

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County
Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2016-001845

GARVIN DUVALL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

TABLE OF CONTENTS

INDEX..... i

RESPONDENT’S QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS..... 4

STANDARD OF REVIEW..... 7

ARGUMENT..... 8

 I. There is probative evidence in the record to support the PCR Court’s finding Counsel did not render ineffective assistance by failing to move for severance of Petitioner’s trial from his codefendant, France Moore (Moore) because Counsel articulated a valid trial strategy for wanting a joint trial and Petitioner has not shown any prejudice resulted from a joint trial..... 8

 II. There is probative evidence in the record to support the PCR Court’s finding Counsel did not render ineffective assistance by failing to object to the sufficiency of the curative instruction or request a mistrial after the trial judge instructed the jury it could consider testimony by three witnesses as to the victim’s fear of Moore only as to Moore and not as to Petitioner. The judge’s curative instruction was thorough, is presumed to have corrected any prejudice, and the testimony did not prejudice Petitioner in any event because it was cumulative to other evidence..... 12

CONCLUSION..... 14

RESPONDENT'S QUESTIONS PRESENTED

- I. There is probative evidence in the record to support the PCR Court's finding Counsel did not render ineffective assistance by failing to move for severance of Petitioner's trial from his codefendant, France Moore (Moore) because Counsel articulated a valid trial strategy for wanting a joint trial and Petitioner has not shown any prejudice resulted from a joint trial.

- II. There is probative evidence in the record to support the PCR Court's finding Counsel did not render ineffective assistance by failing to object to the sufficiency of the curative instruction or request a mistrial after the trial judge instructed the jury it could consider testimony by three witnesses as to the victim's fear of Moore only as to Moore and not as to Petitioner. The judge's curative instruction was thorough, is presumed to have corrected any prejudice, and the testimony did not prejudice Petitioner in any event because it was cumulative to other evidence..

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. In April 2007, the Anderson County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime (2007-GS-04-1218) and criminal conspiracy (2007-GS-04-1219). App. 867-70. Robert Gamble (Counsel) and Matthew Perkins (Perkins), Esquires, represented Petitioner. App. 1. On May 15, 2009, Petitioner proceeded to trial before the Honorable J. Cordell Maddox, Jr., and a jury. App. 1. The jury found Petitioner guilty as indicted. App. 871-73. Judge Maddox sentenced Petitioner to consecutive sentences of thirty years for murder and five-years each for criminal conspiracy and possession of a weapon. App. 871-73.

Petitioner filed a timely notice of appeal. App. 865. Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense - Division of Appellate Defense perfected the appeal. App. 842-62. The South Carolina Court of Appeals affirmed Petitioner's conviction on February 16, 2012. State v. Duvall, Op. No. 2012-UP-132 (S.C. Ct. App. filed February 29, 2012). Petition for a Writ of Certiorari was denied on September 5, 2013. App. 866.

Petitioner then filed a post-conviction relief (PCR) application on September 26, 2013. App. 728-737. An evidentiary hearing into the matter was convened on June 8, 2016, at the Anderson County Courthouse before the Honorable R. Scott Sprouse. App. 745. Petitioner was present at the hearing and was represented by Hugh W. Welborn, Esquire. App. 745. Respondent was represented by Johanna Valenzuela, Esquire, of the South Carolina Attorney General's Office. App. 745. Petitioner, Counsel, and Perkins testified, and Judge Sprouse ultimately denied Petitioner's application by order filed September 6, 2016. App. 746, 833-41.

Petitioner filed a timely notice of appeal on September 7, 2016, and a Petition for Writ of Certiorari on March 17, 2017. This Return follows.

STATEMENT OF THE FACTS

On June 30, 1999, Paul Stephens (Stephens) was shot twice with the same gun - once in the back of the head and once in the back - resulting in his death. App. 520-521. Stephens was found a short distance away from his car, which had been set on fire, off Baugh Road in Anderson County. App. 132-35. White powder was found inside the car, but it tested negative for any controlled substance. App. 188-189, 220-221, 375-376.

