

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Clyde N. Davis, Circuit Court Judge

Appellate Case No. 2016-000469

Marcus Timmons, #217397 Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES UPON APPEAL

- I. Is there any probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to object to the eye witness identification of Petitioner, where counsel adequately preserved the issue for appellate review?

- II. Is there any probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to object pursuant to Doyle v. Ohio to the prosecutor's comment that Petitioner would not identify himself to law enforcement, where the record did not indicate Petitioner had been given his Miranda warnings, and Petitioner did not have a Fifth Amendment right to refuse to identify himself to law enforcement?

- III. Should certiorari be granted where Petitioner has failed to meet his burden to show deficient performance or prejudice in light of findings by the Court of Appeals and appellate counsel that that there were no meritorious issues to appeal from his underlying conviction?

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 Lexington County. Petitioner was indicted on numerous charges as shown below. Petitioner was originally convicted of murder, two counts of armed robbery, two counts of criminal conspiracy, four counts of pointing a firearm, assault and battery of a high and aggravated nature, possession of a firearm during an armed robbery, and attempted armed robbery. The South Carolina Supreme Court reversed his convictions on direct appeal from his first trial. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997). The State retried Petitioner, where he was found guilty on all counts as indicted. Petitioner was represented at his second trial by Carey M. Ayer, Esquire. The Honorable H. Dean Hall sentenced Petitioner as follows:

<u>Charge</u>	<u>Indictment(s)</u>	<u>Sentence</u>
Murder	1994-GS-32-0362 (count 1)	Life imprisonment
Armed Robbery	1994-GS-32-0362 (count 2)	Twenty-five (25) years, consecutive to murder
Criminal Conspiracy	1994-GS-32-0362 (count 3)	Five (5) years, concurrent
Criminal Conspiracy	1994-GS-32-0364	Five (5) years, concurrent
Armed Robbery	1994-GS-32-0367 (count 1)	Twenty-five (25) years, consecutive to murder
Pointing a Firearm	1994-GS-32-0367 (count 2)	Five (5) years, concurrent
Pointing a Firearm	1994-GS-32-0367 (count 3)	Five (5) years, concurrent
Pointing a Firearm	1994-GS-32-0367 (count 4)	Five (5) years, concurrent
Assault and Battery of a High and Aggravated Nature (ABHAN)	1994-GS-32-0367 (count 5)	Ten (10) years, concurrent
Possession of a Weapon During the Commission of a Violent Crime	1994-GS-32-0367 (count 6)	Five (5) years, concurrent
Attempted Armed Robbery	1994-GS-32-2738 (count 1)	Twenty (20) years, concurrent
Pointing a Firearm	1994-GS-32-2738 (count 2)	Five (5) years, concurrent
Pointing a Firearm	2000-GS-32-3326	Five (5) years, concurrent
Pointing a Firearm	2000-GS-32-3327	Five (5) years, concurrent

Attempted Robbery	Armed	2000-GS-32-3328	Five (5) years, concurrent
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Petitioner again sought a direct appeal. Aileen P. Clare, Esquire, of the South Carolina Office of Appellate Defense submitted a final brief and petition to be relieved as counsel pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal pursuant to Anders and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991). State v. Timmons, Op. No. 2002-UP-382 (S.C. Ct. App. filed May 29, 2002). The remittitur was sent on June 6, 2002.

Petitioner subsequently filed for post-conviction relief on February 25, 2003 (2003-CP-32-0759), where he raised the following issues:

1. Ineffective assistance of counsel, in that counsel:
 - a. Failed to make a contemporaneous objection to preserve identification issue for appellate review.

Petitioner, through appointed counsel, Melissa Kimbrough, Esquire, submitted an amendment to application for Post-Conviction Relief which raised the following issues:

1. Ineffective assistance of counsel, in that counsel
 - a. Failed to contemporaneously object to unreliable identification testimony and
 - b. Failed to object to the prosecutor's closing argument that constituted a violation of Doyle v. Ohio, 426 U.S. 610 (1976).
2. Ineffective assistance of appellate counsel, in that counsel
 - a. Failed to raise the preserved issue of the admission of the autopsy photographs and
 - b. Failed to raise the preserved issued that the photographic lineup was improperly admitted under State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986).

