

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Jasper County

R. Lawton McIntosh, Circuit Court Judge

ERIC DARIEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001685

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

By failing to object to portions of an audio recording of Petitioner's statement to police wherein a police officer improperly shifted the burden of proof to Petitioner and gave his lay opinion regarding how the shooting occurred, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution.

After Petitioner and Bubba fought on September 29, 2008, which resulted in Bubba's death, Petitioner went to the hospital due to injuries to his face and scalp. App. 66, ll. 10-21; App. 69, ll. 19-21; App. 71, ll. 14-21; App. 72, ll. 13-14; App. 76, ll. 10-14; App. 76, ll. 18-24; App. 160, l. 17 – App. 161, l. 4. The following day, on September 30, 2008, the police, primarily Donald Hipp with the Jasper County Sheriff's Office, interrogated Petitioner about Bubba's death. App. 39, l. 6 – App. 46, l. 18; State's Exhibit #2. During this interrogation, Petitioner explained what happened. Relevant for the issue presented, Hipp told Petitioner, he "didn't have anything to hide," and he had received "conflicting stories" regarding the shooting. State's Exhibit #2 at 11:20. He emphasized that he, Hipp, was not there, but Petitioner was. State's Exhibit #2 at 11:30. Hipp also told Petitioner, "I wasn't out there. I'm not the one to prove something." State's Exhibit #2 at 22:40. When Petitioner continued to tell Hipp that he acted in self-defense, Hipp told him, "Listen to me, you don't have the right to take someone else's life." State's Exhibit #2 at 21:45. Hipp questioned Petitioner's version of events by giving his opinion about the evidence.

As an initial matter, Hipp's statement to Petitioner that Hipp did not have to prove anything shifted the burden of proof to Petitioner. Hipp's statement clearly indicated that he – the police, the state's representative – did not have to prove anything. In other words, Hipp, and by extension, the state, did not have the burden of proof; instead, Hipp made clear that it was

Petitioner's burden to prove that he acted in self-defense. Counsel's failure to object to the improper burden shifting by Hipp in the recorded statement was deficient performance prejudicial to Petitioner. See State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1997) ("It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove the accused committed the crime charged"); State v. Primus, 349 S.C. 576, 584, 564 S.E.2d 103, 107 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (explaining "[t]his rule stems from the constitutional presumption of innocence and the State's burden of proving the accused guilty"); State v. Brewer, 411 S.C. 401, 407-408, 768 S.E.2d 656, 65659 (2015) (urging trial courts and lawyers to exercise "caution" "in the admission of such evidence to ensure that all out-of-court statements are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay").

Contrary to the state's argument, trial counsel offered no strategic reason for failing to move to redact portions of the interrogation. See BOR at 13-15. Finding trial counsel's testimony credible, the PCR judge noted that trial counsel "admitted he did not consider redacting the police statements before the trial, but should have." App. 354; App. 356. The order explained that on the tape, Petitioner's prior jail time was discussed. App. 354. Although trial counsel failed to move to exclude those portions or redact those portions prior to trial, trial counsel requested and received a curative instruction during the trial. App. 354-355. Additionally, the tape included a police officer "saying that he had nothing to prove and talking about the shooting" of Bubba. App. 355. The PCR judge noted trial counsel "testified the biggest issue concerning [Petitioner]'s statements to the police was the police's statements to

Petitioner.” App. 355. “Specifically, one police officer stated to [Petitioner], ‘you do not have the right to take someone else’s life’ and ‘I have nothing to prove ... The court has to decide those things.’” App. 355. According to the order, counsel admitted he did not ask for curative instructions or move for a mistrial regarding those statements. App. 355. Importantly, counsel “stated he did not have a trial strategy as to the statements.” App. 355.

After citing the applicable law for reviewing a trial lawyer’s conduct for ineffective assistance of counsel, the PCR judge concluded trial counsel “effectively represented [Petitioner] concerning his statements to law enforcement.” App. 358. Despite recognizing that trial counsel “testified that he should have objected to the statements prior to them being published to the jury,” the judge determined trial counsel’s “decision to not challenge [Petitioner]’s statement” was based on information provided by Petitioner. App. 358-359. Thus, the court reasoned, trial counsel’s actions could not be challenged as unreasonable thereafter. App. 359. Noting that a curative instruction is deemed to have cured any alleged error, the PCR court erroneously noted that trial counsel asked for and received a curative instruction concerning the statements made by the police officer during the interrogation. App. 359. The court concluded Petitioner failed to meet his burden of proof. App. 359.

