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 – 000057
Lower Court Case No. 2013-CP-40-07559

Elbert Wallace, #264322,

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. Was trial counsel ineffective when he failed to object to testimony of a K-9 track offered by the State without proper foundation?

2. Was trial counsel ineffective for failing to call an essential witness?

3. Was appellate counsel ineffective for failing to argue improper joinder during Petitioner's direct appeal?

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 indicted during the March 2009 term of the Richland County Grand Jury for Burglary in the First Degree (2009-GS-40-0988), Armed Robbery (2009-GS-40-0989), Assault and Battery with Intent to Kill (2009-GS-40-0997), Burglary in the First Degree (2009-GS-40-1225), Armed Robbery (2009-GS-40-1228), and Murder (2009-GS-40-1229). He was also indicted during the April 2010 term for Burglary in the Second Degree (2010-GS-40-1229). Petitioner was represented by Tivis C. Sutherland, Esquire ("Counsel"). On July 18-21, 2011, Petitioner proceeded to a jury trial before the Honorable Clifton B. Newman, where he was convicted as indicted. Judge Newman sentenced Petitioner to life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.

A notice of appeal was filed on Petitioner's behalf and an appeal was perfected by Appellate Defender Susan B. Hackett ("Appellate Counsel"). Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. The Remittitur was sent on May 31, 2013.

Petitioner subsequently filed an application for post-conviction relief on December 16, 2013. On July 15, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Petitioner testified on his own behalf. Counsel Sutherland also testified. On December 29, 2015, 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 June 1, 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. Deputy Alexander properly testified as a lay witness to what he observed and to his actions the night of the incidents. Regardless, Petitioner suffered no prejudice from Counsel's failure to object to the K-9 track testimony.

Petition first argues the PCR court erred in not finding Counsel ineffective for failing to object to testimony regarding a K-9 track. Specifically, Petitioner argues the K-9 tracking testimony should have been introduced by an expert and was not appropriately offered by Deputy Chris Alexander who was not the K-9's handler. First, Deputy Alexander properly testified to his direct observations and interactions. Second, Counsel's strategy in handling Deputy Alexander was to discredit his testimony by questioning his knowledge and recollection of his involvement in the case. Third, no evidence was presented that the K-9 and its handler were unqualified. Finally, even if this testimony was excluded, there is overwhelming evidence to support the jury's verdict.

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

On January 31, 2009, Petitioner burglarized the home of Carolyn Webb, stabbed her, and robbed her of a quantity of cash, burglarized Christ Lutheran Church, burglarized the home of Linda Derrick, murdered her, and robbed her of jewelry and her car. (App. p. 36-40). First, Petitioner forced his way into Ms. Webb's home. (App. p. 254). Ms. Webb gave Petitioner $16 and was able to phone 9-1-1. (App. p. 258-59). Law enforcement arrived with a K-9 unit. (App. p. 281-83). Deputy Alexander testified about his involvement in the investigation. (App. p. 276-94). He explained that he "assisted the K-9 with the track as a backup unit or cover unit." (App. p. 282). He was not the K-9's handler and was there to "scan the area" and to "watch the [other] deputy's back and cover all sides." Id. The K-9 tracked Petitioner's scent to nearby Christ Lutheran Church where police found the church had been broken into. (App. p. 282-83). While at the church, the deputies found broken glass. Id. There was a broken window in the kitchen of the church and blood spots on the floor. (App. p. 299).[1]

Discussion

There is probative evidence to support the PCR court's finding that Counsel was not ineffective for failing to object to Deputy Alexander's testimony regarding the K-9 track. Deputy Alexander's testimony was lay testimony not expert testimony. He testified to his direct observations and his actions that night. While he testified that he followed the K-9 around Ms. Webb's house and to the church, he did not give any testimony that could be considered

[1] Petitioner voluntarily gave a DNA sample that matched the blood found at the church. (App. p. 824.

specialized.

That aside, Counsel employed a reasonable strategy in his approach to handling Deputy Alexander's testimony. Counsel emphasized that Deputy Alexander did not have any personal recollection of what happened that night and was merely reciting what was written in another deputy's report. (App. p. 290). In closing argument, Counsel argued that the State did not present the deputy who wrote the report that Deputy Alexander relied on because they did not want the jury to hear Ms. Webb's statement that she was 80% sure the assailant was the same man who appeared at her door earlier that day. (App. p. 1014-15). This strategy was reasonable and really attacked the heart of Deputy Alexander's testimony.