An evidentiary hearing was convened on January 24, 2006, in which Petitioner was present with counsel Kimbrough. The State was represented by Assistant Attorney Sabrina C. Todd, Esquire. Petitioner did not testify and failed to offer any evidence. Ms. Kimbrough argued

the allegations of ineffective assistance of trial and appellate counsel. On March 15, 2006, the Honorable Clyde N. Davis, Jr., issued an order denying post-conviction relief that found both trial and appellate counsel were not ineffective. Petitioner did not appeal.

In his second and current application for post-conviction relief Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel
2. Trial counsel failure to make contemporaneous objection.
3. Applicant was denied State and federal rights to appeal by law in accordance to SCRPC his post-conviction relief counsel failure to communicate following January '06 PCR. Attorneys failure to file notice of appeal. Mellissa J. Kimbrough, Esq. (Due Process Violation).

Applicant, through counsel, filed an amended application¹ on May 8, 2015, alleging the following additional grounds for relief:

1. Applicant was denied the effective assistance of PCR Counsel due to PCR Counsel's abandonment of the Applicant's Application for PCR by failing to file a brief of the issues before the PCR Court after the PCR Judge required such a brief. The failure to file the brief resulted in summary dismissal of the PCR.
2. Applicant did not knowingly and intelligently waive his right to a direct appeal of the denial of his PCR claim.

The State consented to relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).² The Honorable D. Craig Brown subsequently submitted an order granting relief pursuant to Austin, and denying each additional allegation as successive and barred by the statute of limitations. Petitioner then filed a petition for writ of certiorari, raising issues from the denial of his previous application for post-conviction relief. This Return follows.

¹ This amendment was initially filed as a new application (2015-CP-32-1731). The two actions were merged into one application in an order by the PCR Court dated and filed December 10, 2015.

² Although Petitioner has not filed an Austin petition alongside his petition for writ of certiorari, as described by King v. State, 308 S.C. 348, 417 S.E.2d 686 (1992), Respondent consented to this belated appeal and has no objection to the matter going forward.

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).

ARGUMENT

- I. There is probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to object to the eye witness identification of Petitioner, where counsel adequately preserved the issue for appellate review.**

Petitioner argues the PCR Court erred in finding the eye witness's identification was suggestive or unreliable. The actual issue before this Court, however, is whether there is any probative evidence in the record to support the PCR Court's finding that counsel was not ineffective. The distinction is important here because the PCR Court denied this claim on two independent grounds: 1) that there was nothing in the record to suggest the eye witness's identification was unduly suggestive or unreliable **and** 2) that counsel adequately objected to its introduction and preserved the issue for appellate review. Petitioner now contends the PCR Court erred with respect to the first finding, but has not contested the validity of the second. Even if the Court's finding that the statement was not suggestive or unreliable was incorrect, Petitioner would not be eligible for post-conviction relief where counsel's performance was not deficient.

The record supports the PCR Court's uncontested finding that counsel raised the issue sufficient to preserve it for appellate review. In most cases, making a motion *in limine* to exclude at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837,840 (2001). The moving party, therefore, must make a contemporaneous objection when the evidence is introduced. Id. However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. Id.

In this case, a hearing was held on the identification issue, after which the trial court ruled the witness would be permitted to identify the Petitioner. (App. p. 245, l. 12 - p. 306, l. 8). She was the very next person to testify. (App. p. 312-357). Because no intervening evidence was admitted, there was no basis for the court to change its ruling and the issue was preserved for appellate review.³ Indeed, counsel testified that the trial court had just ruled on the issue, he did not believe it was necessary for him to object when Ms. Williams identified Applicant before the jury. (App. p. 737). As this issue was properly raised, ruled upon, and preserved for appellate review, the PCR Court's finding that counsel was not deficient with respect to this issue is supported by probative evidence in the record. Certiorari should be denied.