Additionally, Respondent mischaracterizes Petitioner’s argument on appeal. Petitioner does not argue – as Respondent suggests – that trial counsel should have moved to exclude the audio recording of the interrogation in its entirety. See BOP at 13-15. Instead, Petitioner argues that trial counsel should have moved to redact the improper and burden-shifting portions of the recording. While it may have been defense counsel’s strategy to pursue a self-defense argument using the audio recording, such a strategy was not furthered by counsel’s failure to move to redact the audio to remove the offending portions.

If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. Similarly, this Court found counsel's trial strategy reasonable in Drayton v. Evatt, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993) where trial counsel did not present evidence of the defendant's future adaptability because to do so would have allowed the introduction of negative psychiatric and discipline reports. On the other hand, this Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

Trial counsel offered no strategic reason for failing to object or move to redact the audio recording. In fact, trial counsel admitted he should have moved to redact the recording, and the PCR judge found this testimony credible. Thus, the state's argument that trial counsel acted strategically by failing to move to redact the audio recording must fail.

Respondent attempted to divert attention away from the investigating officers' improper comments by pointing to the officers telling Petitioner that it would be for the court to decide whether he acted in self-defense. BOR at 5. However, these comments offer no aid to the state's argument. Rather, these comments support Petitioner's argument that the officers were of the

opinion that Petitioner was guilty, that other witnesses gave statements conflicting with Petitioner's version of events, and that Petitioner was required to disprove his guilt.

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. In State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994), this Court held "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." In Brown, two officers testified about receiving information before establishing surveillance, receiving complaints while in the neighborhood, and being familiar with the neighborhood. Id. According to the Court, the "statements were not offered for their truth but rather to explain why the officers began their surveillance." Id.

Recently, this Court confronted this issue again. In State v. King, 422 S.C. 47, 52, 810 S.E.2d 18, 20-21 (2017), an officer testified that while canvassing the neighborhood around a shooting incident, she talked to two people and learned there were approximately three or four shots fired that night. This Court held it was error to admit the officer's testimony because it was hearsay. Id. at 66, 810 S.E.2d at 28. Applying "a straightforward hearsay analysis," this Court concluded the officer's testimony "was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvass and was offered to prove that [the defendant] fired more than one gunshot." Id. This Court found no exception rendering the testimony admissible. Id. Thereafter, this Court "caution[ed] prosecutors against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." Id. at 66-67, 810 S.E.2d at 28.

Officers testifying regarding what an investigation reveals must tread carefully so as not to testify to hearsay. See United States v. Hinson, 585 F.3d 1328 (10th Cir. 2009)(finding a detective's

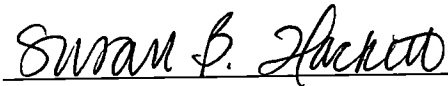
testimony that she began investigating a particular individual due to her suspicion that the individual was selling drugs and that in an interview someone indicated the source of the individual's drugs was the defendant was hearsay and had no purpose except to prove the truth of the matter asserted – that the defendant was a drug supplier); United States v. Benitez-Avila, 570 F.3d 364, 369 (1st Cir. 2009)(explaining “[a] prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it ‘background’ or ‘context’ evidence”); United States v. Shiver, 414 F.2d 461, 463 (5th Cir. 1969)(noting an officer's testimony that an investigation “revealed” that a particular car had been stolen was “pure hearsay” because the officer could not have personal knowledge of this “fact”); United States v. Reyes, 18 F.3d 65, 69-71 (2nd Cir. 1994) (holding testimony of a customs' agent concerning statements by others implicating the defendant in a drug conspiracy was inadmissible hearsay, not “context” or “background”).

“Out-of-court statements can be admitted as background for an investigation only if they provide information that is necessary to explain the government's subsequent actions, and it is not likely that the jury will ‘consider the statement[s] for the truth of what was stated with significant resultant prejudice.’” Hinson, 585 F.3d at 1336 (quoting United States v. Cass, 127 F.3d 1218, 1223-1224 (10th Cir. 1997)); see also United States v. Becker, 230 F.3d 1224, 1228 (10th Cir. 2000) (providing that testimony that is offered only for relevant context or background is not considered hearsay because it is not offered for the truth of the matter asserted).

Petitioner respectfully requests this Court hold defense counsel provided deficient performance that was prejudicial to Petitioner by failing to move to redact portions of the audio recording that allowed improper hearsay and improper lay opinion to be presented to the jury, and more importantly, shifted the burden of proof to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR judge, find counsel rendered ineffective assistance, and order a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2018.

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ERIC DARIEN,

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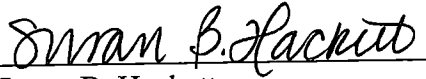
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Petitioner has been served on Eric Darien, #275549, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 9th day of November, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of November, 2018.



(L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028