

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO Horry COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-001820

RECEIVED

SEP 05 2017

S.C. SUPREME COURT

Michael Tompai,.....Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S ISSUE PRESENTED

Trial counsel was not ineffective in failing to object to a police officer's testimony regarding an identification made from a video not introduced at trial because the testimony was merely cumulative of prior identification testimony presented by the victim of the crime.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In May 2013, the Horry County Grand Jury indicted Petitioner for armed robbery (2013-GS-61-2087). W. Thomas Floyd, Esquire, represented Petitioner. On June 10, 2013, Petitioner proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Petitioner guilty as indicted. Judge Hyman sentenced Applicant to seventeen years' imprisonment.

Petitioner filed a timely notice of appeal. Robert M. Pachak, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed Petitioner's appeal after review on June 30, 2014. State v. Tompai, Op. No. 2014-UP-276 (S.C. Ct. App. filed June 30, 2014).

Petitioner filed his application Post-Conviction Relief ("PCR") on May 11, 2015. App. 174-83. The State made its return on February 2, 2016. App. 184-189. An evidentiary hearing into the matter was convened on May 11, 2016, at the Richland County Courthouse before the Honorable Paul M. Burch. App. 190-220. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, W. Thomas Floyd, Esquire, Petitioner's trial counsel, testified.

By Order signed August 11, 2016, Judge Burch denied Petitioner's PCR. App. 221-228. A timely notice of intent to appeal was served on August 31, 2016. Appellate Defender Susan B. Hackett, Esquire of the South Carolina Commission of Indigent Defense - Office of Appellate Defense, filed a petition for writ of certiorari on April 19, 2017. This return follows.

¹ Anders v. California, 386 U.S. 738 (1967).

STANDARD OF REVIEW

This Court must affirm the post-conviction relief 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). In a PCR action, the petitioner has the burden of proving the allegations in his 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 Petitioner must show 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.” Id. at 441, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

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. The question is whether counsel “provided representation within the range of competence required” in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court

presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

ARGUMENT

There is probative evidence in the record to support the PCR Court's finding trial counsel was not ineffective when he did not object to Office Cusick's testimony regarding the surveillance video.

Petitioner asserts trial counsel was ineffective for failing to object to a police officer's identification of the Petitioner produced from watching a surveillance video that was not produced at trial. His argument is twofold: 1) Officer Cusick's lay witness opinion regarding the identification of the robbery suspect exceeded the permissible bounds, and 2) the State never justified its inability to produce the surveillance video at issue, thus inhibiting trial counsel's ability to perform. In supporting this argument, Petitioner cites to the order of dismissal in this matter and states that the PCR court found that counsel was deficient. PWC, 12 (citing App. 226, "could be interpreted as deficient performance as it allowed in some information that may not have been otherwise introduced."). However, in the next sentence, the PCR court finds "Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions." App. 226.

In support of his argument, Petitioner cites to State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012). Petitioner argues Fripp applies to the case at bar because it allows lay opinion testimony regarding identity of an individual if the witness is familiar with the suspect, and Office Cusick was not familiar with Petitioner. In Fripp, the surveillance video from which the identifications were made was not of very good quality, thus lending itself to the need for interpretation from other parties. However, Petitioner's reliance on Fripp is misguided because there is no testimony from Officer Cusick, the primary witness regarding the video, that the video was of poor quality. In fact, he describes the suspect in great detail after his review of the

video several months prior. App. 81;11-21. The record is otherwise silent on the quality of the video, and there was also no longer a video to produce.

Respondent asserts that, if anything, this is a best evidence issue, as the video was not available at trial. Petitioner is accurate in stating that the record reflects there was no evidence presented as to why the video was not available. The best explanation is provided by Officer Cusick, who testified an officer on the next shift was supposed to retrieve it from the scene, but he was unsure if that ever happened. App. 82;1-11. In referring to the South Carolina Rules of Evidence, both PCR counsel and PCR appellate counsel allude to the idea that the State is required to prove the best evidence is lost pursuant to Rules 1002 or 1004; however, neither of these rules or the cases cited in the comments to those rules make that requirement. Most cases involving lost originals consider the issue of whether a copy is sufficient. In this matter, there was no copy available, presumably because surveillance systems typically record over older information after a certain period. When trial counsel was asked during the PCR evidentiary hearing if the State could prove that the video was lost, he could not answer, and indicated that everyone understood that the video was lost. App. 201;10-13. He further testified it was his understanding that the video was lost in the shuffle and no one had access to it. App. 208;6-15. Lastly, he testified that he hired an investigator and sent the investigator to obtain a copy of the video, but without success. App. 199;15-17.