In any event, there is probative evidence in the record to support the PCR Court's finding that Petitioner failed to meet his burden to prove the identification was unduly suggestive and unreliable. The PCR Court found that there was "nothing in the record to indicate anyone suggested to Williams which of the 18 lineup photos to pick." (App. p. 777). Petitioner has not contested the PCR Court's findings on whether the lineup was unduly suggestive; rather, but instead focused on reliability. However, consideration of an out of court identification's reliability is only necessary if the procedure used in obtaining the identification was suggestive. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000) ("Only if the procedure was suggestive need the court consider the second question – whether there was a substantial likelihood of irreparable misidentification"). Because there is no evidence that the identification was obtained as a result of undue suggestion, and regardless counsel adequately preserved the

³ In Forrester, the defense moved before opening statements to suppress cocaine. The Supreme Court concluded that because the State's witness was the first witness at trial, and thus no other evidence was taken before the cocaine's admission, it was unnecessary to object at the time of admission because no opportunity existed for the court to change its ruling.

issue for appellate review, the PCR Court correctly concluded Petitioner failed to meet his burden. Certiorari should therefore be denied.

II. There is probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to object pursuant to Doyle v. Ohio to the prosecutor's comment that Petitioner would not identify himself to law enforcement, where the record did not indicate Petitioner had been given his Miranda warnings, and Petitioner did not have a Fifth Amendment right to refuse to identify himself to law enforcement.

The PCR Court properly concluded Petitioner failed to meet his burden to show ineffective assistance of counsel with regard to the prosecutor's closing arguments. Crucially, there was no Doyle violation for counsel to have objected to.

The United States Supreme Court has held that a defendant's due process rights are violated when a prosecutor uses a defendant's exculpatory story, told for the first time at trial, through cross-examination of the defendant about his failure to tell the story to police after receiving Miranda warnings at the time of arrest. Doyle v. Ohio, 426 U.S. 610 (1976).

The Court reasoned that the Miranda warning that an accused has the right to remain silent carries an implicit assurance to one who receives the warnings that his silence will not carry a penalty. Id. The rule does not prevent the use of a defendant's silence prior to arrest or after arrest if no Miranda warnings are given, because there has been no implied assurance that the silence will carry no penalty. Brecht v. Abrahamson, 507 U.S. 619 (1993).

Here, an officer testified that during a traffic stop, Petitioner refused to identify himself and during the officer's attempt to learn his identity, the Petitioner "wouldn't respond to [the officer's] questions with any more than an occasional grunt." (App. p. 387, l. 13-24). The prosecutor referred to this exchange during his closing argument. (App. p. 630, l. 17-25).

Petitioner did not present any evidence during his evidentiary hearing that he had been given his Miranda warnings before grunting, and in now fact concedes that it is “unclear from the record whether or not [he] was Mirandized.” PWC, p. 12. At the evidentiary hearing, Petitioner asked the PCR Court hearing to infer or presume that he had been given his Miranda warnings. (App. p. 758). It is Petitioner’s burden to prove each of the allegations in his application. Butler, at 442, 334 S.E.2d at 814. Having failed to present any evidence that he was actually given his Miranda warnings, he failed to meet that burden.

Petitioner next argues that whether or not he was warned of his Miranda rights, Doyle is implicated because his refusal to speak occurred during a custodial interrogate in which he should have been warned of his Miranda rights and thus was entitled to its protections. As discussed above and in Breth v. Abrahamsom, this is not the rule in Doyle.

Respondent would also note that the prosecutor was not commenting on Petitioner’s right to remain silent because “[t]he Fifth Amendment prohibits only compelled testimony that is incriminating.” Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 189 (2004). Refusing to provide one’s own name upon request from law enforcement would tend to be incriminating only under unusual circumstances. Id. at 191. Petitioner did not present any evidence that identifying himself by name during the traffic stop would itself have been incriminating. Because the Petitioner did not have a Fifth Amendment right to refuse to identify himself upon request, the prosecutor’s comment on his refusal does not constitute a violation of Doyle. Having failed to meet his burden at the evidentiary hearing, Certiorari should be denied.

