursuant to Rule 59(e)." (App. 356-58). Respondent filed its return to this motion on November 5, 2014. (App. 359-63). On February 23, 2015, the post-conviction relief court denied and dismissed Petitioner's motion by written order; this order was subsequently filed with the Richland County Clerk of Court on March 2, 2015. (App. 364-67).

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

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), 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). 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

I. There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish counsel was ineffective for failing to object to the State's closing argument.

Petitioner contends the post-conviction relief court erred in denying his allegation that trial counsel was ineffective for failing to object to the State's purportedly improper comments during closing argument. Petitioner argues counsel's failure to object prejudiced him, as the "improper comments appealed to the personal biases of the jury and were clearly calculated to arouse the jurors' passions and prejudices." (PWC p. 8). Petitioner further avers he was prejudiced because had counsel objected, the trial court would have given the jury a curative instruction and the issue would have been preserved for appellate review.² To the contrary, the post-conviction relief court properly determined Petitioner had not met his requisite burden of proof and denied relief on this allegation. There is ample evidence of probative value to support this ruling and this petition should be denied.

Closing arguments are a basic element of the adversarial fact-finding process in a criminal trial. Herring v. New York, 422 U.S. 853, 858 (1975). Such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" and provide both the prosecution and the defense with an opportunity to advocate for their respective positions, to argue for certain inferences to be drawn from the evidence and testimony presented, and to identify the weaknesses in their opponents' positions. Id. at 862. As a result, closing arguments are crucial towards achieving the ultimate objective of the adversarial system of justice in the United States, which is for the correct verdict to be reached in each case. Id.; see

² This issue was raised during Petitioner's direct appeal, which he voluntarily withdrew before consideration by the Court of Appeals. (Supp. App. 1-13).

also Gardner v. Florida, 403 U.S. 349, 360 (1977) (“[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]”).

In presenting a closing argument to the jury, a solicitor—and any other party—must confine the argument to the evidence in the record and the inferences to be drawn from that evidence. State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State’s version of the testimony, to comment on the weight to given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (“ ‘[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.’ ” (citations omitted)). Importantly, the solicitor is also permitted to use a closing argument to call into question the credibility of the defenses that were identified or raised by the opposing side during trial. State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999).

In considering the propriety of a closing argument, “[i]t is sometimes difficult to draw the line between proper and improper argument, but counsel’s remarks must be confined within the record.” State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). “However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge.” Id. As a result, trial courts have broad discretion in regard to both the range and scope of closing arguments. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (“The trial court has broad discretion when dealing with the propriety of the solicitor’s argument.”).

In Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010), a capital post-conviction relief action, the South Carolina Supreme Court noted, “the appellate court will view the alleged impropriety of the solicitor’s argument in the context of the entire record, including whether the trial judge’s instructions adequately cured the improper argument and **whether there is overwhelming evidence of the defendant’s guilt.**” (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (emphasis added)). When a challenge is raised to the propriety of a closing argument, the burden rests upon the party raising the challenge to establish that the allegedly improper argument rendered the trial fundamentally unfair. Simmons, 331 S.C. at 338, 503 S.E.2d at 166. Appellate courts will review the alleged impropriety in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant’s due process rights. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (“The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”).

In making that determination, “ ‘it is not enough that the [challenged] remarks were undesirable or even universally condemned.’ ” Darden v. Wainwright, 477 U.S. 168, 181 (1999) (citation omitted). Critically, absent a clear abuse of discretion, appellate courts will ordinarily not disturb the trial court’s ruling concerning a closing argument. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) (“Ordinarily, a trial court’s rulings on closing arguments will not be disturbed.”). Our courts have consistently found no reversible error in a solicitor’s singular inflammatory characterization of a defendant. See Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (holding that prosecutor’s likening of defendant as “cockroach” during closing argument did not so infect trial

as to deny defendant due process); State v. Lee, 269 S.C. 421, 237 S.E.2d 768 (1977) (concluding prosecutor's reference to defendant as a "menace to society" could not be considered prejudicial since that concept forms the very basis for crimes involving moral turpitude).

In the present case, Petitioner asserts the following comments were improper and warrant the grant of post-conviction relief:

Common sense tells you if you've got an officer in a hostile situation, you've got an officer in a hostile house, he's undercover. We want somebody to stick around? Lives are in jeopardy. Real lives are at stake. That officer needs to get out of that hostile house. He needs to get out that hostile area. Undercover buy, these guys are a part of this neighborhood. Officer safety first.

[...]

The officers of the City of Columbia, they put their life on the line every day to protect us, to protect them, all of us. That's what they do. Gilliam did that. He put his life on the line to go make an undercover buy.

[...]

And we know what drugs do to our community. It breeds mischief and it breeds evil. It doesn't take a chemical analyst to tell you that. You know, you live in our communities. It breeds mischief. It breeds evil. And we've got a breeder in this courtroom today. It breeds mischief. It breeds evil. And I submit to you, here is the breeder.

[...]

I want you to consider, consider Agent Sheard putting his life on the line every day. Consider Agent Gilliam putting his life on the line to make our community safe, to clean it. Because we know what drugs do. That's what they do. They live to make our community better. Consider that. Remember what they did.

(App. 164, lines 1-9; App. 165, lines 20-24; App. 166 line 22; App. 166, lines 2-8; App. 167 line 3).

