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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Richland County

The Honorable Henry F. Floyd, Trial Judge
The Honorable J. Ernest Kinard, Jr., Post-Conviction Relief Judge

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MAY 30 2017

S.C. SUPREME COURT

Appellate Case No. 2016-001079

Stephen Smalls,.....Petitioner,

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in finding the State presented overwhelming evidence of guilt such that no prejudice resulted from each of three separate incidents of deficient performance by trial counsel?
2. Did the Court of Appeals err in refusing to find the cumulative effect of the three separate incidents of deficient performance by trial counsel established prejudice requiring a new trial?

STATEMENT OF THE CASE

Petitioner was indicted at the July 2000 term of the Court of General Sessions for Richland County for armed robbery (2000-GS-40-52623). Petitioner was represented by Sheila Mims, Esquire and LaNelle Cantey DuRant, Esquire. On May 2, 2002, Petitioner proceeded to trial, at which he was found guilty of armed robbery. The Honorable Henry F. Floyd sentenced Petitioner to a period of twenty-five years' imprisonment.

Petitioner filed a timely notice of appeal and an appeal was perfected. Petitioner's conviction and sentence were affirmed. State v. Smalls, Op. No. 2004-UP-315 (S.C. Ct. App. filed May 13, 2004). The remittitur was issued on June 21, 2004.

Petitioner filed an application for post-conviction relief (PCR) on May 18, 2005. Respondent made its return on January 10, 2006. An evidentiary hearing was convened on July 31, 2007 before the Honorable James C. Williams. Tara Dawn Shurling, Esquire represented Petitioner. At the close of the hearing, the record was left open to gather additional testimony. On January 13, 2012, a second evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. By order dated March 2, 2012, Judge Kinard denied and dismissed the application with prejudice. On April 13, 2012, Petitioner filed a Rule 59(e) motion to alter or amend the order. On May 8, 2012, Judge Kinard denied the motion. Subsequently, Petitioner filed a timely notice of appeal on July 10, 2012, which was perfected by the filing of a petition for writ of certiorari on April 1, 2013. The State filed its return on June 14, 2013. The Court of Appeals granted certiorari on August 20, 2014. Petitioner filed its brief of petitioner on December 18, 2014. The State's brief of respondent was filed on April 22, 2015. On October 22, 2015, a three judge panel of the South Carolina Court of Appeals heard arguments. On February 10, 2016, the

Court of Appeals affirmed the denial of relief by the PCR judge in a published opinion. Smalls v. State, 415 S.C. 490, 783 S.E.2d 817 (Ct. App. 2016). A timely petition for rehearing was filed but denied on April 21, 2016. Petitioner filed a petition for writ of certiorari with this Court on May 23, 2016. The State filed a return on June 22, 2016. On March 7, 2017, this Court granted the petition for writ of certiorari and ordered additional briefing. The brief of petitioner was filed on April 6, 2017. This brief of respondent follows.

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. See Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC.

ARGUMENT

I. The State presented overwhelming evidence of guilt such that no prejudice resulted from the deficient acts of counsel.

Petitioner argues the Court of Appeals erred in upholding the PCR court's finding and holding that, though trial counsel was deficient, this performance did not cause prejudice to Petitioner because the State produced overwhelming evidence of the Petitioner's guilt at trial. It is well-settled case law in this state that "no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). It is uncontroverted by both the PCR court and the Court of Appeals the amount and character of evidence presented at trial could be characterized as overwhelming. Though Petitioner goes to great lengths in analyzing each instance of deficient performance, the overarching fact that no prejudice befell the Petitioner cannot be ignored. The Court of Appeals appropriately deferred to the findings of the PCR court and its decision to deny this application. See Jordan, 406 S.C. at 448, 752 S.E.2d at 540; Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006) (cited in Smalls, 425 S.C. at 496). Though the PCR court kept its ruling rather general, the Court of Appeals recited the factors that demonstrated Petitioner's guilt: victim identification, fingerprint, flight, and the fact that Petitioner's status as a convicted felon was properly admitted at trial harmed his credibility. Smalls, 425 S.C. at 502.

