STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015 – 001080
Lower Court Case No. 2010-CP-40-4866

Octavia Middleton, #253919,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Did the PCR judge err refusing to find appellate counsel ineffective for failing to challenge the trial judge's admission, over objection, of Petitioner's inculpatory statement taken after Petitioner invoked his right to remain silent and his right to counsel?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the September 2005 term of the Richland County Grand Jury for three counts of assault and battery of a high an aggravated nature, two counts of first degree burglary, five counts of armed robbery, one count of assault with intent to kill, and one count of murder. Petitioner was represented by Steven M. Hisker, Esq. Petitioner proceeded to trial before the Honorable G. Thomas Cooper, Jr. Petitioner was convicted as indicted by the jury on August 31, 2007. Judge Cooper sentenced Petitioner to ten (10) years imprisonment for the assault convictions; thirty (30) years imprisonment on the armed robbery convictions; and fifty (50) years on the burglary convictions and murder conviction.

A notice of appeal was filed and an appeal was perfected. The court affirmed Petitioner's convictions and sentences. State v. Middleton, Op. No. 2010-UP-294 (S.C. Ct. App. filed May 27, 2010). Petitioner was represented on appeal by Joseph L. Savitz, III, Esquire. The Remittitur was sent down on June 10, 2010.

Petitioner filed his application for post-conviction relief (PCR) on July 23, 2010. (2010-CP-40-4866). (App. p.954-58). Respondent filed a Return on February 17, 2011. (App. p. 959-70). A hearing was held on January 10, 2012. Petitioner was represented by Robert C. Fitzsimons, Esq. The State was represented by Brian T. Petrano, Esq. An Order of Dismissal was issued by the Honorable J. Ernest Kinard, Jr. on February 23, 2012. (App. p. 1000-18).

Petitioner filed a second application for PCR on June 4, 2014, seeking the right to a belated appeal of his original application. (App. p. 1019-24). The Honorable Brooks P.

Goldsmith issued an order granting Petitioner an appeal pursuant to Austin v. State[1]. (App. p. 1039-1042). A Petition for Writ of Certiorari Pursuant to Austin v. State was filed on January 7, 2016. This Return follows.

[1] 305 S.C. 453, 409 S.E.2d 395 (1991).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Appellate counsel was not ineffective for failing to challenge the admission of Petitioner's statements on direct appeal because the issue is without merit.

Petitioner argues the PCR Court erred in failing to find appellate counsel, Joseph L. Savitz, III, ineffective in not raising Judge Cooper's ruling on the admissibility of Petitioner's statements on appeal. Specifically, Petitioner argues Judge Cooper erred in refusing to suppress statements made by Petitioner after he invoked his right to remain silent. Respondent submits the PCR Court correctly found Petitioner failed to meet his burden in proving Counsel deficient or that he suffered any resulting prejudice.

How The Issue Was Raised Below

At trial, an extensive Jackson v. Denno hearing was held to determine the voluntariness of Petitioner's statements to law enforcement. (App. p. 18-121). Petitioner was arrested and taken to the Richland County Sheriff's Department headquarters. (App. p. 20, lines 23-25). He was then properly Mirandized both orally and in writing through a waiver of rights form by Chief John Ewing. (App. p. 21, line 11 – p. 24, line 20). Petitioner gave three separate statements to authorities. In the first statement Petitioner orally denied any involvement and denied being present at the time of the incident. (App. p. 25, lines 2-18). Shortly after being asked a few questions, Petitioner stated that he wished to speak to his attorney. (App. p. 26, lines 6-8). Questioning ceased, and he was brought to a holding cell and left there. (App. p. 27, lines 1-3). Approximately forty (40) minutes later, Chief Ewing was contacted by Investigator Barnes who informed him that Petitioner wanted to speak to him. (App. p. 27, lines 12-16; p. 27, line 24 – p. 28, line 10). Petitioner was banging on his cell door trying to get someone's attention in order to speak with Chief Ewing. (App. p. 28, line 25 – p. 29, line 2; p. 42, line 9 – p. 43, line 20). At that

point Petitioner stated, "I was there. I did not shoot anyone. Teran shot the guy." (App. p. 28, lines 12-19). Chief Ewing then asked Investigator Brian Godfrey to come and sit in the office while Petitioner gave his statement. (App. p. 29, lines 11-22). Petitioner's statement was reduced to writing. (App. p. 29, line 25 – p. 30, line 2). In the first few questions in his statement, Petitioner admits that he was initially questioned, asked for an attorney, and then requested to speak with Chief Ewing again after being placed in a cell. (App. p. 30, line 18 – p. 31, line 6). Petitioner did not invoke his right to consult with an attorney during the second interview. (App. p. 31, lines 10-17).

Petitioner testified at the Denno hearing:

> While I was in the D cell, one of the officers who investigated was questioning me along with another officer approached the D cell with a statement from Harry Dukes. They opened the cell and they advised me, they told me that your co-defendant have implicated you. Well, they said Harry Dukes have implicated you as being part of this crime. And they told me that it would be in my best interest to cooperate with them at this point because if not then they would make sure that I spend the rest of my life in jail. And they then left the tank for me to think about what they had just presented to me.

(App. p. 50, line 18 – p. 51, line 4).

Hours later, Petitioner was approached by Sergeant Walter S. McDaniels regarding a separate homicide he was suspected of committing. (App. p. 69, line 11). Petitioner was again advised of his rights and properly Mirandized both orally and through the use of a waiver of rights form. (App. p. 70, line 17 – p. 72, line 25). In his interview with Sergeant McDaniels, Petitioner admitted his involvement in both homicides. (App. p. 74, line 10-24). It was noted that Petitioner signed this third statement ten separate times. (App. p. 76, line 2-5).

