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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY

The Honorable R. Knox McMahon, Trial Judge
The Honorable G. Thomas Cooper, Post-Conviction Relief Judge

Appellate Case No. 2016-000900

TYRIS B. GLOVER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The PCR court erred in denying Petitioner's ineffective assistance of counsel claim on the grounds that defense counsel had no basis for objecting to a lay witness' identification of Petitioner as the burglar depicted on a bar's surveillance video; where the witness, the bar's manger, had never seen Petitioner prior trial. Thus, his identification was an inadmissible lay witness opinion on an ultimate issue of fact in violation of South Carolina Rules of Evidence 701 and 704.

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was indicted during February 2012 term of the Richland County Grand Jury for burglary – 2nd degree (violent) (2012-GS-40-00854) and property crime – 3rd or subsequent offense (2012-GS-40-00857). App. p. 412-415. He was represented by Jeremy MacNealy and James D. Cooper, III, Esquires.¹ On April 26-27, 2012, Petitioner proceeded to a jury trial before the Honorable R. Knox McMahon, where he was convicted as indicted. App p. 1-346. Judge McMahon sentenced Petitioner to twelve years for burglary – 2nd degree (violent) and ten years for enhancement/property crime – 3rd or subsequent offense, to be served concurrently. App. p. 344;5-22.

Petitioner filed a notice of appeal and was represented by Appellate Defender David Alexander, Esquire. Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentence by unpublished opinion. State v. Tyris Bernard Glover, 2014-UP-043 (Ct. App. filed February 5, 2014). The Remittitur was sent on February 24, 2014.

On March 10, 2014, Petitioner filed an application for post-conviction relief alleging trial counsels were ineffective. App. 347 - 353. On June 30, 2014, the State filed a Return. App. 354 - 358. An evidentiary hearing was held on July 15, 2015 before the Honorable G. Thomas Cooper. Jonathan D. Waller, Esquire represented Petitioner. Assistant Attorney General J. Clayton Mitchell represented the State. App. 359. Petitioner and lead defense counsel Jeremy MacNealy, Esquire both testified at the hearing. Judge Cooper denied Petitioner's application for post-conviction relief in a written order issued on December 22, 2015. App. 404 - 411. A notice of appeal was filed, and it was perfected by John Strom, Esquire of the Office of Appellate Defense

¹ Counsel Cooper passed away prior to the PCR hearing.

with the filing of a petition for writ of certiorari on January 12, 2017. This return follows.

Factual History

On the morning of June 28, 2011, Petitioner entered Sharky's Bar ("the bar") while it was closed and stole forty-five packs of cigarettes. App. pp. 112-113; App. p. 122-23. When Ron Hubbard, the general manager of the bar, arrived at work, he found liquor bottles scattered around the bar, the cigarette machine was open and empty, and the cash register was damaged. App. p. 102; App. p. 107.

Shortly thereafter, Officer Schmidt arrived at the bar and reviewed the surveillance video. App. p. 63; App. p. 138. Officer Schmidt saw "a black male wearing a white shirt, blue jeans, [and a] hat" on the video. App. p. 63; App. p. 138. Officer Schmidt believed that the suspect was wearing a New York hat and carrying a book bag at the time of the burglary. App. p. 65; App. p. 142. The suspect also had a limp. App. p. 63; App. p. 142. Additionally, the suspect was caught on the video riding a bicycle past the bar. App. p. 65; App. p. 140. Officer Schmidt left the bar and started to patrol the area in order to try to find the suspect. App. p. 148.

Approximately fifteen minutes after Officer Schmidt left the bar, he encountered Petitioner on a public street in an area near the bar. App. pp. 64-65; App. pp. 148-149. Petitioner was pushing a bicycle and wearing a white shirt, blue jeans, and a hat. App. p. 65; App. pp. 149-151. Petitioner also had a book bag. App. p. 65. Officer Schmidt recognized Petitioner from the surveillance video of the bar. App. p. 65.

Thereafter, Officer Schmidt got out of his vehicle and asked Petitioner for Petitioner's name. App. pp. 65-66. Officer Schmidt told Petitioner to walk towards him in order to see if Petitioner had the same limp as the suspect in the video. App. p. 66. Officer Schmidt testified that Petitioner had the same distinct limp as the suspect on the video. App. p. 152. Additionally,

Officer Schmidt asked Petitioner if he could pat Petitioner down. App. p. 66. Further, Officer Schmidt asked for Petitioner's consent to search Petitioner's book bag. App. p. 66; App. p. 67; App. p. 149. Petitioner gave Officer Schmidt verbal consent to search the book bag and handed the book bag to Officer Schmidt. App. p. 66; App. p. 149; App. p. 160. When Officer Schmidt looked in Petitioner's book bag, he found cigarettes of the same brand that were stolen from the bar. App. pp. 66-67; App. p. 151.

