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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HAMPTON COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Joseph Davis, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Appellate Case No. 2016-000274

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General
SC Bar No. 100192

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

Other counsel of Record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803)734-1343

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QUESTION PRESENTED

I. **Is there probative evidence to support the post-conviction relief ("PCR") court's finding that trial counsel's failure to object to codefendant's statement was not prejudicial due to Petitioner's overwhelming evidence of guilt?**

STANDARD OF REVIEW

This Court must affirm the 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, 363 S.C.at 368, 610 S.E.2d at 814 (2005)).

ARGUMENT

I. There is probative evidence to support the PCR court's finding that trial counsel's failure to object to codefendant's statement was not prejudicial due to Petitioner's overwhelming evidence of guilt.

During the trial, the solicitor asked Shawn Davis, Petitioner's brother and codefendant, what he was doing on the incident date, to which Mr. Davis responded, "The only thing I can say is I got—I got 30 years. I ain't got nothing to say." App. p. 312. Following the bench conference, the Court called a bench conference of the attorneys. After which, the solicitor asked whether Mr. Davis gave a statement. This question was objected to by trial counsel as leading. The Court sustained the objection. Mr. Davis denied he had given a statement to law enforcement. However, the State introduced his statement into evidence. The statement fully implicated Petitioner in the murder of the Victim with a .22 caliber revolver. App. pp. 316-318.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this first prong, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland,

561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 688.

The PCR Court found trial counsel had an obligation to object and request a limiting instruction when the codefendant refused to answer the question asked by the assistant solicitor by responding "I got 30 years." The Court found trial counsel's failure to do so fell below the objective standard of reasonableness required under Strickland. However, the Court also found the deficiency was not sufficiently prejudicial in light of the overwhelming evidence of the Petitioner's guilt presented at trial.

The evidence presented by the State at trial included the Petitioner's own voluntary verbal, and videotaped confessions fully implicating himself as the perpetrator of the crimes. App. p. 355-356; 377. The State presented testimony that Petitioner was read his Miranda rights, never threatened or coerced, and gave his statement fully and voluntarily. App. p. 355. Petitioner's statement included the following admissions: Petitioner and his three codefendants rode in a vehicle together; went to a store to rob the victim; Petitioner shot the victim; the victim had no money on him; Petitioner and codefendants became frightened and left the scene. App. p. 357. The State also introduced Shawn Davis's statement to law enforcement into evidence. Shawn Davis's statement fully implicated Petitioner in the murder of the victim. Additionally,

the State introduced Derrick Adkins,' another co-defendant of Petitioner, statement into evidence. Adkins' statement also implicated Petitioner in the murder of the victim. App. p. 326-328. Further, Marquis Bryant, a fourth co-defendant of Petitioner and the driver of the vehicle, testified he knew the other codefendants were planning to rob Victim and that Petitioner threatened to kill him with a gun if he ever told anyone about the incident. App. p. 308. There is expansive probative evidence to support the PCR court's finding there was overwhelming evidence presented at trial against the Petitioner. This overwhelming evidence negated any deficiency of trial counsel for failing to object to codefendant's unprompted assertion of his thirty year sentence.

Furthermore, Petitioner was not prejudiced by his codefendant's assertion of, "I got 30 years. I ain't got nothing to say" because the error was only in failing to ask for a cautionary instruction. App. p. 312. It was proper for the jury to consider the codefendant's guilt albeit with cautioning instructions as noted by the following cases:

> In Smith v. United States, the appellant asserted his Sixth Amendment right to confrontation was violated where his co-defendant admitted at trial he had entered a plea of guilty to the offense. The Court of Appeals examined the case according to the standards established in Bruton v. United States, and concluded the wealth of evidence against appellant independent of his co-defendant's admission eliminated any possible error.

State v. Murphy, 270 S.C. 642, 644, 244 S.E.2d 36, 36 (1978) (internal citations omitted)

> Violations of the Confrontation Clause are subject to a harmless error analysis. A [C]onfrontation [C]lause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict. Considerations include the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case.

State v. Holder, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) (internal citations omitted)

The instant case is analogous to Holder and Murphy. Shawn Davis's assertion he "got 30 years," which was not responsive to the solicitor's question, was relevant to his knowledge of Petitioner's intention, during that same crime, to rob the victim. Therefore, the evidence could have properly been considered by a jury. "The Court concluded that evidence of Scott's guilty plea was properly admitted because 'Scott's plea of guilty was relevant to the issue of appellant's knowledge of Scott's intentions.'" State v. Moore, 337 S.C. 104, 106, 522 S.E.2d 354, 355 (Ct. App. 1999). However, the Court usually requires cautionary instructions be given in these circumstances. State v. Moore, 337 S.C. 104, 106, 522 S.E.2d 354, 355 (Ct. App. 1999). A bench conference was called directly after the codefendant uttered his nonresponsive assertion. App p. 312. At the PCR hearing, trial counsel testified he did not remember what was said during that bench conference, but he testified it was common trial strategy not to "ring the bell" on harmful issues. App. p. 674. The witness's testimony was cumulative and corroborated by the other codefendant's testimony, including Petitioner's own. App. p. 355-356; 377. The prosecution's case presented overwhelming evidence to convict Petitioner. Therefore, because the error was harmless and the evidence against Petitioner was overwhelming, the Court should deny review of Petitioner's Writ for Certiorari.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General
S.C. Bar No. 100192

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 12, 2017

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Certiorari to Hampton County
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JOSEPH DAVIS, #262813,

PETITIONER,

v.

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:

Susan B. Hackett, Esquire
SCCID - Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

This 12th day of January, 2017.

JOCELYN BAKER
LEGAL ASSISTANT