III. Certiorari should be denied where Petitioner failed to meet his burden to show deficient performance or prejudice, particularly in light of findings by the Court of Appeals and appellate counsel that there were no meritorious issues to appeal from his underlying conviction.

Petitioner argues the PCR Court erred in holding that appellate counsel was not ineffective for refusing to pursue relief on the improper admission of autopsy photos and the photographic lineup instead of filing an Anders brief. This issue should be dismissed because there is no evidence appellate counsel was deficient in filing an Anders brief rather than a merits brief, and – in light of findings by both counsel and the Court of Appeals that there were no meritorious issues on appeal – Petitioner has failed to show prejudice.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, courts apply the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Bennet v. State, 383 S.C. 303, 680 S.E.2d 273 (2009). The Strickland test is also applied where counsel files an Anders brief, as opposed to a brief on the merits. Id. at 309, 680 S.E.2d at 276; see also Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (finding that even where appellate counsel believes his client’s appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel’s performance should be reviewed under Strickland).

Petitioner has failed to present any evidence that appellate counsel’s decision to file an Anders brief rather than a merits brief was objectively unreasonable or otherwise deficient. Given the high level of deference attributable to defense and appellate counsel, Respondent submits there is none. In any event, it was Petitioner’s burden to prove each of his allegations at the evidentiary hearing. Butler, at 442, 334 S.E.2d at 814.

Petitioner also failed to meet his burden to show prejudice. Petitioner's appeal was submitted pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Where appellate counsel submits an Anders brief, the role of the appellate court is to review the brief submitted by counsel, any *pro se* response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit. State v. Lyles, 381 S.C. 442, 444, 673 S.E.2d 811, 813 (2009) (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991)). If an issue is found which has arguable merit, the appellate court will direct the parties to file merit briefs, and the case will proceed under the normal appellate process. Id. On the other hand, if no issues of arguable merit are found by the appellate court, the appeal is dismissed, and the appellant's counsel is relieved. Id. Applicant's appeal was dismissed after review pursuant to Anders, reflecting that "the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." Id.; see also Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765-66 (2000) (In most cases in which a defendant's appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous).

Both appellate counsel and the Court of Appeals concluded that there were no meritorious issues in Petitioner's direct appeal. Their respective conclusions are supported by the record. The admission of evidence is within the circuit court's discretion and will not be reversed absent an abuse of that discretion. State v. Dickerson, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). A trial court has particularly wide discretion in ruling on Rule 403 objections. State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012). A trial court's decision regarding the comparative probative value versus prejudicial effect of evidence should be reversed only in exceptional circumstances. Lee v. Bunch, 373 S. C. 654, 658, 647 S.E.2d 197,

199 (2007) (*citing* State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). When balancing the danger of unfair prejudice against probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Autopsy Photographs

The trial judge did not abuse his discretion in admitting the autopsy photographs, where their prejudicial impact did not substantially outweigh their probative value. The photographs were probative in that they corroborated witness testimony, enabled Dr. McMaster to testify more effectively, and enabled the jury to better understand the testimony. Autopsy photographs may be introduced to corroborate witness testimony. See State v. Dial, 405 S.C. 247, 260-61, 746 S.E.2d 495, 502 (Ct. App. 2013). “[P]hotos are not inadmissible merely because they are gruesome, especially where . . . the photos simply mirror the unfortunate reality of the case.” State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). “Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable to jury to better understand the testimony. Other acceptable purposes are to show the condition of the victims’ bodies, the probable type or location of the injuries, and the position in which the bodies were discovered.” State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014) (*quoting* Carmargo v. State, 327 Ark. 631, 940 S.W.2d 464, 467 (1997)).

