STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-001898

Brandon Heath Clark, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to call Katye and Dustin Allison as witnesses to impeach the testimony of Josh Wood and David Murray about alleged conversations they had with Petitioner after the shooting?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the Judge's instruction to the jury that inferred malice may also arise when the deed is done with a deadly weapon when there was evidence in the record that would reduce the murder to involuntary manslaughter?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the March 2007 term of General Sessions for two counts each of murder (2007-GS-23-2442, count 1 and -2443, count 1) and possession of a weapon during the commission of a violent crime (2007-GS-23-2442, count 2 and -2443, count 2). (App.pp.313-16). Scott D. Robinson, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On November 4, 2009, the Honorable Edward W. Miller sentenced Petitioner to concurrent terms of forty (40) years for each count of murder and five (5) years on each count of possession of a weapon during the commission of a violent crime. (App.p.311; pp.317-20).

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Clark, Op. No. 2012-UP-549 (S.C. Ct. App. filed Oct. 10, 2012). The remittitur was sent on October 26, 2012.

Petitioner filed an application for post-conviction relief (PCR) on March 7, 2013 (2013-CP-23-1325) and an amendment on December 16, 2014. (App.pp.321-26; p.332). A hearing was held at the Greenville County Courthouse on June 18, 2015. (App.pp.333-447). 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 Perry H. Gravely denied relief in an order filed August 6, 2015. (App.pp.456-64).

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), SCRCP.

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was deficient in not calling Katye and Dustin Allison as witnesses.

Petitioner argues trial counsel was deficient in not calling Katye and Dustin Allison as witnesses at trial for the purpose of impeaching State witnesses about conversations with Petitioner after the shooting. (Pet. Cert., pp.8-11). This argument is without merit.

A.

The Party

On July 29, 2006, a party was held at Steven Watson's house. (App.p.51; p.65; p.77; p.104; p.111; p.138). Several witnesses testified Cameron Wade[1] and Joshua Wood were going to fight that evening (and had already been involved in an altercation two weeks prior). (App.p.52; p.58; pp.65-66; pp.76-78; pp.87-88; p.104; pp.111-12). Witnesses provided different figures when asked how many people were at the party and law enforcement was told there were between twenty and 200 people present. (App.p.53; p.66; p.108; p.139; p.239).

Tiffany Saltz saw Petitioner with a gun at the party that evening and that "he just seemed

[1] Wade was one of the murder victims. The other victim was Christopher Garland.

like something was aggravating him. He was just kind of ill, you know." (App.pp.104-05; p.107). Saltz did not see anyone else with a gun and did not witness the shooting. (App.p.107).

Wood arrived at the party with David Murray. (App.p.82; p.87). Wood admitted he was acting "ignorant" at the party and said "[y]ou know, I was drinking. I was acting wild and out of control." (App.p.78). Wood stated he did not have a gun and did not see anyone with a gun that night. (App.p.79; p.85). Several witnesses indicated Wood was acting wild that evening but none testified they saw him with a gun. (App.p.53; p.66; p.112).

Murray confirmed he went to the party with Wood and that he understood Wood and Wade would fight that night. (App.p.111). Murray said that, when the victims arrived, "a bunch of people start running down there and they started running up there and it just got pretty crazy." (App.p.112). Murray did not see anyone with a gun. (App.p.112).

The Shooting

Christopher Allison went to the party with Petitioner and Jordan Mardis. (App.p.139; p.143). Allison heard a gunshot and saw a shot being fired over the roof of a dark colored Honda. (App.p.141; p.148). In response, Allison said Petitioner fired his .40 caliber Smith and Wesson handgun approximately nine times in the air. (App.p.141; p.148). After Petitioner fired the shots, the two ran to Allison's car with Mardis and Petitioner drove to Allison's brother's house. (App.pp.141-42; pp.148-50).

Murray heard gunshots but did not see who fired them.[2] (App.p.113). Murray and Wood started to leave. (App.p.82). Wood then got out of the truck, picked up a tire iron from the bed

[2] Two other witnesses testified they had not seen anyone with guns that night and that, while they heard gunshots, they did not see who was shooting. (App.pp.54-55; pp.68-69).

of the truck, and threw it at the victims' vehicle. (App.p.82; p.113). After they left, Murray and Wood went to Allison's brother's house and met up with Mardis, Allison and his brother Dustin, Katye Crawford, and Petitioner. (App.p.84; p.114). Murray recalled Petitioner said Christopher Allison was supposed to throw his gun in the river. (App.p.115). Murray did not see Petitioner with a gun but overheard that Petitioner believed "he had shot in the air." (App.p.115).

Wood saw Petitioner fire his gun twice into the air, but did not see what happened after that. (App.p.81). Wood spoke with Petitioner later at Allison's brother's house. (App.p.84). Wood stated, "[w]ell, when we got back [Petitioner] looked really scared and he had the gun in his hand and said, I think I shot them, I think I shot them. And I said, no, you didn't, you didn't shoot them, you shot into the air." (App.p.84). Wood said Petitioner indicated he was going to throw the gun in the Saluda River. (App.p.85).

