

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-000816

JERON ALONDO COOK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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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 comments to the jury asking them to seek a "true and just verdict" where the jury instructions as a whole were free from error.

- II.** Whether probative evidence supports the PCR court's finding that no actual conflict of interest existed or affected Trial Counsel's representation of Petitioner.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was true bill indicted at the April 2010 term of the Sumter County Grand Jury for assault and battery with intent to kill, murder, first-degree burglary, possession of a firearm during the commission of a violent crime, and unlawful carrying of a handgun (2009-GS-43-882). Ernest Finney, III, Esquire, represented Petitioner. On April 21, 2010, Petitioner proceeded to a jury trial before the Honorable W. Jeffrey Young and was found guilty of voluntary manslaughter, possession of a weapon during the commission of a violent crime, and unlawful carrying of a handgun. Petitioner was acquitted on the charges of assault and battery with intent to kill and murder. Judge Young sentenced Petitioner to a twenty-two year term of imprisonment for voluntary manslaughter, to run consecutively to a five year term of imprisonment for possession of a firearm during the commission of a violent crime and a one year term of imprisonment for unlawful carrying of a handgun.

A timely Notice of Appeal was filed and an Anders¹ brief was submitted on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Jeron Cook, Op. No. 13-UP-349 (Ct. App. filed September 4, 2013). The Remittitur was issued on September 20, 2013.

Petitioner filed his first application for post-conviction relief on March 21, 2013 (2012-CP-43-522). Respondent made its Return and Motion to Dismiss without Prejudice July 31, 2013. In an Order of Dismissal without Prejudice signed August 5, 2013 and filed August 8, 2013, the Honorable George C. James, Jr., denied and dismissed this application without

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

prejudice until Petitioner's pending direct appeal in the South Carolina Court of Appeals could reach its conclusion.

Petitioner subsequently filed his second and current application for post-conviction relief on April 3, 2014. An Order was issued by the Honorable George C. James, Jr., on April 27, 2015, authorizing discovery. In his application, Petitioner alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to conduct investigation of case facts.
2. Ineffective Assistance of Appellate Counsel
 - a. Failure to raise claims requested.

Respondent made its return on November 14, 2014. Petitioner filed an amended application on February 10, 2016, adding the following allegations:

1. Ineffective assistance of trial counsel for failure to conduct a reasonable investigation prior to trial.
2. Ineffective assistance of trial counsel for failure to discuss and inform Applicant of all available defenses and reach an informed trial strategy with Applicant prior to trial.
3. Ineffective assistance of trial counsel for failure to discuss the implications (i.e. establishing the elements of manslaughter) his testimony could result in at trial.
4. Ineffective assistance of trial counsel for failure to utilize additional witnesses at trial to corroborate Defendant's testimony, support the defense argument, or establish additional defenses and/or reasonable doubt.
5. Ineffective assistance of counsel for failure to object to the Court's opening comments to the jury regarding a true and just verdict. Transcript p. 51, lns. 8-10.
6. Ineffective assistance of counsel for failure to fully cross-examine and impeach the State's witnesses.
7. Ineffective assistance of trial counsel for failure to object to the jury being charged on voluntary manslaughter and/or failure to preserve the matter for appeal.
8. Ineffective assistance of trial counsel for failure to utilize the ten day time period offered by the court to file a post trial motion and for electing to only proceed with a motion for a new trial immediately after sentencing.
9. Ineffective assistance of trial counsel due to a conflict of interest: Prior to trial Applicant was advised by counsel that it would present a conflict for him to proceed with representing Applicant due to his campaign for Solicitor that

resulted in his election later that year, yet he continued with representation without Applicant waiving the conflict.

10. Pursuant to Rule 15(b), SCRCPP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.
11. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal.

An evidentiary hearing was convened before the Honorable Brooks P. Goldsmith on March 16, 2016, at the Sumter County Courthouse. Petitioner was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. Judge Goldsmith denied and dismissed the application in an Order signed December 27, 2016, and filed January 12, 2017. Petitioner served a motion to reconsider pursuant to Rule 59(a) and (e), SCRCPP, on January 16, 2017. Respondent filed a return to the motion to reconsider on February 7, 2017. Judge Goldsmith filed an Order Denying Motion on February 9, 2017.

