STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari
Appeal from Barnwell County
Maité Murphy, Circuit Court Judge
Appellate Case No. 2017-000850

DEMETRIUS D. SMALLS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

I. The record amply supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to the trial court's curative instructions after a prospective juror stated he had been in jail with Petitioner, because Trial Counsel offered a valid strategic reason for choosing not to object in front of the jury pool, and Petitioner failed to show any prejudice since his prior conviction for possession of cocaine was admitted as impeachment evidence before the jury.

II. The record amply 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, because the instruction was proper under the law and supported by the evidence presented at trial.

STATEMENT OF THE CASE

In January 2011, the Barnwell County Grand Jury indicted Petitioner Demetrius D. Smalls on one count of murder, one count of assault and battery with intent to kill, and one count of possession of a firearm during the commission of a crime of violence, arising from an August 20, 2009, incident, during which Petitioner Appellant shot Zantrell Mays and fatally wounded Terrance Mays. The case was called for trial on January 24, 2011, before the Honorable Doyet A. Early, III, Circuit Court Judge. Josh Koger, Esquire, represented Petitioner, and Deputy Solicitor David Miller, Esquire, prosecuted the case.

The jury convicted Petitioner of voluntary manslaughter as to Terrance Mays, ABWIK as to Zantrell Mays, and possession of a weapon during a violent crime, and all twelve jurors immediately confirmed their verdicts when polled. The circuit court sentenced Petitioner to concurrent prison terms of twenty-five years, twenty years, and five years, respectively. (Appendix, pp. 1-537). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Smalls, 2015-UP-028 (S.C. Ct. App. filed January 15, 2015) (Appendix, pp. 728-729).

Petitioner filed a timely application for post-conviction relief on November 2, 2015, raising 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.

(Appendix, pp. 699-635). Respondent submitted its return on January 29, 2016. (Appendix, pp. 639-644). Petitioner subsequently 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.

(Appendix, pp. 635-638).

The matter was called for an evidentiary hearing on January 26, 2017, at the Bamberg County Courthouse before the Honorable Maité Murphy, Circuit Court Judge. Petitioner was present at the hearing and represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and presented testimony from Trial Counsel, Josh Koger, Esquire. Following the hearing, the circuit court issued an Order of Dismissal signed on March 1, 2017, and filed March 24, 2017, denying Petitioner's application for post-conviction relief. (Appendix, pp. 730-745).

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, which this Court granted by Order filed August 21, 2018.

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).

ARGUMENT

I. The record amply 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 a prospective juror's statement he had been in jail with Petitioner, because Trial Counsel offered a valid strategic reason for not objecting in front of the jury pool, and Petitioner failed to show any prejudice since Petitioner's prior conviction for possession of cocaine was admitted as impeachment evidence at trial.

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. He asserts the South Carolina Court of Appeals' decision in his direct appeal evidences prejudice because the court found his subsequent motion for a mistrial was not preserved for appellate review. Probative evidence in the record amply 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 offense was admitted at trial as impeachment evidence. Further, if the issue had been preserved for appeal, it would not have changed the result and Petitioner cannot prove prejudice.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813, 814 (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, 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, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 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, 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." *Id.*

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 statement. 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.

(Appendix, pp. 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 law as instructed by the court. No juror indicated any problem based on Juror No. 3's statement. (Appendix, pp. 44-46).

After jury selection, but before the jury was sworn, 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 then asked Trial Counsel if he had a motion regarding the statement by Juror No. 3. 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. (Appendix, pp. 48-50).

At the PCR evidentiary hearing, Trial Counsel testified he did not contemporaneously object to the potential juror's comment because he did not want to draw more attention to it, and 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. Trial Counsel further stated he believed his objection was properly made and preserved the issue for appellate review. Trial Counsel also testified Petitioner had to testify at trial because of his self-defense claim, and his prior conviction was going to come out to the jury anyway. (Appendix, pp. 690-698).

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, and noted Trial Counsel immediately objected once he was outside the presence of the jury, moved for a mistrial and requested a new trial. (Appendix, p. 739). 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). Trial Counsel's testimony constitutes probative evidence supporting the PCR court's finding Trial Counsel articulated a valid trial strategy in choosing not to object before the jury pool.

Petitioner argues Trial Counsel could have approached the bench to make a contemporaneous objection and preserve the issue for appeal. This suggestion ignores the fact that immediately approaching the bench after the comment would have drawn the jury pool's attention to it as surely as if the objection was stated from counsel table. Trial Counsel's strategy to avoid drawing attention to the comment was valid under either scenario.

Secondly, even assuming Trial Counsel were somehow deficient in failing to draw the jury pool's attention to the potential juror's statement regarding being in jail with Petitioner, Petitioner can show no resulting prejudice from his deficiency. As the PCR court found, there was no prejudice because the jury heard about Petitioner's prior conviction during his trial testimony. In order to present a successful strategy of self-defense under the facts and circumstances of this case, Trial Counsel believed Petitioner had to testify at trial, and Petitioner's 2005 possession of cocaine conviction was indisputably admissible as impeachment evidence when Petitioner testified. 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.

