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ATTORNEY GENERAL

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JUL 31 2017
S.C. SUPREME COURT

July 31, 2017

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

Re: <u>Taurus Watts, #324820 v. State of South Carolina</u>
Appellate Case No.: 2016-000500
Lower Court Case No.: 2013-CP-40-3226

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 the Petitioner in his *pro se* capacity and the Office of Appellate Defense.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/mm
Enclosures

cc: Taurus Watts, #324820
Office of Appellate Defense

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016 – 000500
Lower Court Case No. 2013-CP-40-03226

RECEIVED
JUL 31 2017
S.C. SUPREME COURT

Taurus Watts, #324820,

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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PETITIONER'S QUESTIONS PRESENTED

1. Is there any evidence of probative value to support the PCR court's determination that trial counsel was not ineffective in failing to call witnesses and submit evidence to support the defense theory?
2. Is there any evidence of probative value which supports the p.c.r [sic] court's conclusion that counsel was not ineffective for failing to present a defense, in that counsel failed to present Kamelah Wilson as a witness?
3. Is there any evidence of probative value which supports the P.C.R. court's conclusion that counsel was not ineffective for failing to move to sever the Appellant's trial from that of co-defendant Wray?
4. Is there any evidence of probative value which supports the P.C.R. court's conclusion that counsel was not ineffective for failing to mve [sic] to question members of the jury on their impartiality?

STATEMENT OF THE CASE

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 true bill indicted during the August 2007 term of the Richland County Grand Jury for Murder (2007-GS-40-5913). Theresa Johns, Esquire, represented Petitioner. On October 5-9, 12-15, 2009, Petitioner proceeded to a jury trial before the Honorable J. Michelle Childs, where he was convicted as indicted. On October 15, 2009, Judge Childs sentenced Petitioner to thirty-five (35) years' imprisonment.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Katherine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence on June 1, 2012. State v. Watts, No. 2012-UP-381 (S.C. Ct. App. June 20, 2012). The Remittitur was issued on August 10, 2012.

Petitioner subsequently filed an application for post-conviction relief on May 30, 2013. On December 10, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Petitioner testified on his own behalf. Counsel Johns also testified. On March 4, 2016, Judge Cooper issued an Order of Dismissal, denying relief. Petitioner served and filed a notice of appeal to the South Carolina Supreme Court. A Petition for Writ of Certiorari was filed on November 17, 2016. Petitioner then moved to proceed *pro se* which this Court allowed by order issued February 28, 2017. The prior Petition for Writ of Certiorari was struck, and Petitioner filed his *pro se* petition on March 24, 2017. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. Counsel made the strategic decision not to call Deputy Weldon Gregory to testify. Regardless, Gregory's testimony would not have changed the result of the trial.

Petition first argues the PCR court erred in failing to find Counsel ineffective in not calling Deputy Weldon Gregory to testify. Specifically, Petitioner argues that Gregory's testimony would have supported a third-party guilt defense. (PWC p. 15). Counsel made the reasonable strategic decision in not putting up a case. Gregory's testimony, if offered, would not have had any effect on the jury's decision.

Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of 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); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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). With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

How the Issue was Raised at Trial

In the early morning of June 30, 2007, Petitioner and his codefendant, Tremaine Wray, fired multiple shots outside of the H&J Club in Richland County, fatally wounding Dumuria "Hank" Johnson. The bullet lacerated the left popliteal artery. (App. p. 1279-80). Johnson died as a result of the bleeding to death. (App. p. 1280). On June 29, 2007, the victim traveled with his friends Travis Malone and Lamont Goodwin from St. Matthews to Columbia. (App. p. 373). After meeting up with friends, the group decided to go to H&J Club, a bar in northeast Columbia. (App. p. 279-80; 304-05).

While inside the club, Charlie Bates, who was with the group, ran into his ex-girlfriend, Jalicca "Lisa" Johnson. (App. p. 248-99; 282). At some point during the evening, Charlie and another club patron were involved in an altercation revolving around Lisa Johnson. (App. p. 249-50; 282; 310-11). A fight ensured inside the club. (App. p. 399-400; 282-83). Charlie testified that it appeared the whole club was fighting against their group. (App. p. 316).

The group escaped from inside of the club. (App. p. 251-52). The victim was standing outside against a wall and was urging others in the group to run. (App. p. 251; 272). As they were running, they reached a small brick wall between the club and a car wash. (App. p. 251). As they arrived at the brick wall, shots were fired. (App. p. 401). The victim was shot. (App. p. 285).

