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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Frank R. Addy, Circuit Court Judge

Trevee Gethers, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Appellate Case no. 2016-000284

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether trial counsel provided effective assistance of counsel when trial counsel did not objection to the admission of Petitioner's booking photograph for identification purposes?

2. Whether trial counsel provided effective assistance of counsel when trial counsel did not object to trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure justice is done"?

STATEMENT OF THE CASE

A Dorchester County grand jury indicted Petitioner on December 3, 2007 for the offense of murder. He was represented by Sara Jayne Rogers, Esquire. On November 15, 2010, Petitioner proceeded to a trial by jury by which he was found guilty of murder. He was sentenced by the Honorable Diane Schafer Goodstein to confinement for a period of forty-five years.

Petitioner timely filed a notice of intent to appeal his conviction and sentence with the South Carolina Court of Appeals. Elizabeth Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Gethers, 2012-UP-576 (S.C. Ct. App. Filed October 25th, 2012.) His petition for writ of certiorari was denied by this Court and remittitur issued on May 7, 2014.

Petitioner filed an application for post-conviction relief (PCR) on July 3, 2014. Respondent made its Return on February 24, 2015, requesting an evidentiary hearing be convened. Rodney D. Davis, Esquire was appointed for the Petitioner by the Dorchester County Clerk of Court. With Applicant and Counsel present, a hearing was held on October 28, 2015, before the Honorable Frank R. Addy at the Dorchester County Courthouse. After questioning Applicant, counsel, and witnesses PCR Court denied and dismissed the application by order dated January 8, 2016. Petitioner timely filed a notice of intent to appeal and subsequently submitted a Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

I. This Court should deny review because the booking photograph was correctly introduced for identification purposes and, even if this Court finds that trial counsel's lack of objection to the photograph was in error, Petitioner suffered no prejudice from the booking photograph.

Petitioner argues trial counsel should have objected to the use of defendant's mugshot for identification purposes. This argument is without merit.

The PCR Court found that the booking photograph was offered in a relevant line of questioning. App. p. 323-326. Testimony was elicited that fingerprints were lifted from the automobile where the victim was found murdered. App. p. 175. Petitioner was identified by a set of fingerprints taken from an arrest that produced the aforementioned booking photograph. App. p. 345, 350. The booking photograph conclusively tied the prints taken at that booking to the Petitioner. App. p. 324. Counsel testified credibly to this effect and agreed that the photograph was admitted to show how law enforcement identified Petitioner as a suspect in the murder.

> Stephens's remaining argument, that his "mug shot" in the photo lineup implied he had a prior criminal record, is unpersuasive on its face. Our appellate courts have affirmed the admission of photo lineups that were more suggestive of a prior criminal record than the one in this case. *See, e.g., State v. Denson,* 269 S.C. 407, 412–13, 237 S.E.2d 761, 764 (1977) (finding no error in admitting photo lineup despite the fact photographs included placards that were taped over to conceal arrest information); *State v. Robinson,* 274 S.C. 198, 199–200, 262 S.E.2d 729, 730 (1980) (affirming admission of photo lineup comprised of full frontal, profile, and frontal head-and-shoulders images with written information blacked out); *State v. Davis,* 309 S.C. 326, 338–39, 422 S.E.2d 133, 141 (1992), *overruled on other grounds by Brightman v. State,* 336 S.C. 348, 352 n. 5, 520 S.E.2d 614, 616 n. 5 (1999) (affirming admission of photo lineup using mug shots with identifying information masked).

State v. Stephens, 398 S.C. 314, 321–22, 728 S.E.2d 68, 72 (Ct. App. 2012).

A. Traylor Test

Petitioner relies heavily upon the Traylor test, "The introduction of a "mug-shot" of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004.)) The facts of the instant case meet the requirements of the Traylor test.

1. Demonstrable Need

The State has shown a demonstrable need to introduce the photograph. The PCR Court found that the booking photograph of Petitioner was "offered in a relevant line of questioning" and "tied those prints to the Applicant." App. p. 706. The photograph was introduced as a matter of establishing the validity of the fingerprints which were a key piece of circumstantial evidence. The booking photograph, taken by the witness at the same time as the fingerprints, was the way by which the witness recognized and correlated the fingerprints with the Petitioner. App. p. 324.