The testimony regarding the K-9 was particularly insignificant because the church break in would have been inevitably discovered along with Petitioner's DNA. While this doctrine is applicable to 4th Amendment challenges, it is also useful for our prejudice analysis in this context. On the night in question, after discovering the break-in to the church, law enforcement could not locate a contact person for the church. (App. p. 662). The following morning, just hours later, church members or staff cleaned up most of the blood stains inside the church before law enforcement was able to process the crime scene. Id. So, if the K-9 testimony was not admitted, then the State could have easily called various church members and staff to explain that a break in occurred at the church which is near Ms. Webb's residence. The K-9 testimony here did not lead to the identification of Petitioner as it did in State v. White[2]. The K-9 track led law enforcement to the site of another crime scene that would have been discovered just hours later. In reality, due to law enforcement's failure to secure the church, very little evidence was recovered.

[2] 382 S.C. 265, 268 (2009).

Furthermore, Petitioner did not present any evidence that the K-9 and handler in question would not have been qualified to give expert testimony after an objection. Applicants bear the burden of proving both deficiency and prejudice in PCR proceedings. See Butler v. State, 286 S.C. 441 at 442. Petitioner failed to make any showing that the K-9 and handler did not have the requisite training and experience to follow a scent and lead law enforcement on a trail. On the contrary, it is almost certain that the K-9 and its handler would have met the qualifications to have testimony regarding the track heard. Finally, there is clear and overwhelming evidence of Petitioner's guilt as specifically laid out in the Order of Dismissal. Even assuming that Counsel was deficient, he cannot prove that the outcome of the trial would have been any different had these objections been made. Certiorari is not warranted to address this issue.

II. Petitioner's sister's testimony would not have been helpful to his defense and had credibility problems. Additionally, this testimony would not have had any effect on the jury's verdict.

Next, Petitioner argues the PCR court erred in failing to find Counsel was ineffective in failing to call Vernell Wallace, Petitioner's sister, as a witness. Counsel did not believe her testimony to be credible or particularly helpful to Petitioner's defense. Vernell's testimony would not have changed the result of the trial because it does not provide an alibi defense nor does it add any substantive evidence that could have changed the result of the trial.

Vernell testiified at the PCR hearing. She explained that she is Petitioner's older sister and that they are close. (App. p. 1229). Petitioner lived on Vernell's property in what was formerly a workshop. Id. She testified that she was interviewed by private investigator Lee Connelly. (App. p. 1230). She detailed her recollection of the day before the incident took place and the night of. (App. p. 1231-34). She testified that sometime around 5:30-6:00 pm she asked Petitioner to go to the store to pick up something for her headache. (App. p. 1233). She stated

that Petitioner did and "came right back." Id. Vernell stated that Petitioner was at the house when she went to bed, at times when she awoke during the night, and when she woke up in the morning. She conceded that she did not know if Petitioner left the house between midnight and 3 o'clock in the morning. (App. p. 1236). She also testified that Petitioner cut his finger on her car.

Counsel made a reasonable strategic decision in not calling Vernell to the stand to testify. Counsel explained that he did not believe her testimony would be helpful. (App. p. 1202). He said that the statements taken as a whole were contradictory. Id. He noted that the statements also had credibility problems. Id. He testified he believed that Vernell's testimony regarding how Petitioner cut his finger could corroborate that part of his story. (App. p. 1203). The PCR court found Vernell's testimony not to be credible. (App. p. 1173). Counsel made a well-reasoned decision in not calling Vernell to testify. She would not be able to establish an alibi defense because she could not account for the hours the crimes took place. "To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime." State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only *less likely* the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012). Petitioner failed to present sufficient evidence to establish a *physical impossibility* that he was involved in the crimes.

Counsel also made the strategic decision not to call Vernell to testify how Petitioner injured his finger. Vernell's testimony would only be appropriate if Petitioner were to testify. Considering Petitioner's serious record and the risk of enduring cross examination, Petitioner stood no benefit to testifying. Vernell could possibly corroborate his statements about how he injured his finger, but there really is no benefit to corroborating this minor detail. Petitioner gave varying versions of what happened and how he stumbled upon the crime scenes leaving blood droplets and his DNA behind. The fact that Petitioner cut his finger earlier in the day instead of cutting it while stabbing Ms. Webb or while murdering Ms. Derrick, is immaterial. This certainly would not have changed the result of the trial. This Court should deny certiorari on this issue.

