STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County
Maité Murphy, Circuit Court Judge

Appellate Case No. 2017-000850

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S.C. SUPREME COURT

DEMETRIUS D. SMALLS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

I. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's curative instructions after an improper comment by a prospective juror where Trial Counsel offered a valid strategic reason for choosing not to object in front of the jury pool and where there is no prejudice because Petitioner's prior record came in as impeachment evidence before the jury later regardless of this comment.

II. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's mutual combat jury instruction where the instruction was proper under the law and was supported by the evidence presented at trial.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Petitioner was indicted at the January 2011 term of the Barnwell County Grand Jury for murder (2011-GS-06-00065) and assault and battery with intent to kill (2011-GS-06-00066). The charges arose from an incident on August 20, 2009, during which Appellant shot Zantrell Mays and Terrance Mays, resulting in the death of Terrance Mays. The trial testimony established Petitioner got into a fistfight with Terrance Mays earlier in the day on August 20, 2009. Subsequent events led to Petitioner shooting Terrance Mays and Zantrell Mays in the chest, and Terrance Mays died from his wound. Petitioner asserted he acted in self-defense. App. 73-85, 195-198, 205-211, 231-242, 251-268, 379-429.

Josh Koger, Esquire, represented Petitioner. Deputy Solicitor David Miller, Esquire, prosecuted the case. Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. He was found guilty of the lesser included offense of voluntary manslaughter and as indicted for assault and battery with intent to kill. Judge Early sentenced Petitioner to twenty-five years for voluntary manslaughter and twenty-years for assault and battery with intent to kill, with the sentences running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf. On appeal, Petitioner challenged the trial court's denial of his motion for a mistrial based on prejudicial comments by a potential juror, as well as the denial of his motion for a new trial based on the trial court's purported prejudicial facial expressions during trial. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Smalls, 2015-UP-028 (Ct. App. filed January 15, 2015). The Remittitur was issued on February 2, 2015.

Petitioner filed a timely application for post-conviction relief on November 2, 2015, alleging he was being held unconstitutionally based on the following allegations:

1. Ineffective assistance of counsel
    a. Failing to contemporaneously object to the alleged indictments in this case.
    b. Failed to request Judge Early recuse himself from presiding over the trial.
    c. Failure to object to the trial court's instruction on mutual combat.
    d. Being found guilty of ABWIK where malice is an element but being found not guilty of murder where malice is an element.
2. Lack of subject matter and personal jurisdiction.

Respondent submitted its return on January 29, 2016. Petitioner filed amended applications on August 18 and August 30, 2016, adding the following allegations of ineffective assistance of counsel:

(a) Counsel failed to object, move for mistrial and/or preserve for appellate review the fact that during jury selection, one juror openly stated he had been previously incarcerated with the Applicant. A curative instruction was given, however, counsel failed to contemporaneously object to the instruction.

(b) Counsel failed to properly cross-examine Agent Green.

(c) Counsel failed to object to the jury instruction regarding mutual combat as it applied to both alleged victims.

(d) Counsel failed to object to the jury instruction regarding mutual combat based on the testimony one alleged victim first presented a firearm. State v. Taylor, Op. No. 25637 (S.C. Sup. Ct. filed June 12, 2003).

(e) Counsel failed to properly explain to Applicant what it meant to waive the three (3) day notice requirement regarding the indictment.

(f) Counsel failed to object, move for mistrial and/or preserve for appellate review a discussion occurring between the trial judge and jury foreperson. See pg. 523.

An evidentiary hearing was convened on January 26, 2017, at the Bamberg County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney

General Julie A. Coleman of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from Trial Counsel, Josh Koger, Esquire. Following the hearing, Judge Murphy issued an Order of Dismissal signed on March 1, 2017, and filed March 24, 2017, denying Petitioner's application for post-conviction relief.

Petitioner filed a timely notice of appeal on April 10, 2017. Petitioner's Petition for Writ of Certiorari and Appendix were filed on November 13, 2017. This Return to Petition for Certiorari follows.