Lamont testified that as they were heading back towards the cars from the club, he heard gunshots coming from the road. (App. p. 378). He did not see who was shooting. (App. p. 379). He could not say how many shots were fired. (App. p. 379). He indicated that it sounded like one gun, but he was not sure how many weapons were fired. (App. p. 380). Other witnesses testified

that they believed more than one gun was fired. (App. p. 258-59; 262). After learning that the victim was shot, the group then drove to Providence Northeast Hospital. (App. p. 253; 286).

Lisa testified she heard gunshots as she was getting to the kitchen door of the club. (App. p. 420). She could not say how many shots she heard because they were too fast. (App. p. 422). Lisa testified that she thought she saw Petitioner inside the club that night/early morning. (App. p. 464). Ricky Jacobs also indicated that he saw both Petitioner and codefendant Wray inside the club that night, although this was information he had not mentioned prior to his trial testimony. (App. p. 554-55; 608). Ricky Jacobs, the owner of H&J club, testified that after the fight, he closed the club early. (App. p. 515). He had the disc jockey stop the music and turned the lights up. (App. p. 515). Jacobs then walked outside and headed across the street to move his car. (App. p. 515-16). As he walked under the canopy where old gas pumps were at the convenience store beside the club, Jacobs saw Petitioner and codefendant Wray walking towards the club. (App. p. 518). Jacobs told the two men that the club was closing, and there was no need for them to go back. (App. p. 518). He noted that Petitioner said okay, and turned around to leave. (App. p. 518). Jacobs then observed Petitioner walking towards a tan or champagne colored Suburban. (App. p. 518). Both Petitioner and codefendant Wray got into the Suburban, with Petitioner getting in the passenger's seat. (App. p. 517-18). Jacobs noted that he had seen codefendant Wray drive that vehicle before. (App. p. 518-19).

Jacobs saw Petitioner had a black gun and that his hand was covered in cloth. (App. p. 520-21). Jacobs testified that Petitioner said, "I've got something for that," to Jacobs when Jacobs saw the gun. (App. p. 620). Jacobs identified Petitioner and codefendant Wray in photo lineup and identified the Suburban in a photo. (App. p. 534; 537; 538-39; 547-48).

Jacobs testified that the Suburban pulled out and headed down Hardscrabble Road towards Farrow Road. (App. p. 521). Jacobs heard a shot and then heard rapid fire. (App. p. 522-23). He could not tell how many shots were fired. (App. p. 523). He saw shots were being fired from the driver's side of the Suburban. (App. p. 524). The shots were being fired towards the club. (App. p. 524). He could not see who was shooting. (App. p. 524). Jacobs then saw a white Isuzu Rodeo leave the scene. (App. p. 526). Jacobs testified the passenger of the Rodeo sat up on the door and shot a pistol into the air one time. (App. p. 529-30).

While the murder weapon was not recovered by law enforcement, three witnesses testified about the disposal of the firearm. (App. p. 1152-1231).[1] Rashonda Simpson, who was married to codefendant Wray's cousin, testified that on July 1, 2007, she got into an argument with her husband, Jarrell Dansby, because he was digging a hole in their backyard to purportedly bury the murder weapon. (App. p. 880-83). She later saw Dansby walk over to her uncle, Brian Watson. (App. p. 884). Simpson testified that Watson took the gun apart. (App. p. 885-86). Watson and Dansby then put the gun in a book bag and left home. (App. p. 885). When they returned approximately forty-five minutes later, they did not have the book bag or the gun. (App. p. 885). Simpson testified that Dansby told her that they had thrown the gun into a river. (App. p. 895). Dansby testified that codefendant Wray asked if he could hide his gun at Dansby's house to hide it from his grandmother. (App. p. 919-20). Dansby enlisted Watson to help dispose of the gun. (App. p. 924). Watson testified that he threw the gun and the clip into a creek. (App. p. 999-1000).

[1] These witnesses were not located until the start of Petitioner's original trial date in trial in May of 2009, when Brian Watson, contacted the solicitor's office and indicated that he had information regarding the disposal and location of the murder weapon. Based on this information, the court granted the State's motion for continuance over Petitioner's objection to allow the State additional time to locate the murder weapon. Despite numerous attempts and tactics, including a dive team, the murder weapon was never found.