The guiding opinion of Strickland v. Washington acknowledges the issue of prejudice

may be the turning point in evaluating ineffective assistance of counsel: “The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” Strickland, 466 U.S. 668 (1984). There is certainly probative evidence to support both the PCR court and Court of Appeals’ congruous findings that, though there was deficient performance by trial counsel, there was no prejudice to Petitioner due to the existence of overwhelming evidence.

To be more specific, in analyzing Petitioner’s three main issues, there is clearly no prejudice for each one. Regarding failure to object and move for a mistrial regarding the gun used in the burglary: Petitioner was identified in a photo lineup and again in the courtroom (App. p. 78 and 82); Petitioner fled when approached by police, dropping a two year old baby in the middle of the street (App. p. 289, lines 12-22); Petitioner’s fingerprint was found on the weapon used the night of the robbery (App. p.. 265); this was not brought up again in closing argument; and there is overwhelming evidence of guilt. Regarding failure to object to solicitor’s opening argument that Appellant was seen by police fleeing the scene: there was no deficiency because the State merely argued what the victim would testify to at trial (App. p. 74, 2-13); no prejudice because the judge instructed the jury that opening and closing arguments are merely opinions of the evidence and should not be considered (App. p. 352, 20-24; p. 361, 22-25; p. 389 line 23-p. 390, 2); and overwhelming evidence of guilt. Lastly, regarding failure to object to not being able to cross examine the Petitioner about his pending or dismissed carjacking charges: Solicitor Pascoe testified that he had talked to the prosecutor who said the charges were dismissed; PCR court found no credible evidence presented that the dismissal of the charges somehow influenced his

trial testimony (App. p. 542); there is no prejudice because Petitioner was already impeached with his prior convictions (App. p. 96); and overwhelming evidence of guilt.

There was clear evidence of probative value in the record to support the PCR court's and Court of Appeals' findings. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. Therefore, the Court of Appeals should be affirmed.

II. The Court of Appeals properly declined to apply a cumulative effect analysis when considering the prejudicial effect, if any, that counsels' acts had on Petitioner.

The courts of this state have declined to recognize the idea that several deficient acts of counsel could have a cumulative and prejudicial effect, thus constituting ineffective assistance of counsel. Regardless, Petitioner attempts to differentiate the facts of the case at bar from that of Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), the leading case in this state regarding the notion. In Green, this Court declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). Similarly, Petitioner evaluates several direct appeal cases decided by this Court and the South Carolina Court of Appeals that cite things such as "collective impact of numerous errors" and attempts to analogize that to PCR cases. State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (accumulation of errors warranted reversal, but Court also found each individual error

caused prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find the alleged error(s) is, in fact, one that prejudices the Petitioner's rights under the Constitution. Only then can the cumulative prejudice arising from the error be considered, as these injustices are the ones that post-conviction relief is designed to rectify. To hold otherwise is to conclude that even appropriate and effective performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996) (an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation."); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995) (cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors). The Eighth and Sixth Circuit Courts of Appeal have expressly rejected cumulative error analysis in terms of Federal Habeas Corpus actions because such an analysis is not in line with precedent set by the Supreme Court of the United States. See Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006); Lorraine v. Covle, 291 F.3d 416, 447 (6th Cir.2002).

Simply, the issue of granting post-conviction relief based upon the cumulative prejudicial effect of two or more instances of deficient performance is one that South Carolina has not accepted. Based on the rationales stated in the federal cases cited above, this reasoning makes sense – incidents that do not rise to the level of a constitutional violation separately cannot and should not be combined to become a constitutional violation. Due to the nature of the deficiencies in the case at bar, combined with the overwhelming evidence presented at trial, there is no sound rationale for this Court to alter its line of case law at this time. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the Court of Appeals’ order should be affirmed.

CONCLUSION


For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By: 
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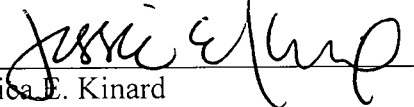
Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Felicia V. Hayes, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 30th day of May, 2017.


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