The Physical Evidence

Each of the two victims was killed by a single gunshot wound. (App.p.170; pp.172-73). Nine .40 caliber shell casings were found 10-12 yards from the victims' vehicle. (App.pp.189-90; pp.204-09; p.233; p.238). The forensic firearms examiner stated these casings were all the same caliber of .40 caliber Smith and Wesson and fired from the same firearm. (App.pp.251-52; p.255). The forensic firearms examiner could not conclude the casings were fired from the same handgun as the projectile retrieved from one of the victim's bodies because there was no firearm for comparison. (App.pp.255-56). At trial, the parties stipulated Petitioner was present at the party on the night in question and fired his handgun nine times, which accounted for the nine .40 caliber casings recovered from the scene. (App.p.166).

B.

At the PCR hearing, Petitioner stated he had meetings with trial counsel to discuss his case and review discovery materials. (App.pp.414-15). Petitioner stated he wanted trial counsel to interview Katye and Dustin Allison and that they did speak to him about what they had seen and heard. (App.p.419). Petitioner stated trial counsel subpoenaed Katye and Dustin Allison but did not call them as witnesses at trial. (App.pp.420-21). Petitioner stated the jury wanted to re-hear testimony from Chris Allison and Josh Wood and he believed testimony from Katye and Dustin Allison "could have helped me out." (App.pp.425-26).

Katye Allison (hereinafter "Katye") stated she was married to Dustin Allison (Christopher Allison's brother) and that they were at their home on the night of the shooting. (App.pp.390-91; p.397). Katye is Petitioner's cousin. (App.p.391). Katye stated Petitioner, Christopher Allison, and Jordan Mardis all came to her house after the party and that Wood and Murray arrived approximately 45 minutes later. (App.pp.392-93). Katye stated Murray stayed in the truck but Wood got out and knocked on her door. (App.pp.393-94). Katye stated she did not let Wood inside, however, because he had "blood running all down his legs." (App.p.394). Katye stated neither Wood nor Murray entered her home and that – to her knowledge – Petitioner did not go outside to speak to them. (App.p.394). Katye said Petitioner did not have any weapons with him. (App.p.395). Katye said she spoke to trial counsel and told him about seeing Wood after the party. (App.p.396).

Dustin Allison (hereinafter "Dustin") confirmed he was with Katye at their home on the night of the shooting. (App.p.401). Dustin stated Petitioner and Christopher Allison came to the house and Wood and Murray arrived 45 minutes later. (App.pp.402-03). Dustin stated Murray

sat on his front porch and they would not let Wood into the house because his leg was bleeding. (App.p.403; pp.411-12). Dustin stated he did not see Petitioner go outside to speak to Wood or Murray. (App.pp.403-04). Dustin said he spoke to trial counsel about what he saw and heard at his house that night. (App.p.408).

Trial counsel testified he did not have notes from interviews with either Katye or Dustin Allison. (App.pp.355-56).

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 called witnesses to testify at trial." The PCR judge found "there is no reasonable probability that Katye and Dustin Allison's testimony would have changed the outcome of the trial." (App.p.460).

C.

For an applicant to be granted PCR 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 both that trial counsel erred in not calling Katye and Dustin Allison as witnesses and that he was prejudiced as a result. Petitioner contends testimony from Katye and Dustin could have assisted in impeaching State witnesses' testimony about conversations with Petitioner after the shooting. This contention is not supported by the record.

Petitioner failed to meet his burden of proving trial counsel's performance was deficient because it is clear trial counsel made a strategic decision in not presenting a defense case at trial. "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, 597 (2007). Trial counsel testified a decision was made for Petitioner not to testify at trial because "I didn't believe the State put up enough evidence in this matter for the jury to convict him of this crime." (App.p.362). Trial counsel testified he believed "the State had not proved their case beyond a reasonable doubt to the jury" and that "conflicting testimony" came out at trial. (App.p.368). Petitioner stated trial counsel discussed the "pros and cons of presenting a defense and not presenting." (App.p.418). Petitioner stated trial counsel did not want to call witnesses or present a defense but Petitioner could not recall why. (App.pp.421-22; pp.429-30). Based upon this testimony – and a review of the record – it is apparent that trial counsel's decision not to call Katye or Dustin Allison as defense witnesses was part of his trial strategy to refrain from presenting a defense case in order to have the final closing argument. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis

for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841 (2010). Trial counsel testified he had pointed out inconsistences in witnesses' testimony and did not believe the State had met its burden of proof. As such, trial counsel decided not to present a defense case. It is clear from this testimony (and the record) that this a strategic decision to retain the final closing argument to the jury. Petitioner cannot rebut the presumption that trial counsel rendered adequate assistance and trial counsel cannot be deemed ineffective for choosing not to call Katye or Dustin as defense witnesses.