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 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 action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, at 441, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "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, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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

I. Certiorari should be denied because probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to contemporaneously object to the trial court's curative instruction following an improper comment by a prospective juror in front of the jury pool. Trial Counsel offered a valid strategic reason for not objecting in front of the jury pool, and, more importantly, there is no prejudice because Petitioner's prior offenses came in as impeachment evidence at trial regardless.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to contemporaneously object to the trial court's curative instruction following an allegedly prejudicial comment by a potential juror in front of the jury pool. However, probative evidence supports both the PCR court's ruling that Trial Counsel offered a valid strategic reason for choosing not to object, and its ruling that Petitioner suffered no prejudice because his prior offenses were admitted at trial as impeachment evidence. Petitioner points to the South Carolina Court of Appeals' decision in his direct appeal as evidence of prejudice because the court found his subsequent motion for a mistrial was not preserved for appellate review. However, this argument eschews this Court's standard of review. Here, even if the issue had been preserved for appeal, it would not have changed the result of the appeal, so Petitioner cannot prove prejudice.

During jury qualification, in response to the trial court's question regarding any relationships with Petitioner, Juror No. 3 stated:

> Real close to them, personal friend, know the family a long time. Me and him had an incident a couple of years ago where we had been locked up together, and I feel, I feel I would, I that I would - - .

The trial court immediately excused the juror, and instructed the remaining potential jurors:

> [T]he fact this man mentioned that they were locked up in the past, that ain't got anything to do with this trial. Disregard, disregard that letter. I mean we all grow up sometimes and we may get in it a little. That ain't got anything to do with this case. Just disregard that.

App. 34-35. Trial Counsel did not object to the curative instruction in front of the jury pool or make any motion regarding the jury panel at that time. The trial court subsequently asked if any jurors knew of any reason they could not perform the jury's duty of determining the facts and applying it to the as instructed by the court. No juror indicated any problem based on Juror No. 3's statement.

After jury selection, the trial court asked if there were any motions regarding jury selection, and both the State and Petitioner responded there were none. The court dismissed the jury and asked Trial Counsel if he had a motion regarding the statement by Juror No. 3. App. 48-49. Trial Counsel moved to dismiss the selected jury panel and the entire jury pool on the ground Juror No. 3's statement that he and Petitioner "were locked up together" was prejudicial to Petitioner and tainted the jury pool. The trial court denied the motion, finding the curative instruction, combined with the subsequent question regarding whether there was any reason the jurors could not perform the jury's duty, cured any potential prejudice. App. 49-50.

At the PCR evidentiary hearing, Trial Counsel testified he did not object to the potential juror's comment at the time it was made because he did not want to draw more attention to it. App. 691, line 1-6. He stated that he objected to it later, outside the presence of the jury, to avoid drawing additional attention by making an objection in front of the jury pool. App. 691, line 8-11. Trial Counsel testified he believed that his objection was properly made and preserved the issue for appellate review at that time. App. 693. Trial Counsel noted Petitioner took the stand at trial, as necessitated by his self-defense strategy, and therefore his prior conviction was going to come out to the jury anyway. App. 694. He stated that if there had been any other convictions on Petitioner's record in addition to the 2005 charge, the Solicitor would have brought it out to the jury on cross-examination of Petitioner as well. App. 695.

In its Order of Dismissal, the PCR court found Trial Counsel articulated a valid trial strategy for choosing not to object in front of the jury pool. Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). 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).

Here, the PCR court found Trial Counsel credibly testified that he chose not to draw the jury pool's attention to the juror's comment by objecting to it. App. 739. It noted Trial Counsel immediately objected once he was outside the presence of the jury and requested a new trial, and the trial court gave a curative instruction. App. 739. Trial Counsel's testimony constitutes probative evidence that supports the PCR court's finding that he articulated a valid trial strategy in choosing not to object. Furthermore, in his Petition, Petitioner argues counsel could have approached the bench to make a contemporaneous objection and preserve the issue for appeal. This suggestion ignores the fact that approaching the bench would have drawn the jury pool's

attention to the comment as well. The strategy was valid under either scenario. Thus, the ruling that there was no deficiency in Trial Counsel's representation should be affirmed.