Petitioner filed a timely Notice of Appeal on April 6, 2017. Petitioner's Petition for Writ of Certiorari and Appendix were filed on January 22, 2018. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. 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 his or her application. Rule 71.1(e), SCRCPP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 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, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 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. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's comments to the jury asking them to seek a "true and just verdict" where the jury instructions as a whole were free from error.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to object to the trial court's comments to the jury about seeking a "true and just verdict." However, this issue is meritless, as probative evidence supports the PCR court's ruling that the comments likely did not change the result of the trial because the trial court's instructions as a whole were free from error and clearly explained the State's burden of proof. Accordingly, Petitioner failed to meet both prongs of the Strickland test, and this Court should affirm the PCR court's denial of post-conviction relief.

In his argument, Petitioner points to specific instances in the trial court's jury instructions where the trial judge, Judge Young, explained that the jurors were to "search for the truth":

At the start of trial, Judge Young told the jurors they were engaged in a "search for the truth." He defined a trial as "[a] search for the truth in an effort to make sure that justice is done." App. 28, 11. 4-6. He expounded: "Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive, the exact opposite of what you've seen on TV or movies and read in books." App. 28, 11. 6-9. According to the judge, the attorneys were there to help the jurors "in [their] search for the truth." App. 28, 11. 14-19. He informed the jurors they had taken "an oath to listen to the evidence of this case and reach a fair and just verdict." App. 28, 11. 22- 25. After telling the jurors that they were the judges of the fact, he explained the jury would hear the evidence, then "deliberate and render a true and just verdict" pursuant to their oath. App. 31, 11. 8-10. Along these lines, Judge Young instructed the jurors it was their "sole responsibility to determine the guilt or the innocence of the defendant." App. 32, 11. 19-21. He told the jurors they would "be in a position to determine what the true facts are and to apply the law to those facts and thus render a true and just verdict." App. 35, 11. 13-16.

...

The judge's final instructions to the jury included elements of the truth-seeking as well. Specifically, the judge told the jurors it was their "duty to determine the value, weight, and truth of the evidence presented during this trial." App. 377, 11. 6-9. Regarding credibility, he told the jurors it was their duty "to analyze and

evaluate the evidence and determine which evidence convinces [them] of its truth." App. 378, 11. 11-13. Trial counsel posed no objection to these instructions when given.

PWC at 6-7.

In its Order of Dismissal, the PCR court found Trial Counsel was not ineffective for failing to object to any of the trial court's comments including this "truth-seeking" language where there was no reason to object to the comments and where there was no prejudice because the trial court clearly explained the State's burden of proof and Petitioner's presumption of innocence. App. 645-46. The PCR court held that any objection to these comments would not have changes the outcome of the trial. App. 646.

This Court has held multiple times that "truth-seeking" language by trial courts are disfavored and should be avoided. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (holding jury instructions on reasonable doubt which also charge the jury to "seek the truth" or "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant); State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties); State v. Beaty, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018), reh'g denied (May 25, 2018) (full citation not yet available). However, this Court has not yet held in any of the cases in which the trial court used this improper language that there was any resulting prejudice. "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" Aleksey, 343 S.C. at 26–27, 538 S.E.2d at 251 (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "However, jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." Id.

(citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. (citing Estelle v. McGuire, 502 U.S. 62 (1991); Boyde v. California, 494 U.S. 370 (1990)).

This Court very recently ruled on this exact issue in State v. Beaty, No. 2015-000718, 2018 WL 1938544 (S.C. Apr. 25, 2018), reh'g denied (May 25, 2018) (full citation not yet available). Beaty addressed comments to the jury that were nearly identical to the comments at question in the current case by the same trial judge, Judge Young. Beaty found the comments were improper, again instructing that "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." Id. at 3. However, this Court found the comments were harmless error because, based on a review of the entire trial record and the full opening comments to the jury, there was no prejudice sufficient to warrant reversal.

The Beaty opinion noted that Aleksey warned against these jury comments in conjunction with the reasonable doubt or circumstantial evidence jury charges, but explained, "the disputed comments can be distinguished from Aleksey because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in Aleksey." Beaty at 3. Because the comments in Petitioner's current case were simply opening comments to the jury, rather than official jury instructions given during the reasonable doubt or circumstantial evidence charges at the end of trial, this Court should reach the same conclusion it did in Beaty. The comments did not alter the full meaning of the jury instructions or shift the burden of proof from the State to

Petitioner, but simply set the jury's expectation for their role during the trial ahead. Therefore, Petitioner can show no prejudice from the comments, even if improper.