Regardless, Petitioner also failed to meet his burden of proving he suffered prejudice as the result of trial counsel's performance. Testimony from Katye and Dustin would not have changed the outcome of Petitioner's trial. One of the key points in their testimony at the PCR hearing was that Katye and Dustin had seen Wood with blood on his leg after the shooting. (App.p.394; p.403; pp.411-12). Both Christopher Allison and Wood testified at trial, however, about this fact. (App.pp.96-97; p.99; p.151). As such, the absence of additional testimony on this point is not prejudicial as it would have been merely cumulative to the trial testimony. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) ("We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward.") (citations omitted). One of the other points Petitioner attempted to argue – based on Katye's and Dustin's testimony – was that these witnesses could have rebutted trial testimony that Petitioner spoke to Wood at their house after the shooting. At trial, Murray testified Petitioner said he shot his firearm into the air and Wood testified Petitioner said "I think I shot them." (App.p.84; p.115). Katye and Dustin stated that – to their knowledge – Petitioner never came out of their house to

speak to Murry and Wood. (App.p.394; pp.403-04). Further, testimony from the Allisons would not have assisted Petitioner's defense because Katye and Dustin contradicted each other on a very important point. Katye stated Murray stayed in the truck but Dustin stated both Murray and Wood got out of the truck. (App.pp.393-94; p.403). Based upon the content of Katye's and Dustin's purported trial testimony, Petitioner cannot demonstrate their testimony would have changed the outcome of his case. See id.

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 on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was deficient in failing to object to a jury instruction regarding inferred malice.

Petitioner argues trial counsel was deficient in failing to object to a jury instruction that referred to inferred malice because there was evidence in the record that would support involuntary manslaughter. (Pet. Cert., pp.12-13). This argument is without merit.

After advising Petitioner of his right to testify, there was a charge conference. Neither party requested jury charges of either involuntary or voluntary manslaughter. (App.pp.260-64). The following malice instruction was charged to the jury:

> Therefore, there must be a combination of the previous evil intent and the act. Malice aforethought may be expressed or inferred. These terms, expressed and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Expressed malice is shown when a person speaks words which express hatred or ill-will toward another or when the person is prepared beforehand to do the act which was later accomplished. Malice may be inferred from conduct showing a total disregard from human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. And whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

(App.p.293).

At the PCR hearing, Petitioner stated there was a jury charge regarding an inference of malice and trial counsel did not object. (App.p.422). Trial counsel stated he did not object to the malice charge. (App.p.359).

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 to the jury charge regarding an inference of malice." The PCR judge found "[State v.] Belcher[3] is inapplicable in this case as there was no evidence presented at trial that would mitigate, reduce, excuse, or justify the murder for which a jury found [Petitioner] guilty. As such, trial counsel was not deficient in failing to object to this portion of the jury charge." (App.pp.461-62).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel was deficient in not objecting to the malice instruction in this case and that he was prejudiced as a result. Petitioner bases his argument upon the holding in State v. Belcher. In Belcher, this Court held "the 'use of a deadly weapon' implied malice instruction had no place in

[3] 385 S.C. 597, 685 S.E.2d 802 (2009).

a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing." Belcher, 385 S.C. at 610, 685 S.E.2d at 809. The Court held further "the permissive inference charge concerning the use of a deadly weapon remains a correct statement under the law where the only issue presented to the jury is whether the defendant has committed murder." Id. at 612, 685 S.E.2d at 810.

It was not incumbent upon trial counsel to have objected to the malice instruction in Petitioner's case because the prohibition of the charge as explained in Belcher was not applicable. As stated supra, the permissive inference charge is still properly charged "where the only issue presented to the jury is whether the defendant has committed murder." Id. That is precisely the case here. Christopher Allison, who was with Petitioner on the night in question, testified he saw a shot fired and that Petitioner fired in the air several times in response. (App.p.141; p.148). Petitioner stipulated to firing his handgun nine times – leaving behind the nine .40 caliber casings recovered at the scene that had all been fired from the same weapon. (App.p.166; pp.251-52; p.255). The trial judge did not charge the jury with involuntary manslaughter, voluntary manslaughter, the defense of accident, or self-defense. Rather, the jury solely considered whether or not Petitioner was guilty or not guilty of murder. As such, the malice charge in Petitioner's case was proper. While trial counsel attempted to impeach the credibility of the State's witnesses and make the implication that Wood was the actual perpetrator, the jury weighed the evidence and determined Petitioner was guilty of murder. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant's account of what transpired).

As there was no need for an objection to the malice charge in this case, any purported error in conveying the malice charge was harmless.

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

CONCLUSION

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

Respectfully submitted,

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By: 
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August 22, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-001898

Brandon Heath Clark, ... Petitioner,

v.

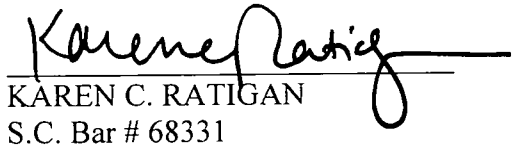
State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Kathrine H. Hudgins, 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 22nd day of August, 2016.



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August 22, 2016

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AUG 22 2016
SC SUPREME COURT

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

Re: **Brandon Heath Clark v. State of South Carolina**
Appellate Case No: 2015-001898
Lower Court Case No: 2013-CP-23-1325

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

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

KCR/jacc
Enclosures

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services (without enclosure)