Earlier that day, Stephens' ex-wife, who was Moore's daughter, was interviewed by Anderson police about a series of fraudulent checks. App. 313. After the daughter admitted to the check crimes and claimed Stephens had coerced her to write them, Moore had an outburst and stated in front of the investigating officer "she would" kill that son of a bitch," meaning Stephens. App. 314.

Around 2:45 pm, Moore was seen driving a white Toyota RAV4 from a spot on Baugh Road in the immediate vicinity of where the victim was found to a parking lot at Anderson Meats and Grocery with a male passenger. App. 226-229, 233-37, 262-265. She was identified by a store employee as the woman who used the pay phone there. App. 230-234, 343, 479-480. The employee could not identify the man with her, although he testified the picture of Petitioner "jumped out" as being the most similar. App. 269. Moore and the man left around 3 pm, and the first report of a fire on Baugh Road was made at 3:27 pm. App. 162-63. Investigators later learned three calls were made to Moore's daughter-in-law's home, where Stephens was living at that time, between 2:50 and 3:00 pm. App. 479-480.

Three witnesses testified Stephens had been living in fear of Moore, specifically a fear of being shot and having his car set on fire, for over three months. App. 295, 300, 305-06. The

witnesses testified he had made repeated statements sharing this fear and if that something like that ever happened to him, Moore should be investigated. App. 295, 300, 305-06.

Additionally, J.W. Stansell, an acquaintance of Petitioner, described a conversation that occurred between them on Sunday, June 27, 1999, three days before the murder, when they were both at a birthday party. App. 386, 389-90. According to Stansell, Petitioner asked him to go for a ride so they could talk. App. 389. Petitioner told Stansell he was in trouble and “said that Paul and he and some other people had been involved in some different criminal activity and that Paul was about to get arrested and was going to turn on them, and that Frances Moore was one of the ones that was involved, and that she along with some other people wanted Paul dead.” App. 390. Stansell testified Petitioner told him Moore was going to pay him \$2,000 to kill Paul. App. 390.

Stansell further testified Petitioner showed him a gun Petitioner claimed had been provided for him to do the murder, and Petitioner stated he was going to dispose of it afterwards by putting it in the furnace at Ryobi, where he worked at the time. App. 390-91. Stansell also testified Petitioner asked him if he wanted to do it and explained he knew of a location off the road where Stansell could hide behind some bushes and “pop” the victim when he drove up. App. 392-93. Stansell testified Petitioner told him he was going to leave some drugs at the scene and set the car on fire to make it look like a drug deal gone bad. App. 393. Stansell testified he learned the victim had been murdered later that week. App. 396-97.

Sometime after the murder, Stansell had a second conversation with Petitioner when he ran into him at the hospital. App. 397. Stansell testified he asked Petitioner if he had killed Stephens, and Petitioner told him he had. App. 397. Stansell testified Petitioner explained on the day of the murder he called Stephens from the pay phone at Anderson Meats, lured him out to Baugh Road, shot him in the back of the head, and set the car on fire. App. 398. Further,

Stansell testified Petitioner confirmed he took the gun and disposed of it at Ryobi, as they had discussed in June. App. 399. The State introduced evidence corroborating Petitioner's employment as the melt shop operator who ran the furnaces at Ryobi, as well as Petitioner's absence from work at Ryobi on June 30, 1999. App. 513-515.

STANDARD OF REVIEW

The PCR 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 PCR 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 PCR 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)).