Respondent submits that the issue of Officer Cusick's testimony was one of credibility. The information regarding what he viewed was submitted to the jury, which had the opportunity to debate whether he was credible or not. Importantly, the jury also had the testimony of the victim of the robbery, who positively identified the Petitioner, selected him from a lineup, and

testified credibly at trial to the incident. It was this testimony that the trial court used to justify its ruling on trial counsel's motion for judgment notwithstanding the verdict:

Of course, the issue here is whether or not the verdict is supported by the evidence that we have heard in this case. I believe that it is. We have an eye witness who was able to identify Mr. Tompai. He was very concise and clear with his identification, and I think the verdict should stand. I would respectfully deny your motion, Mr. Floyd.

App.152;2-7.

Petitioner argues that Officer Cusick's testimony vouched for the store clerk's testimony, and "placed the imprimatur of law enforcement on the identification." PWC p. 18. He further argues that, had Officer Cusick's testimony been omitted, there is a reasonable probability that the outcome of the trial would have been different. PWC p.19. Respondent respectfully disagrees. The State presented a very credible witness in the store clerk, who testified emphatically that he was positive in his identification ("One hundred percent," App. 76;12), because he was trained to focus on appearances in such an incident. App. 72;24-73;9. The procedure for the photographic lineup process was found to be valid pursuant to Neil v. Biggers, 409 U.S. 188 (1972). There was enough credible evidence for the jury to have made their conclusion without Officer Cusick's testimony, thus negating any inference that there was reasonable probability otherwise.

In sum, Officer Cusick's testimony was cumulative evidence produced after the introduction of eyewitness evidence of the store clerk, and cumulative evidence cannot be prejudicial, as discussed infra. Respondent analogizes this to the introduction of hearsay evidence that repeats or bolsters a witness's testimony, as Petitioner argues Officer Cusick's testimony is essentially secondhand knowledge if there is no video to which we can refer. There are several cases in South Carolina that hold admission of this type of evidence is harmless when

it is merely cumulative. In State v. Vick, 384 S.C. 189, 199-200, 682 S.E.2d 275, 280 (Ct. App. 2009), testimony was presented to demonstrate the defendant's state of mind. Though the Court, in this instance, found that the testimony was not hearsay, it also held that "the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence." (citing State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006)). Similarly, in State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010), the Court of Appeals made the following analysis:

"[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009). Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors. Id. An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or *when the evidence is merely cumulative of other evidence.*

Id. at 199–200, 682 S.E.2d at 280 (emphasis added).

In the case at bar, the evidence presented by Officer Cusick is clearly merely cumulative, as the primary identification and evidence presented by the State was that of the store clerk. Because of its cumulative nature, it cannot be prejudicial toward the defendant at trial, and trial counsel cannot be deemed deficient or prejudicial for his performance regarding the testimony. A similar circumstance was presented to the Fourth Circuit Court of Appeals in the federal habeas corpus action of Tucker v. Ozmint, 350 F.3d 433 (2003), where Tucker alleged that his trial counsel was ineffective for failing to ascertain that an expert witness who was testifying against him had been placed on probation from practice. The Court held that Tucker's counsel was not ineffective in failing to introduce evidence of this probation because, with or without his testimony, the jury was presented with the State's overall theory of the case. Id. at 445. In the case at bar, Officer Cusick's testimony was cumulative, if not ultimately unnecessary, because

the jury had already been presented with the State's theory through the testimony of the store clerk. Trial counsel cannot be found to have caused prejudice to Petitioner in failing to object to Office Cusick's testimony because his testimony presented no new evidence to the jury.

For the above reasons, the PCR court correctly denied relief, as probative evidence exists to uphold its ruling that trial counsel was not deficient, Petitioner failed to establish prejudice, and, therefore, counsel was not ineffective. Respondent respectfully requests that this petition be denied and dismissed.

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: 
ATTORNEYS FOR RESPONDENT

Sept. 5, 2017

STATE OF SOUTH CAROLINA

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Certiorari to Horry County
Court of Common Pleas
The Honorable Paul M. Burch, Circuit Court Judge

2015-CP-26-3502
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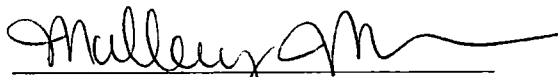
Respondent.

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:

Susan B. Hackett, Esquire
1330 Lady Street, Ste. 401
Columbia, SC 29201

This 5th day of September, 2017



MALLORY MORRIS
Legal Assistant for Respondent