At trial, two experts in latent fingerprint analysis testified that Petitioner's fingerprint matched a fingerprint found on a liquor bottle that the suspect touched in the bar. App. p. 182; App. p. 208.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether “**any** evidence of probative value” exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant 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.

ARGUMENT

There is probative evidence to support the PCR Court's finding trial counsel was not ineffective for failing to contemporaneously object to the in-court identification by witness Ron Hubbard.

Petitioner argues trial counsels were ineffective for failing to properly object to Ron Hubbard's identification of him in a surveillance video. He supports this claim by stating that the identification was improper, as Mr. Hubbard had never seen Petitioner in person and was not an eyewitness to the crime. Petitioner cites inconsistency between trial counsel's testimony and the finding of the PCR court as a reason for this issue to be overturned. Respondent disagrees.

The PCR court found this allegation to be without merit for several reasons, including that any potential suggestiveness portrayed to the jury by Hubbard's identification was remedied through cross-examination and argument. Specifically, the court found that trial counsel questioned Hubbard "in a manner to let the jury know that they will be watching the video themselves and will be able to judge the reliability of the identification. (Trial Tr. p. 124, line 14 - p. 125, line 6; p. 127, lines 15-19)." App. p. 407. Additionally, the court specifically referred to trial counsel's closing argument, in which he questions the reliability of Hubbard's identification now that the jury has viewed the video for itself. Id.

It is abundantly clear in the record exactly what Hubbard testified to – that he was 75-80% sure that the man on the surveillance tape was the Defendant/Petitioner. He never testified that he witnessed the Petitioner in the club or committing a crime, and his identification was hedged by the addition his percentage of surety. A reasonable person would have no reason to think that his identification of a person he had never met would be any better than his or her own. This is the very definition of a lay witness opinion: it "is rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or to determining a fact at

issue; and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” SCRCF 701. By testifying that he believed the recording system to be working correctly and, by his viewing of the tape, he believed with some certainty that the man on the tape was Petitioner, Hubbard provided no unusual or harmful testimony.

Regardless, Hubbard’s testimony was corroborated by law enforcement and reviewed by the jury. Investigator Williams testified that he watched the tape, as did several other officers, and they all believed that the individual on the tape was “identifiable” and later found and arrested. App. 216; 15-24. He also identified Petitioner in the courtroom as the man that had been arrested for these crimes. Additionally, the surveillance videos were viewed by the jury and, as noted, trial counsel argued after publication that they should decide for themselves if Petitioner was the man on the video. App. p. 407, citing trial transcript found at App. p.114;9-24. Trial counsels made credible, comprehensive, and effective arguments on the matter, and Petitioner has failed to meet his burden of proving prejudice.

Additionally, Petitioner has not carried his burden of proving prejudice. As the PCR court noted, had trial counsel objected to Hubbard’s testimony, there is no evidence that it would have been granted. App. p. 408. Additionally, it is fair to presume that Investigator Williams would have still testified and that the State would have managed to get the surveillance video before the jury. Lastly, the fact that overwhelming evidence existed against the Petitioner defeats the prejudice prong of Strickland. It is well-settled case law in this state that “no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt.” Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

Furthermore, the PCR court found that there was overwhelming evidence to find Petitioner guilty of the crimes. App. p. 408. Fingerprint evidence was involved in identifying and charging Petitioner, he was also found in possession of potentially stolen cigarettes, and he was located wearing the same clothes as the perpetrator in the video. App. p. 410. Investigator Williams also testified at trial that he believed overwhelming evidence existed against Petitioner on both direct and cross examinations. App. p. 247;1 and p. 272;5.

For the above-stated reasons, there is probative evidence in the record to support the PCR court's findings. Though Respondent maintains that there was no deficient performance on the part of trial counsel, it cannot be said that Petitioner experienced any prejudice as a result of alleged deficiency. Furthermore, the PCR court made a finding of overwhelming evidence that should not be disturbed. For the reasons stated above, this petition for writ of certiorari must be denied, and the must serve the remainder of his sentence.

CONCLUSION

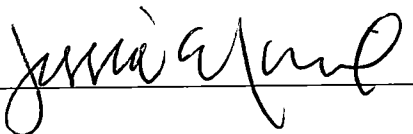
For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.


Respectfully submitted,

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By: 

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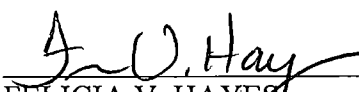
Respondent.

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:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
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This 29th day of June, 2017



FELICIA V. HAYES
Legal Assistant For Respondent