Secondly, even if Trial Counsel were somehow deficient, there is no resulting prejudice from his failure to object. First, the PCR court found there was no prejudice because the jury heard about Petitioner's prior convictions later in the trial when he took the stand to testify. App. 739. In order to present a successful strategy of self-defense under the facts and circumstances of this case, Trial Counsel opined Petitioner had to take the stand and testify at trial. Petitioner had a prior cocaine conviction from 2005 which was admissible as impeachment evidence and was brought out in front of the jury. The PCR court found that there was no resulting prejudice from the potential juror's comment because the jury ultimately heard about Petitioner's prior record regardless of the comment.

Moreover, even if the issue had been properly preserved for appeal, it would not have changed the outcome of the appeal, so Petitioner can show no prejudice. The trial court has broad discretion when determining whether potential jurors are qualified to serve on the jury. See State v. Mercer, 381 S.C. 149, 672 S.E.2d 556, 560 (2009) ("'Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.'") (quoting Uttecht v. Brown, 551 U.S. 1, 9 [2007]). The trial court's determinations regarding juror qualifications will not be disturbed on appeal unless wholly unsupported by the record. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99, 104 (1999).

Petitioner conceded in his direct appeal that nothing in the potential juror's vague comment about being locked up with Petitioner in the past indicated "whether [Petitioner] was

incarcerated for the current charge or for a previous charge," "whether he was actually convicted of the potential prior charge," or "a nexus or logical relevance between the prior bad act and the current offense." (Brief of Appellant, p. 6). Thus, under Petitioner's own analysis of the comment, it was so vague it could not possibly constitute sufficient prejudice to warrant disqualifying the entire jury pool. If counsel had contemporaneously objected he still would have lost this argument on direct appeal. Petitioner has failed to carry his burden of proving otherwise.

Finally, a curative instruction is generally deemed to cure any alleged error. State v. Walker, 366 S.C. 643, 623 S.E.2d 122, 129 (Ct.App. 2005); see also State v. Bantan, 387 S.C. 412, 692 S.E.2d 201, 204-206 (Ct. App. 2010) (witness' reference to defendant's presence on an inadmissible surveillance video did not warrant mistrial in light of trial court's curative instruction indicating the jury should disregard the testimony). In this case, the trial court immediately excused the juror at issue, and instructed the remaining jurors the excused juror's reference to being "locked up" with Petitioner had nothing to do with the present case, and they were to disregard the statement entirely. Rather than enhance the prejudice as Petitioner alleges, the court effectively minimized the reference by alluding to it as a youthful indiscretion everyone experiences. App. 35.

Subsequent to the curative instruction, the trial court asked if there was "any reason whatsoever" any of the remaining jurors could not perform the duty of determining the true facts of the case and applying those facts to the law as instructed by the court. Only two jurors responded, and neither mentioned the excused juror's vague statement as a reason they could not perform that duty. App. 43-46. Consequently, there is absolutely **no** evidence the excused juror's statement "tainted" the remaining jurors in any way, and therefore, the circuit court properly denied Petitioner's motion to disqualify the entire jury pool. See State v. Anderson, 754

S.E.2d 761, 764-66 (W.Va. 2014) (prospective juror's statement in the presence of other prospective jurors that defendant "just looks guilty" did not taint the jury pool such that a mistrial was warranted); State v. Betancourt, 322 P.3d 353, 362-63 (Kan. 2014) (prospective juror's reference to the crime being "gang related" during *voir dire* did not warrant a mistrial because the juror mentioned gang involvement only in passing, the topic was not raised again, and the remaining jurors indicated during general *voir dire* they could decide the case on the evidence before them).

For all these reasons, Petitioner can show no prejudice from Trial Counsel's failure to object because the issue would not have succeeded on appeal if it had been preserved. Because probative evidence supports the PCR court's finding that there was no deficiency or prejudice, this Court should affirm its findings.

II. Certiorari should be denied because probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the mutual combat jury instruction where the instruction was proper under the law and supported by the evidence presented at trial.