2. Criminal History

The photograph shown to the jury has not been proven to suggest the Petitioner had a criminal history. The photograph was discussed in a bench trial. App. p. 325. It is noted that there is a condition placed on the photograph, without which there would have been an objection. App. p. 326. That condition is never placed in the record. That condition could very well have been to remove any identifying marks that would infer a prior criminal. The picture was not made part of the record at the evidentiary hearing. "In a PCR action, the applicant bears the burden of proving the allegations in his application." Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985.) There was also no mention during the trial of when the booking photograph took

place or for what charge he was being booked. The jury could easily have inferred the picture and fingerprints were from Petitioner's booking for the murder charge before them. The burden rests on the Petitioner to prove his case. The Petitioner has not proven that this booking photograph suggested a criminal history.

3. Origin and Implication

The photograph was not introduced in such a way as to draw attention to its origin or implication. The entire testimony of the witness was three pages long. App. p. 323 – 325. The booking photograph and the fact that the fingerprints were taken at a county detention center were not mentioned during the State's closing argument. A criminal history was never implied or alluded to by the State. The testimony surrounding the photograph never mentions the timing or the cause of the booking photograph. The photographs origin and implication were entirely avoided by the State after its introduction.

B. Probative Evidence to Support Lack of Prejudice

Even if this Court finds the State failed to meet the elements of the Traylor test, the Petitioner has failed to show that he suffered prejudice from the introduction of the booking photograph. In Traylor, this Court found that the defendant, despite the State failing the Traylor test, suffered no prejudice from the admission of his mug-shot and affirmed the trial court's decision. "Although we have held admission of a mug-shot to be reversible error if the three criteria of State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977) are not met, the rationale for this holding is that such photographs are prejudicial because they imply a defendant's prior bad acts." State v. Traylor, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004.) In Greene, the Court of Appeals found the mug-shot cumulative and of little prejudicial value. "Finally, we note that Green suffered little prejudice, if any, from the admission of the booking photograph because it

did not suggest he had committed prior bad acts." State v. Green, 412 S.C. 65, 83, 770 S.E.2d 424, 434 (Ct. App. 2015.)

The Petitioner's fingerprints matched the fingerprints found at the crime scene. The probative value of linking the fingerprint evidence to the Petitioner and, thus, the scene of the crime, far outweighs the prejudicial effect of an inference of a criminal history. The PCR Court agreed with this line of thought and found that trial "counsel testified credibly to this effect and agreed the photograph was admitted to show how law enforcement identified Applicant as a suspect in the murder."

Even if trial counsel had objected to the mug-shot and successfully suppressed it, there is probative evidence to support the PCR court's finding there was no reasonable probability the outcome of the trial would have been different. App. p. 707. "This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law." Kolle v. State, 386 S.C. "[C]ounsel's deficient performance must have prejudiced the petitioner 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The State introduced the photograph through Javon Wright, who worked for the Charleston County Detention Center. Javon Wright identified the Petitioner in court as the person whose fingerprints he took. This in-person identification by Javon Wright made the booking photograph cumulative and eliminated any possibility that the suppression of the photograph would change the outcome of the trial. The DNA, the fingerprint evidence at the scene of the crime, the Petitioner's fleeing of the state, and the statement of Petitioner's

codefendant were the key pieces of evidence by which the jury found the defendant guilty. Without the booking photograph those pieces remain intact. In fact, the photograph wasn't mentioned once in the Assistant Solicitor's opening or closing arguments. Therefore, there is no reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different.

Petitioner failed to prove Counsel was ineffective in failing to object or that the objection would have been successful. Petitioner also failed to prove that if an objection had been successfully made there was a reasonable probability the result of the trial would have changed. Therefore, review should be denied on this allegation.

II. This Court should deny review because the 'seek the truth' language was harmless and the jury was properly instructed on the law.

Petitioner argues that his Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was "a search for the truth in an effort to make sure that justice is done." This argument is without merit.

The central function of the trial process in both criminal and civil cases is to discover the truth. *See Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); *see also State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"); *see, e.g., Carella v. California*, 491 U.S. 263, 265 (1989) (explaining that burden-relieving jury instructions "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases" (emphasis added)). As part of the truth-seeking process, the State carries the burden to prove a criminal defendant's guilt for every element of a criminal offense

beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); see also *Burr v. Florida*, 474 U.S. 879, 880 (1985) ("[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]" (emphasis added)).