At a minimum, the photographs in the case corroborated the testimony of Dr. McMaster, the State’s expert in pathology, and aided him in showing the orientation of the shotgun blast on the victim’s body. (App. p. 559). Dr. McMaster also testified that the photographs would aid

him in his testimony about gunshot residue, stippling, and scatter. (App. p. 558-59). The photographs also corroborated the testimony of Deputy Snead, who saw the victim at the scene and testified that he had been shot in the lower back from what appeared to be a shotgun. (App. p. 187).

Respondent would also note that it does not appear that the photographs were actually admitted or even produced during the evidentiary hearing. In effect, the Petitioner asked the PCR Court to find that the admission of photographs it had never seen likely constituted an abuse of discretion by the trial judge. A finding of prejudice cannot be grounded solely on speculation. See, e.g., Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

For these reasons, Petitioner has failed to meet his burden to show appellate counsel was ineffective for filing an Anders brief, rather than briefing this issue on the merits. Certiorari should be denied.

Photo Lineup

Petitioner has also failed to show appellate counsel ineffective for failing to file a merits brief challenging the trial judge's ruling allowing admission of the photo lineup. Admission of a "mug shot" is reversible error unless it is shown that: (1) the state had a demonstrable need to introduce the photograph; and (2) the photographs themselves, if shown to the jury, must not imply that the defendant had a prior criminal record; and (3) the photograph must not be introduced in such a manner to draw attention to the source or implication of the photograph. State v. Tate, 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986).

The trial judge did not abuse its discretion in allowing the photo lineup into evidence. The photographs were admissible under Tate. First, there was a demonstrable need to introduce the photographs. In Tate, there was already "competent evidence proving identity." 288 S.C. at

106, 341 S.E.2d at 381. In this case, a number of years had passed between the initial identification and the in court identification, and defense counsel vigorously attacked her reliability. The State correctly pointed out that it needed the photographs to corroborate her identification, and that they went toward her credibility and reliability. (App. p. 309-10). Additionally, Petitioner failed to prove the photographs themselves, if shown to the jury, would imply that the defendant had a prior criminal record; nor has he shown that the photographs were introduced in such a manner to draw attention to the source or implication of the photographs. The trial judge instructed the State to tell their witnesses not to make any mention of the fact that the photographs came from any police agency, and to explain that the numbering system is a method of using a number as opposed to a name when doing a line-up. (App. p. 310-11). Detective Blackwell testified that each photograph in the lineup was assigned a number, and that each of the eighteen photos Ms. Williams was shown had a different number. (App. p. 368; 370-71). He then testified that Ms. Williams picked out the number that corresponded with Petitioner. (App. p. 371).

Finally, even if the photographs were admitted in error, they were not prejudicial as a result of the above referenced safeguard taken by the trial court. See, e.g., State v. Council 335 S.C. 1, 13 n. 7, 515 S.E.2d 508, 514 n. 7 (1999) (distinguishing Tate, finding that improper reference to fingerprint card not prejudicial where there was no evidence before the jury of when or for what purpose the fingerprint card was made); Traylor v. State, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (even where three criteria of Denson not met, no prejudice where photograph explained in such a manner that it did not imply defendant had committed prior bad acts). Because there were no references to prior bad acts by the Petitioner, there was no prejudice in admitting the photographs, and Petitioner has failed to meet his burden to show appellate counsel

was ineffective in failing to file a merits brief on this issue. Certiorari should therefore be denied.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari.

Respectfully submitted,
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By: 
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S.C. SUPREME COURT

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CERTIORARI TO LEXINGTON COUNTY
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The Honorable Clyde N. Davis, Circuit Court Judge

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MARCUS TIMMONS, #217397,

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THE STATE OF SOUTH CAROLINA,

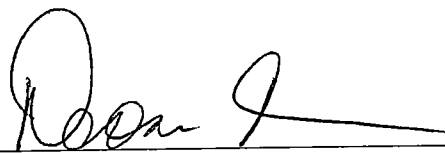
RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville, SC 29601

This 23rd day of September, 2016



DEONNA ROGERS
LEGAL ASSISTANT