Petitioner alleges the PCR court erred in finding Trial Counsel was not ineffective for failing to object to the mutual combat jury instruction because there was no evidence that Petitioner agreed upon a gun fight but instead armed himself in self-defense after a fist-fight escalated and the victim drew a gun. However, probative evidence supports the PCR court's finding that the mutual combat charge was properly given where evidence presented at trial supported the charge, and therefore Trial Counsel was not ineffective for failing to object.

The trial transcript and the testimony presented at the evidentiary hearing reveal Petitioner was involved in a fist-fight between himself and the two victims in this case, which followed a confrontation that took place earlier in the day. During the fight, one of the victims, Zantrell Mays, pulled out a gun, cocked it, and waved it in Petitioner's face. See App. 169, App. 170, App. 111-113. Petitioner then turned away, grabbed a gun from a friend in the group of onlookers, and shot both victims, killing one and injuring the other. See App. 170, line 9-13.

The State presented testimony of Zantrell Mays, Petitioner's written statement confessing to grabbing a gun during the fight and shooting the two victims, and testimony of multiple eyewitnesses who were present during the incident, including Tiffany Haynes, William Henry Jones, and Carlen Thomas. App. 73-85; 170; 204-211; 230-243; 250-274. In its jury charge, the trial court gave the following instruction:

> If the defendant voluntarily participated in mutual combat, a fight, for purposes other than protection, the killing of the victim would not be self-defense. This is true even if, during the combat, the defendant feared death or serious bodily injury... For mutual combat, there must be a mutual intent and willingness to fight. This intent must be shown by the acts and conduct of the parties and the circumstances surrounding the combat.

App. 515, line 11-23. Trial Counsel did not object to this instruction.

Jury charges must be based on the evidence presented. "The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A jury charge is appropriately given if there is any evidence presented that would support it. To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 301, 395 S.E.2d 740, 741 (Ct.App.1990).

Mutual Combat negates a claim of self-defense. State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919). South Carolina courts have held that there must be "mutual intent and willingness to fight" to constitute mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." Id. "Where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder." State v. Andrews, 73 S.C. 257, 257, 53 S.E. 423, 424 (1906). The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. See, e.g., State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977).

In its order, the PCR court found the jury charge of mutual combat was properly given in this case, and thus Trial Counsel was not ineffective for failing to object to the instruction. App. 742. The PCR court explained there was evidence presented at the trial that there was a dispute between Petitioner and the two victims earlier in the day. There was evidence presented that Petitioner and the two victims willingly entered into a separate altercation that evening, and they all physically fought each other. The PCR court noted that, more importantly, there was evidence

that, at some point during the fight, the victim pulled out a firearm, and Petitioner pulled out a firearm in response. App. 742. Petitioner then shot both the victim who pulled the gun and his unarmed younger brother.

This evidence presented at trial consisted not only of eyewitness testimony from at least three onlookers of the fight, but it also included a written statement given by Petitioner in which he admitted his involvement in the fight and that he grabbed a gun in response to Zantrell Mays pulling out a gun. Petitioner argues this Court's opinion in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) stands for the proposition that a mutual combat charge is not appropriate in a shooting that started as a fist fight. This reading is too restrictive. Taylor merely establishes a mutual combat charge is not proper where the parties are engaged only in a fist fight. Here, the parties were not, and the fight mutually escalated into a gun fight. Because there was evidence presented that both Petitioner and the victim were armed in this fight, the mutual combat instruction was properly given. The underlying fight and ongoing dispute in this case distinguishes the facts from a self-defense case. The ongoing dispute coupled with the parties' escalation of the fight into a gun fight create mutual combat. Any objection to this instruction would have been overruled.

Accordingly, Trial Counsel cannot be deficient for failing to object to this charge, and there is no resulting prejudice. Because probative evidence supports the PCR court's finding that the jury charge was proper under the law and supported by the evidence presented at trial, this Court should affirm its finding that Trial Counsel was not ineffective for failing to object to the charge.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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March 30, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County

The Honorable Maite' Murphy, Circuit Court Judge

DEMETRIUS D. SMALLS, #344584

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 30TH day of March 2018.

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