Trial counsel's failure to object to the Judge Goodstein's comments was not erroneous. Counsel credibly testified that she did not find those statements objectionable. Judge Goodstein's opening remarks were not an instruction on the law. The cases that Petitioner cites concerning 'seek language' are all concerned only with the court's use of 'seek language' within the language of a circumstantial evidence jury instruction. State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857 (1998) [In this case, the trial judge's ***circumstantial evidence charge*** was erroneous because it instructed jurors to seek a reasonable explanation other than the guilt of the accused.] State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991) (overruled in State v. Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000)) [His charge deviates from the ***circumstantial evidence charge*** cited in *State v. Edwards,* 298 S.C. 272, 379 S.E.2d 888 (1989), that requires the evidence "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis."] State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995) [Here, although the ***circumstantial evidence charge*** was in error, the jury instructions, when read as a whole, do not convey that a lesser degree of proof is permissible. The trial court charged, quite extensively, that the State had the burden of proving the defendant guilty beyond a reasonable doubt.]) State v. Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000) [While we have urged trial courts to ***avoid using any "seek" language when charging jurors on either reasonable doubt or circumstantial evidence*** (*see State v. Needs,* 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)), the "seek" language here did not appear in either the reasonable doubt or circumstantial evidence

charges, but in the instructions on juror credibility. ***Both the reasonable doubt and circumstantial evidence charges were complete and proper.]***

In the instant case, the 'seek' language used by the court was part of Judge Goodstein's opening remarks to the jury, not her instruction on reasonable doubt or circumstantial evidence. Furthermore, appellate courts have consistently found such 'seek the truth' language to be harmless when complimented by a full and correct charge on reasonable doubt and the burden of the state.

> As an abstract concept, "seeking the truth" suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt. The district court, however, did not use it in this way. Rather, the trial court began its instructions with a clear definition of the government's burden of proof in which it repeatedly stated that the defendant could not be convicted unless the jury found that the government had proven him guilty beyond a reasonable doubt. It correctly defined proof beyond a reasonable doubt as "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs." There is no reasonable likelihood that the jury inferred that the single reference at the end of the charge to "seeking the truth," rendered as it was in the context of an admonition to "not give up your honest beliefs," modified the reasonable doubt burden of proof. United States v. Gonzalez–Balderas, 11 F.3d 1218, 1223 (5th Cir.1994)
> We find the reasoning of the *Gonzalez–Balderas* court very persuasive. There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof. Under the standards articulated in *Smith* and *Boyde,* the instruction as a whole properly conveyed the law to the jury and there is not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a reasonable doubt.

Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000)

Respondent submits that Petitioner has failed to show entitlement to post-conviction relief on the basis of the language of the trial judge's opening remarks. The jury charge should be

read as a whole when determining if there is error. See State v. Smith, 315 S.C. 547 (1994), citing State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.). When the charge is read as a whole, it contains the correct definition and adequately covers the law. See State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) (a jury charge which is substantially correct and covers the law does not require reversal). Respondent maintains that the trial judge's instruction, when viewed in its entirety, was not misleading or erroneous. The trial judge repeatedly instructed the jury that the State carried the burden of proving the Petitioner guilty beyond a reasonable doubt. App. p. 485-486.

Accordingly, Respondent asserts the PCR Court's rejection of this claim of ineffective assistance of counsel, is not contrary to, or an unreasonable application of, clearly established state law, nor did the adjudication result in an unreasonable determination of the facts. The instructions in the present case were clear, proper, and did not improperly shift the burden of proof to Petitioner. State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985); State v. Franklin. 310 S.C. 122,425 S.E.2d 758 (Ct. App. 1992). The charge clearly informed the jury the burden was on the State to prove Petitioner's guilt beyond a reasonable doubt. Thus, trial counsel cannot be deficient for his failure to object to a lawful and proper jury instruction and Petitioner was not prejudiced from his failure to do so.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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By: _____
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September 7, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Dorchester County
Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

TREVEE GETHERS, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

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

Lara M. Caudy, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 7th day of September, 2016

Ashley Haworth

ASHLEY HAWORTH
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 07 2016
S.C. SUPREME COURT

September 7, 2016

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

RE: **Trevee Gethers v. State of South Carolina**
Appellate Case No. 2016-000284
Lower Court Case No: 2014-CP-18-1287

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 opposing counsel today.

Sincerely,

Ruston W. Neely
Assistant Attorney General
SC Bar No. 100192

RWN/ah
Enclosures

cc: Lara M. Caudy, Esquire