III. Appellate Counsel was not deficient because the severance issue is not clearly stronger than the juror misconduct issue raised on direct appeal. Further, the severance issue would not have required reversal.

Finally, Petitioner argues that the PCR court erred in failing to find Appellate Counsel ineffective for failing to raise the joinder on direct appeal. On appeal, Appellate Counsel raised the issue of whether the trial court properly refused to grant a mistrial "where individuals, whom the jurors perceived to be associated with Appellant, made threatening and intimidating remarks to at least three jurors violate Appellant's state and federal rights to a fair and impartial jury." (App. p. 1092-1110).

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and

prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to

appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

Here, the PCR court correctly found that Appellate Counsel was not deficient and that the issue was not clearly stronger than the juror misconduct issue raised. The severance issue, like the juror misconduct issue, follows an abuse of discretion standard of review. The trial court made its required findings and ruled that the charges were appropriately tried together because they "are related in kind, place, and character involving the closely connected transaction of offense." (App. p. 67-68). Appellate Counsel was not deficient for failing to raise a non-meritorious issue.

Petitioner also failed to meet his burden in proving that if the issue had been raised, then it would have required the appellate courts to reverse the conviction. See Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (no prejudice where there is no merit to arguments that were not briefed). "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. A ruling on a motion for severance is addressed to the sound discretion of the trial judge

and will not be disturbed on appeal absent an abuse of that discretion. State v. Caldwell, 378 S.C. 268, 277, 662 S.E.2d 474, 479 (Ct. App. 2008).

Petitioner's charges all arose from a single chain of circumstances, were proved by the same evidence, and are of the same general nature. The incidents happened one right after another: first Petitioner went to Ms. Webb's house, then the church, and then Ms. Derrick's house. The cases are proved by nearly all of the same evidence. As the State argued pre-trial, there are only four unique witnesses to the charges that arose from Ms. Webb's house and the church. (App. p. 39-40). All other witnesses would be the same. Id. Proof of one crime is proof of the other crimes. Likewise, these crimes are of the same nature with respect to them being violent assaults and robbery in homes of women who are alone. Furthermore, Petitioner also cannot point to any specific right that was violated by having these heinous crimes charged together. This is acknowledged in his petition. (PWC, p. 15).

Petitioner also argues that the prejudice analysis is burden shifting in that the defendant must prove he is prejudiced by having the charges tried together. While Petitioner fails to cite any authority to support this argument, the Fourth Circuit Court of Appeals has held that a defendant seeking severance of charges bears the burden of demonstrating a "strong showing of prejudice." See United States v. Branch, 537 F.3d 328 (4th 2008); United States v. Goldman, 750 F.2d 1221 (4th 1984) (holding the same). Our state courts follow the same rule in all contexts. See Gill v. State, 346 S.C. 209, 222, 552 S.E.2d 26, 33 (2001) (holding that "the defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of fair trial."); State v. Patterson, 324 S.C. 5, 13, 482 S.E.2d 760, 764 (1997) (holding that the defendant bears the burden of showing actual prejudice in a change of venue motion); State v. Grovenstein, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999) (defendant bears burden in proving

prejudice in jury misconduct challenges). This makes logical sense as it would be difficult for the State to prove a negative: that no specific rights of the defendant are violated. Finally, any grant of a reversal is precluded by the overwhelming evidence of Petitioner's guilt.

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 issues discussed above.

Respectfully submitted,

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BY: _____
ATTORNEYS FOR RESPONDENT

October 16, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

ELBERT WALLACE, #264322,

PETITIONER,

v.

THE 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:

Lance S. Boozer, Esquire
The Boozer Law Firm, LLC
1400 Laurel Street, Suite 4A
Columbia, South Carolina 29201

This 16th day of October, 2017

CAROLINE COLLINS
Administrative Coordinator, PCR

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 16 2017
S.C. SUPREME COURT

October 16, 2017

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

Re: **Elbert Wallace, #264322 v. State of South Carolina**
Appellate Case No. 2016-000057
Lower Court Case No. 2013-CP-40-07559

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

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

JCM/cc
Enclosures

cc: Lance S. Boozer (2 copies)