ARGUMENT

- I. **There is probative evidence in the record to support the PCR Court's finding Counsel did not render ineffective assistance by failing to move for severance of Petitioner's trial from his codefendant, Frances Moore, because Counsel articulated a valid trial strategy for wanting a joint trial and Petitioner has not shown any prejudice resulted from a joint trial.**

Petitioner contends the PCR court erred in finding Counsel was not ineffective for failing to move for severance of Petitioner's trial from his codefendant, Frances Moore. PWC, p. 13. At trial, Moore's counsel argued Stansell's testimony was inadmissible hearsay as to his client. App. 23-25. The trial judge ruled the first part of Stansell's statement – that Moore had offered Petitioner \$2,000 to commit the murder – would likely be admitted as evidence of the conspiracy, but the second part – Petitioner's confession afterwards – was inadmissible because it did not contain any statement as to Moore. App. 36. The judge then expressed his concern about trying both defendants together due to their potentially conflicting interests and asked if there would be any motions to sever. App. 36-37, 41. Counsel and Moore's attorney both declined to make the motion. App. 41. However, Counsel testified he did not make the motion because he felt he had no grounds and because he wanted a joint trial as part of his strategy. App. 771-72.

“Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”

Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

At the evidentiary hearing, Counsel testified he did not make a motion to sever because he felt a joint trial was helpful to Petitioner, especially because Moore had never given a statement against him. App. 772. Counsel explained his strategy was to attack the credibility of Stansell, whose testimony was the main evidence tying Petitioner to the crime, which Counsel did at trial by, among other things, eliciting testimony about his membership in the KKK and his dubious ecclesiastic credentials. App. 772-773, 408-11, 417-21, 427-28. Counsel testified he felt if he could show Stansell was not credible, then the fact Moore had been silent and never made a statement against Petitioner would result in both of them being found not guilty. App. 772.

Counsel further testified he felt he had no basis to make a motion to sever because there was no way for Counsel to argue Petitioner was prejudiced under the circumstances. App. 771, 773. The statements at issue from Mr. Stansell were admissible against Petitioner in their

entirety. App. 38, 771. The trial judge initially ruled the State could only introduce the first part of Stansell's testimony, regarding Moore, provided they also introduced other independent evidence of the conspiracy. App. 36. At that time, Counsel noted his objection to the ruling, and informed the court he intended to elicit the full statement, including the testimony about Moore's offer to pay for the murder, on cross examination. App. 40. Counsel testified in that instance, Petitioner's codefendant had grounds to make a severance motion, but Petitioner did not. App. 771. Counsel did indeed elicit information regarding Moore's involvement on cross-examination, and the trial judge allowed it in over Moore's objection. App. 433-37.

Petitioner argues Counsel should have made a motion to sever based on the testimony of the three witnesses who testified as to Stephens's fear of Moore, because that testimony would have been inadmissible in a separate trial. PWC, 14. However, this testimony was cumulative to other testimony and evidence introduced at trial, so Petitioner was not prejudiced by the testimony. J.W. Stansell testified Petitioner told him Moore offered him \$2,000 to murder Stephens, and Stansell testified Petitioner explained his plan was to shoot the victim, set his car on fire, and make it look like a drug deal gone bad. App. 390-93. Stansell also testified Petitioner told him he was going to take the murder weapon to his workplace and throw it in the furnace. App. 391. Stansell's testimony was corroborated by independent evidence showing Petitioner was absent from work on the day of the murder, and Petitioner's job assignment at in June 1999 was to run the furnace. App. 513-15. Further, a man matching Petitioner's description was seen with Moore in the vicinity of the murder, at the pay phone at Anderson Meats, at the time the crime was committed. App. 226-229, 233-37, 262-265, 269.

Jointly tried criminal defendants are not entitled to separate trials as a matter of right. State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). In order for an appellate court to

reverse a conviction based on a trial court's failure to allow severance, a defendant must show prejudice. Id. "The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) (citing Dennis, 337 S.C. at 281, 523 S.E.2d at 176). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Id. Further, "an appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." State v. Stuckey, 556 S.E.2d 403, 497 (Ct. App. 2001).