In its Order of Dismissal, the post-conviction relief court denied and dismissed this claim, finding Petitioner failed to meet his burden of establishing any deficiency of counsel and that counsel's performance was "reasonable and prudent based on the facts and circumstances of [Petitioner's] case." (App. 343). The court further found "the solicitor's comments during closing argument were not 'calculated to arouse the jurors' passions or prejudices' and were not objectionable[,]" citing to Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). (App. 343). Additionally, the post-conviction relief court found that if counsel had objected and preserved the issue for appellate review, Petitioner's conviction would be affirmed on appellate review. (App. 343). The post-conviction relief court also found Petitioner failed to establish any resulting prejudice from counsel's alleged deficiency because there is no reasonable likelihood that the result of Petitioner's trial would have been different based on overwhelming evidence of guilt. (App. 343-44). 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.

As an initial matter, the post-conviction relief court properly determined the prosecutor's closing argument comments were not "calculated to arouse the jurors' passions or prejudices and were not objectionable." See App. 343 (citing Simmons, 331 S.C. at 338, 503 S.E.2d at 166). These comments, particularly when viewed in light of the prosecutor's entire closing argument, were not improper and certainly did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights." Rudd, 355 S.C. at 550, 586 S.E.2d at 157. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[T]he prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was

followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."'). Therefore, had counsel objected to these comments, the objection would have been overruled by the trial court. See Copeland, 321 S.C. at 324, 468 S.E.2d at 624 ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument.'). Additionally, Petitioner's conviction would have been affirmed on appeal, as an appellate court would have reviewed the alleged impropriety in the context of the entire record and determined the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of Petitioner's due process rights. See Rudd, 355 S.C. at 550, 586 S.E.2d at 157 (holding appellate courts will review the alleged impropriety in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights).

Furthermore, the post-conviction relief court properly found Petitioner failed to establish any resulting prejudice from counsel's alleged deficiency because there is no reasonable likelihood that the result of Petitioner's trial would have been different based on overwhelming evidence of guilt. (App. 343-44). The drug transaction was recorded by video camera on the undercover officer's person and this video and the photographic stills created from the video clearly identified Petitioner as the suspect who sold the crack cocaine. Counsel testified these photographic stills, introduced as Respondent's Ex. No. 1, clearly identify Petitioner as the suspect and undoubtedly match the photograph of Petitioner in the lineup shown to Officer Gilliam. (App. 280-81). Additionally, counsel testified he did not object to these comments because his defense strategy focused on mistaken identity, and therefore, these comments had no

bearing on Petitioner's case. (App. 285, 299-300). Based on the overwhelming evidence of Petitioner's guilt presented the jury, there is no reasonable likelihood that the result of Petitioner's trial would have been different

Based on the foregoing, the post-conviction relief court's 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 response to the State's closing argument. 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.

II. There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish counsel was ineffective for failing to object to State's witness Gilliam testifying about Junior Black.

Petitioner contends the post-conviction relief court erred in denying his allegation trial counsel was ineffective for failing to object to State's witness Officer Gilliam's testimony that a man nicknamed "Junior Black" was smoking crack four days earlier at the same home where Gilliam purchased crack during the undercover buy subject to this conviction from a man others referred to as Junior Black. Petitioner asserts this testimony was inadmissible hearsay and prior bad act evidence which "unfairly prejudiced Petitioner at trial" because it allowed the State to improperly bolstered its case by identifying him as Junior Black. (PWC p. 11-3). Petitioner further avers he was prejudiced because if counsel objected, the issue would have been preserved for appellate review. To the contrary, the post-conviction relief court properly determined Petitioner had not met his requisite burden of proof and denied relief on this allegation. There is ample evidence of probative value to support this ruling and this petition should be denied.

In its Order of Dismissal, the post-conviction relief court noted counsel's testimony that "he saw no arguable basis for objecting to the reported nickname of the suspect, particularly in light of his defense strategy that [Petitioner] was not the suspect and law enforcement had arrested the wrong individual." (App. 345). The court then found counsel's performance "was reasonable and prudent based on the facts and circumstances of this case" and concluded Petitioner failed to establish any deficiency of counsel. (App. 345). The court also concluded Petitioner had not established the requisite prejudice necessary for relief, finding no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, as there is overwhelming evidence of [Petitioner]'s guilt." (App. 345) (internal

citations omitted). 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.

Initially, there is evidence of probative value in the record to support the post-conviction relief court's findings regarding counsel's proficient performance. Counsel testified "identify was the primary defense" put forth at trial based on Petitioner's assertions he was not the person depicted in the video and photographs—despite counsel informing Petitioner it was readily apparent he could be identified based on the video and photographs. (App. 280-83, 285). Counsel testified that based on this misidentification defense strategy, he did not think Officer Gilliam's references to Junior Black were prejudicial to Petitioner. (App. 300-01). Counsel's strategy was prudent and reasonable based on the circumstances of this case, and therefore, his decision not to object was reasonable under professional standards. See Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006) (recognizing when counsel provides a valid trial strategy in response to a Sixth Amendment ineffective assistance of counsel claim, counsel's performance will not be deemed deficient). The post-conviction relief court properly determined counsel did not perform deficiently.

Furthermore, there is evidence of probative value in the record to support the post-conviction relief court's findings Petitioner failed to establish the requisite prejudice necessary for relief. As discussed earlier, the State presented overwhelming evidence of Petitioner's guilt, including a video and photographs that clearly identify Petitioner as the man who sold Officer Gilliam crack cocaine. Additionally, counsel testified he did not object to these comments because his defense strategy focused on mistaken identity, and therefore, these comments had no bearing on Petitioner's case. (App. 285, 299-300). Based on the overwhelming evidence of

Petitioner's guilt presented the jury, there is no reasonable likelihood that the result of Petitioner's trial would have been different

Based on the foregoing, the post-conviction relief court's 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 electing not to object to references to Junior Black during Officer Gilliam's testimony. 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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May 4, 2016

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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:

Tiffany Butler, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 4th day of May, 2016.


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