PCR Hearing

Gregory testified at the PCR hearing that he was the first responding officer. (App. p. 1780). He testified that it was his job to secure the scene and preserve any evidence. (App. p. 1781). Gregory's report was introduced by PCR counsel. (App. p. 1844-45). Gregory testified that he briefly spoke to Jacobs who told him that "two gentleman had tried to come in the club, and he told them that the club was closed . . . and nobody else could come in." (App. p. 1782). Gregory's report states in pertinent part:

> Compl states two Susp's attempted to enter the club and Compl told Susp's he was closed. Compl states of the Susp's made a comment to the effect 'I've got something for you." Compl states Susp's left the location and a few minutes later Compl states a white vehicle SUV with the Susp's in it began shooting toward the club. Compl described the vehicle possibly being a white Nissan with a black stripe down the side. Compl states Susp #2 fired over the top of the vehicle.

(App. p. 1844).

Discussion

There is probative evidence to support the PCR court's findings that Counsel was not deficient in failing to call Gregory to testify. Additional, his testimony would have been inconsequential and would not have changed the result of the trial. Counsel made the strategic decision to attack Jacobs' testimony through cross-examination rather than calling Gregory. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted).

Not only did Counsel conduct a thorough investigation of the case and into possible witnesses, she made the reasonable determination that calling witnesses would not have been in Petitioner's best interests. Counsel noted that there were four or five witnesses ready to testify in

Petitioner's case but she decided not to call any of them. (App. p. 1809). Counsel noted that Jacobs' testimony was the crux of the State's case. (App. p. 1807). While Counsel had reservations about her strategy after the fact, she conceded that, at the time, she believed it was in Petitioner's best interests to not call any witnesses to preserve final closing argument. (App. p. 1831). This was a reasonable determination. Gregory's testimony would not have added much substance to the case and would only have provided a few points for cross examination of Jacobs. Furthermore, law enforcement officers are typically not good witnesses for the defense.

In support of this contention, Petitioner cites to Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008).[2] However, since Miller, this Court has reexamined third-party guilt claims, notably in State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) cert. denied, 135 S. Ct. 400, 190 L. Ed. 2d 289 (U.S.S.C. 2014). The admissibility of evidence of third-party guilt is governed by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, the South Carolina Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. Id. at 105, 16 S.E.2d at 534. Furthermore, to be admissible, evidence of third-party guilt must be "limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence." Cope, 405 S.C. at 341, 748 S.E.2d at 206 (citing Gregory at 104, 16 S.E.2d at 534 (internal quotations omitted)). Pursuant to this standard, Petitioner cannot establish the requisite prejudice necessary for relief, as Gregory's testimony and report are not facts raising an inference or presumption of innocence because they are not facts or circumstances that tend to clearly point out someone else as the guilty party. Evidence of Jacobs initially informing the first responding officer that a passenger from a white

[2] The State notes that third party guilt was not specifically raised to the PCR court and questions whether this discussion is preserved.

SUV fired shots is not inconsistent with Petitioner's guilt, nor does it raise a "'reasonable inference'—and certainly not a presumption"—of Petitioner's innocence. See Id. Therefore, Petitioner cannot establish that he was prejudiced because such testimony would not have aided his third-party guilt defense. Certiorari is not warranted to address this issue.

II. Kamelah Wilson's testimony would not have changed the jury's verdict.

Next, Petitioner argues the PCR court erred in failing to find Counsel was ineffective in failing to call Kamelah Wilson as a witness. Wilson's testimony would not have changed the result of the trial because her testimony does not directly refute Jacobs' testimony.

Wilson provided testimony at the PCR hearing. She testified that she was present at the H&J Club the night of the shooting. (App. p. 1786). She explained that an unknown person pulled a gun in the club and people then scattered out of the club. (App. p. 1787-88). Wilson testified that she ran out of the club and across the street where she heard "a whole bunch of gunshots . . ." Id. She further testified that Jacobs was already across the street before the shooting started. (App. p. 1788-89). She testified that Jacobs would not have been able to see the shooting from his vantage point. (App. p. 1791). She explained that Jacobs had a house across the street from the club. (App. p. 1793).

First, Counsel conducted a reasonable investigation of witnesses who were present at the club the night of the incident. Wilson testified that she was not contacted by Counsel and never spoke to law enforcement about what she saw. Counsel's decision not to call witnesses to preserve last closing argument was reasonable. This issue turns on whether Wilson's testimony would have changed the result of the trial. It is important to note that the PCR court found Wilsons' testimony *not* credible. (App. p. 1838). This Court gives great deference to a PCR

judge's findings where matters of credibility are involved. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citations omitted).