Counsel was correct in his determination he did not have grounds to move for severance because Stansell's full statement was admissible against his client even in a separate proceeding. Any testimony as to the victim's fear of Moore was cumulative to Stansell's statement and other evidence introduced at trial, and therefore, Petitioner was not prejudiced by its admission. Furthermore, Counsel articulated a valid reason for wanting a joint trial – so he could impeach Stansell and rest on Moore's silence. App. 772. Because Counsel articulated a valid strategy for not moving to sever and because Counsel correctly determined he did not have a basis to make a severance motion in any event, the PCR court correctly found his performance was not deficient. Therefore, the Petition should be denied as to this question.

- II. There is probative evidence in the record to support the PCR Court's finding Counsel did not render ineffective assistance by failing to object to the sufficiency of the curative instruction or request a mistrial after the trial judge instructed the jury it could consider testimony by three witnesses as to the victim's fear of Moore only as to Moore and not as to Petitioner. The judge's curative instruction was thorough, is presumed to have corrected any prejudice, and the testimony did not prejudice Petitioner in any event because it was cumulative to other evidence.**

At trial, the State called three witnesses to testify Stephens was afraid of Moore, and specifically, Stephens was afraid Moore would kill him by shooting him and setting his car on fire. App. 295, 300, 306. The trial judge gave a curative instruction after each witness's testimony instructing the jury the evidence was admitted only in the State's case against Moore, not Duvall. App. 298, 303, 309. Counsel did not object to the sufficiency of the curative instructions. App. 298, 303, 309. Petitioner argues the Court of Appeals' decision in his direct appeal, finding this issue unpreserved, establishes that his counsel were ineffective and caused him prejudice. PWC, 16-17. However, the curative instructions given by the trial judge were thorough and clearly instructed the jury the testimony could only be considered against Moore, not Petitioner. App. 298, 303, 309. Additionally, the Solicitor's reference to these statements in closing only directed the jury's attention to Frances Moore. App. 660. The PCR court correctly found the fear testimony was cumulative to the testimony of Stansell, and therefore, Petitioner cannot prove the outcome of his appeal would have been different had the objection to the testimony been preserved.

"If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction. . . the error is deemed to be cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). The trial court in this case gave three curative instructions – one at the conclusion of each witness's testimony – that the testimony was admitted only in the State's case

against Moore, but not against Petitioner. App. 298, 303, 309. Further, the trial judge explained during his final jury instructions “the case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually.” App. 682. The trial judge also instructed the jury their verdict did not have to be the same for each defendant, and they should “take each defendant and consider the evidence as to that defendant. . . and reach a verdict.” App. 682. Because the trial judge gave thorough curative instructions at the end of each witness’s testimony, and again immediately before the jury began deliberations, any error in admitting the testimony was cured, and Counsel had no basis for an objection. Therefore, Counsel’s performance was not deficient.

Additionally, as discussed above, the “fear” testimony Petitioner complains of is cumulative to other evidence and testimony introduced at trial, so even if this Court finds Counsel should have made further objection to the curative instruction, Petitioner suffered no prejudice. Petitioner argues he was prejudiced because he was on trial for conspiracy, so the testimony as to Moore was prejudicial to him as well. PWC, 16-17. However, whether Moore came up with the plan or Petitioner did is irrelevant to Petitioner’s guilt in the murder or the conspiracy, and there was plenty of other evidence tying Petitioner and Moore to the murder. Stansell testified Petitioner told him Moore offered him \$2,000 to murder Stephens, and Petitioner explained his plan was to shoot the victim and then set his car on fire. App. 390-93. Further, a man matching Petitioner’s description was seen with Moore in the vicinity of the murder at the time the crime was committed. App. 226-229, 233-37, 262-265, 269. The PCR court correctly found the “fear” testimony was cumulative and would not have changed the outcome of Petitioner’s direct appeal. App. 838-39.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA,

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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:

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This 30th day of August, 2017


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