When read as a whole in their entirety, the jury instructions in Petitioner's trial clearly explained the State's burden of proof and Petitioner's presumption of innocence. Before deliberations, Judge Young charged the jury:

The defendant has pled not guilty to these counts in the indictment and that puts the burden on the State to prove the defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove their innocence. I charge you that this is an important rule of law that a defendant in a criminal trial, no matter how serious the charge, may be (sic) always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence does not end when you begin your deliberation but it accompanies the defendant throughout the trial until you reach a verdict based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant which remain with the defendant until it has been stripped from that defendant by evidence satisfying you of the defendant's guilt beyond a reasonable doubt.

The presumption of innocence is not a mere legal theory. It is not just a legal phrase that we use. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied, from the evidence, of the defendant's guilt beyond a reasonable doubt.

App. 373, line 14 – 374, line 17. Judge Young's charge thoroughly explained the burden of proof and presumption of innocence, and it is extremely unlikely that an occasional comment about searching for the "truth" at the beginning of the trial changed the jury's understanding of the burden of proof in this case. As a whole, the instructions are clear and free from error.

Notably, the language used by the trial judge in this case was, at the time of trial, a standard charge from the judge's bench book given to trial courts. The language was proper at the time of trial, and it was not improper for Trial Counsel not to object. Accordingly, Trial Counsel should not be held deficient in that regard.

Furthermore, these “truth seeking” comments were not prejudicial because they had no effect on the outcome of the trial because of the strong evidence presented of Petitioner’s guilt. There was no question at trial that Petitioner was engaged in a sexual relationship with Shameikkico Weathers, and that he paid her for sex. It was also undisputed that he was having sex with Weathers on the night of the shooting, and Petitioner shot and killed the victim. Petitioner presented a self-defense defense at trial and testified at trial that he shot the victim because he saw the victim reaching with his right hand to his back pocket, and he thought the victim was going to try to pull out a gun, so he shot first. App. 297. The defense presented at trial meant that, in order to determine Petitioner’s guilt, the jury had only to consider whether he had met all elements of self-defense, meaning he was without fault in bringing on the difficulty, Petitioner was actually in or actually believed he was in imminent danger of death or serious bodily injury, and Petitioner had no other probable way to avoid the danger of death or serious bodily injury other than to shoot the victim. See App. 387-389. The comments made by the trial judge about searching for the “truth” did not affect the outcome of the trial based on the evidence and defense strategy used at trial.

Because the jury instructions as a whole are free from error and the entire record before the Court shows no resulting prejudice from any potential improper jury comments, the PCR court correctly found Trial Counsel was not ineffective in failing to object to the comments. Probative evidence clearly supports the PCR court’s finding that Petitioner failed to prove that an objection to these comments would not have changed the outcome of the trial. Therefore, Petitioner can show no prejudice under Strickland, and the PCR court’s finding that Trial Counsel was not ineffective should be affirmed.

II. Probative evidence supports the PCR court's finding that no actual conflict of interest existed or affected Trial Counsel's representation of Petitioner.

Petitioner argues the PCR court erred in finding Trial Counsel had no actual conflict of interest that adversely affected his representation of Petitioner. However, this issue is meritless, as probative evidence supports the PCR court's ruling that no actual conflict existed. Accordingly, this Court should affirm the PCR court's denial of post-conviction relief.

Trial Counsel was hired to represent Petitioner shortly after he was arrested in the Spring of 2009. App. 569. At that point in his career, Trial Counsel had been practicing law as a criminal defense attorney for twenty-five years. App. 569. In February of 2010, about a month before Petitioner's trial, Trial Counsel decided to file to run for the office of Solicitor for the Third Circuit. Trial Counsel had run for this office unsuccessfully twice before—first in 1990, and again in 1996. App. 592. Trial Counsel testified that at the time he announced his candidacy, he was fully into his representation of Petitioner and was getting the file ready for the upcoming trial. App. 594. He testified that he assumed the topic came up in his discussions with Petitioner, but he did not believe his decision to run created any sort of conflict of interest with his representation of Petitioner, and neither Petitioner nor his mother ever expressed any concern to him about a conflict. App. 601-02; App. 594. He stated that, if they had expressed an issue with it, he would have refunded their money and let them take the case somewhere else. App. 602.