The PCR court's finding that Wilson's testimony would not have changed the result of the trial is supported by the evidence. The PCR court found Wilson's testimony not credible. (App. p. 1838). Wilson's testimony at the PCR hearing was given over six (6) years after the incident. Wilson's testimony, even if taken as true, does not refute Jacobs' account of the shooting. The only substantive difference between Jacobs' and Wilson's testimony is that Wilson did not believe Jacobs could see the shots coming from the Suburban. In any event, Jacobs' testimony was inconsistent as he was thoroughly impeached throughout cross-examination by both Counsel and Swerling. Wilson's testimony would not have only added a few points for Counsel to make on her cross examination of Jacobs. The jury likely believed Jacobs despite his inconsistent testimony, so Petitioner is unable to prove that a point about Jacobs' line of sight would have changed the result of the trial. This Court should deny certiorari on this issue.

III. Counsel was not deficient in failing to move to sever his case from codefendant Wray's case. If made, the motion would have been denied.

Petitioner next argues that the PCR court erred in failing to find Counsel ineffective for failing to move to sever his case from codefendant Wray's case. "Criminal defendants who are jointly tried [...] are not entitled to separate trials as a matter of right." State v. Dennis 337 S.C. 275, 281, 523 SE2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). "Charges can be joined in the same indictment and tried together where they 1) arise out of a single chain of circumstances; 2) are proved by the same evidence, 3) are of the same general nature; and 4) no real right of the defendant has been prejudiced." State v.

Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). A court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." Id. at 282, 523 S.E.2d at 176.

Here, the PCR court was correct in finding Petitioner's rights were not compromised or violated because he stood trial with codefendant Wray. Petitioner argued that he "was painted by the jury with the same broad brush of guilty [sic] as applied to Wray." (PWC p. 21). While Counsel testified that in hindsight, she should have attempted to have the cases severed by making a motion, it would have been of no consequence to the result of the trial. The evidence presented against codefendant Wray was stronger which allowed Petitioner to argue that he was less culpable. The testimony presented showed that codefendant Wray involved other in disposing of the handgun that was fired the night of the incident. (App. p. 1152-1231). It was reasonable under prevailing professional norms not to move for a severance, chiefly because the motion would have been futile. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (attorney not deficient for failing to make futile arguments).

As to the prejudice prong, the PCR court did not err in finding that the motion to sever the case would have been unsuccessful. The incident that Petitioner and codefendant Wray were charged on was based out of the exact same circumstances, was proved by the exact same evidence, and was of the same exact nature. Finally, no specific trial right was violated by trying Petitioner and codefendant Wray together. Petitioner only argues that he was less culpable than codefendant Wray and fails to identify any specific trial right that was violated. Certiorari is not warranted to address this issue.

IV. Counsel was not deficient in failing to move to question individual members of the jury on their impartiality after a juror was dismissed for allegedly stating he would convict the defendants.

Lastly, Petitioner argues the PCR court erred in not finding Counsel ineffective for failing to question members of the jury on their impartiality. Petitioner argued Counsel was deficient in failing to request that the trial judge question the members of the jury on their impartiality after a juror was removed from the panel. During the trial, a juror came forward and told the trial judge that she overheard another juror saying he would convict the defendant while on his cell phone. (App. p. 51-67).

In addition, the PCR court did not err in finding that Petitioner did not suffer any prejudiced from this alleged deficiency because there was no evidence showing that any jurors were impartial. Petitioner failed to meet his burden of proof as no evidence was presented to support this allegation. Petitioner argues that questioning the reporting juror was not enough and that other jurors may have heard the comments. But, there was no evidence presented to support this contention. The PCR court was correct not to speculate and presume a juror was impartial because of the comments made one juror. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). This Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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BY:____________________________
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
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Certiorari to Richland County
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Appellate Case No. 2016 – 000500
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Taurus Watts, #324820,

Petitioner,

v.

State of South Carolina,

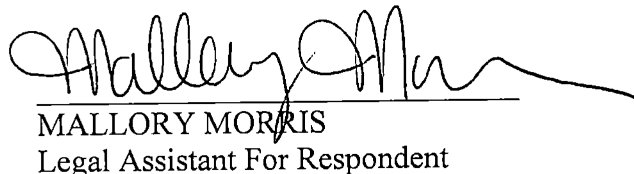
Respondent.

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:

Taurus Watts, #324820
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

This 31st day of July, 2017



MALLORY MORRIS
Legal Assistant For Respondent