Counsel Hisker moved to suppress all statements made by Petitioner because he invoked his Fifth Amendment rights. (App. p. 90, line 18 – p. 91, line 9). The State argued no credible evidence was presented to the court to prove his rights were violated or that his statements were

not made voluntarily. (App. p. 94, lines 19-21; p. 112, lines 9-24). Judge Cooper found all statements admissible. (App. p. 114-20). Judge Cooper found the first verbal statement admissible because Petitioner was properly advised of his rights and made a valid waiver. (App. p. 114, lines 21-23). The second statement was admissible because Petitioner agreed that he initiated the conversation after invoking his Fifth Amendment rights. (App. p. 115, line 17 – p. 116, line 14). The third statement was found admissible because a second set of proper Miranda warnings were administered. (App. p. 117, lines 8-17).

During the testimony of Chief Ewing, Petitioner's first written statement was admitted into evidence as State's Exhibit No. 2 over Counsel Hisker's objection. (App. p. 608, lines 10-14). Petitioner's second written statement was admitted as State's Exhibit No. 4-A over Counsel Hisker's objection. (App. p. 735, lines 4-11).

Petitioner argued at the PCR hearing that Counsel Savitz was ineffective in failing to raise the issue of whether Judge Cooper erred in admitting the statements. Judge Kinard denied relief and ruled that Petitioner failed to show Judge Cooper abused his discretion. Judge Kinard also noted that Judge Cooper made the requisite credibility findings in making his ruling.

Analysis

Petitioner's argument that Counsel Savitz was ineffective for failing to challenge on direct appeal the admission of Petitioner's statements is without merit. First, Petitioner has not shown that the issue was clearly stronger than the issues raised by Counsel Savitz. Second, Petitioner has not shown that the issue would have been meritorious and required a reversal of his conviction.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524

S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800

F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Here, Petitioner failed to meet his burden in proving Counsel Savitz was deficient. As more thoroughly discussed below, the challenge to the admission of the statements is not meritorious. Counsel Savitz raised two issues on appeal. The first was a challenge to the admission of photographs of scratches on Petitioner's arms that helped prove his participation in the violent incident. The second was a challenge to the denial of Counsel Hisker's motion for directed verdict. There was no evidence presented or argument made that these issues were clearly not stronger than the issue regarding the admissibility of the statements. Respondent submits the issues raised were stronger than the issues regarding the admissibility of Petitioner's statements.

Petitioner also failed to meet his burden in proving that if the issue had been raised, then it would have required the appellate courts to reverse the conviction. See Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (no prejudice where there is no merit to arguments that were not briefed). When determining whether or not a statement is voluntary, the trial judge must conduct an evidentiary hearing, outside the presence of the jury. State v. Simmons, 384 S.C. 145,162, 682

S.E.2d 19, 28 (Ct. App. 2009). During the evidentiary hearing, the State must prove the statement was voluntarily made by a preponderance of the evidence. Id. If the trial judge finds the statement voluntary and admissible, an appellate court will not reverse unless the decision was so erroneous as to demonstrate an abuse of discretion. Id. In other words, when reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead determines whether the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Petitioner goes through an analysis of the Mosley[2] factors set forth by the United States Supreme Court. Respondent submits Mosley does not apply to the facts in this case because it was Petitioner who initiated further communication with law enforcement. "In Miranda v. Arizona, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." Edwards v. Arizona, 451 U.S. 477, 481, 101 S. Ct. 1880, 1883, (1981). "A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with police unassisted." Davis v. United States, 512 U.S. 452, 461, 114 S.Ct. 2350, 2356 (1994). "[A]n accused . . . having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, *unless* the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona at 484- 485, 101 S.Ct. 1885 (emphasis added); also State v. Binney. 362 S.C. 353, 608 S.E.2d 418 (2005) (A criminal suspect's rights are not violated when the suspect, not the police, initiate further

[2] Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L.E.2d 313 (1975).

communication, exchanges or conversations with the police); see also State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988) (defendant's Fifth Amendment right against self-incrimination was not violated by not having counsel present during interview since defendant initiated contact with law enforcement).

Petitioner argues the State failed to prove Petitioner initiated the further discussion with law enforcement, thus not "scrupulously honoring" Petitioner's invocation or his Fifth Amendment right to remain silent. Judge Cooper's ruling was based on the credibility of the witnesses presented at the Denno hearing. Petitioner initiated the contact with Chief Ewing independently and voluntarily which waived any previous invocation of the right to counsel made by Petitioner. Further, Petitioner answered in the affirmative when asked whether he was initially questioned, asked for an attorney, and then requested to speak with Chief Ewing again. (App. p. 30, line 18 – p. 31, line 6). Petitioner did not invoke his right to consult with an attorney in the second interview. (App. p. 31, lines 10-17). Petitioner's testimony that other officers came by his cell and told him his codefendant was implicating him was not found credible by Judge Cooper. Respondent submits this issue is without merit.

Accordingly, Respondent submits the record fully supports the PCR court's reasonable findings in this regard.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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May 25, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 25 2016
SC SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-001080

Octavia Middleton, #253919,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Katherine Hudgins, Esquire
Appellate Defender
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 25th day of May, 2016.

J. CLAYTON MITCHELL
ATTORNEY FOR RESPONDENT

SWORN to before me this 25th day of May, 2016.

Notary Public for South Carolina.
My Commission Expires: 04-28-2025

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 25 2016
SC SUPREME COURT

May 25, 2016

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

Re: Octavia Middleton, #253919 v. The State of South Carolina
Appellate Case No. 2015-001080

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving petitioner today.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/jcb
Enclosures

cc: Katherine Hudgins, Esquire