By the time of Petitioner's trial in April, 2010, Trial Counsel had not done much more for his campaign than simply filing the papers to run. App. 592. He testified that he had not ordered signs, bumper stickers, or other campaign materials at that time, but had simply filed the paperwork. App. 592. By the time Trial Counsel began campaigning for the position, which based on his testimony was presumably after Petitioner's trial, he explained that his platform was

to “make improvements to the [Third Circuit Solicitor’s] office, to make sure that the office ran efficiently, and that we paid attention to our victims, to work with law enforcement to make the criminal justice system as fair as possible.” App. 592, line 23 – 593, line 1. He explained that he is “not somebody that believes that just because somebody is arrested, that they are guilty.” App. 593, line 2-3. Trial Counsel testified that he did not think he made any specific promises about being “tough on crime.” App. 592.

Trial Counsel testified that his decision to run for Solicitor in no way affected his representation of Petitioner. App. 602. He repeated that he did not feel there was any kind of conflict, and he could see how it might create an issue if he were running against the sitting Solicitor and it were a contentious, political campaign, but because he was running for an open seat, it did not create an issue. App. 601-02. He agreed that if he had identified any kind of real conflict, he would have a duty as an attorney to get informed, written consent from his client. App. 594.

In its Order of Dismissal, the PCR court held Petitioner “failed to prove that an actual conflict of interest existed or that he did not waive his conflict.” App. 648-49. The PCR court’s finding was proper based on the evidence and testimony presented and should be affirmed.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation.

Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

Here, Petitioner argues Trial Counsel labored under a conflict of interest during his representation of Petitioner because he was seeking election as the top law enforcement officer in the Circuit, and in order to serve in that capacity, he was required to show that he was "'tough on crime,' compassionate toward victims of crime, and able to work with law enforcement." PWC at 21. Petitioner asserts that these qualities are "antithetical to representing Petitioner during the criminal trial." PWC at 21. However, Petitioner's assertion is incorrect.

Respondent submits that the qualities one must possess to succeed as a prosecutor, such as compassion, efficiency, and an interest in fairness and justice for the criminal justice system, are not only similar to the values held by good criminal defense attorneys, but necessary to fully represent a criminal defendant. The political platform set forth by Trial Counsel during his campaign, as explained in his PCR testimony, is not antithetical to Petitioner's interests, but seeks to create a fair and just environment to ensure that his rights as a criminal defendant are upheld. Trial Counsel testified that he made no specific promises to be "tough on crime," and he was not even actively campaigning for office at the time of the trial. At that time, Trial Counsel was not actively representing the State or involved with the prosecution in any way, but he merely expressed an interest in running for the office through the primary election, and later the

general election. This decision in no way created an actual conflict of interest which affected his representation of Petitioner.

Accordingly, because the PCR court's ruling that there was no actual conflict of interest was properly based on the probative evidence presented at the evidentiary hearing, including Trial Counsel's credible testimony,² this Court should affirm its decision and deny the Petition for Writ of Certiorari.

² The PCR court made a credibility finding: "Specifically, this Court finds Trial Counsel's testimony credible and Applicant's testimony not credible." App. 641-42.

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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By: 
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June 8, 2018

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

The Honorable Brooks P. Goldsmith, Circuit Court Judge

JERON A. COOK, #337103

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

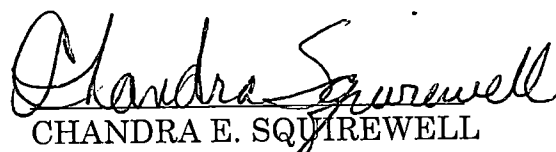
PROOF OF SERVICE

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:

Susan B. Hackett, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 8TH day of June 2018.


CHANDRA E. SQUIREWELL
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ATTORNEY GENERAL

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JUN 08 2018

June 8, 2018

S.C. SUPREME COURT

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

RE: Jeron A. Cook v. State of South Carolina
Appellate Case No. 2017-000816
Lower Court Case No. 2014-CP-43-0644

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services (letter only)