Even if the issue had been properly preserved for appeal, however, it would not have changed the outcome of the appeal and 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, and 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. (Appendix, p. 35). Rather than enhance the prejudice as Petitioner alleges, the trial court effectively minimized the reference by alluding to it as a youthful indiscretion everyone experiences.

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, the issue would not have succeeded on appeal if it had been preserved.[1]

There is ample probative evidence in the record supporting the PCR court's findings Trial Counsel's performance was not deficient, and Petitioner was not prejudiced by Trial Counsel's strategic decision not to bring additional attention to the potential's juror's statement by

[1]Petitioner's contention there was a reasonable probability the trial judge would have dismissed the entire jury panel and started over if Trial Counsel had contemporaneously objected, ignores the fact the trial judge believed his curative instruction sufficiently removed any prejudice. (Appendix, p. 50). Therefore, the trial judge would have overruled any objection.

immediately objecting before the entire jury pool. Accordingly, this Court should affirm the PCR Court's findings and conclusions on this issue.

II. The record amply supports the PCR court's finding Trial Counsel was not ineffective for failing to object to the mutual combat jury instruction, because 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, arguing there was no evidence Petitioner agreed upon a gun fight, and he only armed himself in self-defense after the fist fight escalated and Zantrell Mays drew a gun. To the contrary, the record supports the PCR court's finding the charge was proper based on the evidence presented at trial, and therefore, Trial Counsel was not ineffective by failing to object to it.

The trial transcript and the testimony presented at the evidentiary hearing revealed Petitioner was involved in a fist fight with Terrance Mays, which arose from a confrontation between Petitioner and the victims' younger brother earlier in the day. The State presented testimony from one of the victims, Zantrell Mays, as well as Tiffany Haynes, William Henry Jones, and Carlen Thomas, who were present during the entire incident. The State also presented Petitioner's written statement confessing to grabbing a gun during the fight and shooting the two victims. Petitioner testified on his own behalf, and presented testimony from Julius Tilley, Levaun Patrick, and Michael Walker, who were also present during the incident. (Appendix, pp. 73-85, 170-175, 204-211, 230-243, 250-274, 302-333, 360-429).

There was no dispute Petitioner had a confrontation with the victims' younger brother, which led to the subsequent fight with Terrance Mays. While details of the incident varied in some respects, such as the color of the gun Zantrell Mays had, all the witnesses, including Petitioner, testified the fight between Terrance Mays and Petitioner ended, and Terrance Mays was walking away from Petitioner, who started verbally taunting Terrance Mays because he did not feel their fight had been "fair."

Zantrell Mays testified he intervened when Petitioner approached the Mays' sister after the fist fight was over, and after some arguing and pushing, Zantrell Mays pulled a gun out of his pocket. Most of the witnesses testified Zantrell Mays either held the gun down by his side or was waving it around, but he never pointed it at anyone, while others testified he pointed the gun at Petitioner. After Zantrell Mays pulled out the gun, Petitioner turned his back toward Zantrell Mays, walked over to Carlen Thomas, who was standing several feet behind him, got Thomas' gun, turned around and immediately started shooting. Zantrell Mays never fired his gun. (Appendix, pp. 77-80, 207-209, 237-241, 256-263, 305-309, 325-326, 365-368, 388-391).

In the jury charge regarding the first element of self-defense (no fault in bringing on the difficulty), 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... However, if the defendant withdraws and tried in good faith to try to avoid further conflict and either, by word or act, makes that fact known to the victim, he would be without fault in bringing on the difficulty.
>
> 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. In addition, it must be shown that both parties were armed with a deadly weapon. So, the first element is that the defendant must be without fault in bringing on the difficulty.

(Appendix, pp. 514-516). 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).

To constitute mutual combat, there must be "mutual intent and willingness to fight." State v. Graham, 260 S.C. 449, 196 S.E.2d 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, 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 this case, the evidence presented at the trial established there was a dispute between Petitioner and the two victims' brother earlier in the day, leading to Petitioner and Terrance Mays willingly entering into a physical altercation that evening, which ended when Terrance Mays walked away. Rather than letting the matter end, however, Petitioner continued the situation by verbally taunting the victims and their sister. Significantly, Petitioner's continuation of the dispute led to Zantrell Mays' intervention and ultimately pulling a gun. Petitioner made no effort to get away either before or after the gun was drawn, but walked away from Zantrell Mays, armed himself, turned around and immediately opened fire, shooting both Zantrell and Terrance Mays. Zantrell Mays never fired his gun, even after Petitioner started shooting.

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. Taylor merely established that mutual combat requires evidence of existing ill-will between the parties at the time of the altercation. Here, the initial fist fight was over, Petitioner continued the dispute, and Zantrell Mays and Petitioner mutually escalated it into a gun fight. The ongoing dispute, coupled with the parties' mutual intent and willingness to

escalate the fight into a gun fight, created the basis for the mutual combat charge. *See* State v. Young, 424 S.C. 424, 818 S.E.2d 486, 492 (Ct. App. 2018) (mutual combat requires mutual intent and a willingness to fight).

Further, Petitioner cannot show prejudice from Trial Counsel's failure to object to the mutual combat language. The undisputed evidence established Petitioner was not faultless in bringing on the altercation with Zantrell Mays. Rather than walking away from the initial fist fight like Terrance Mays did, Petitioner tried to continue the fight after it was clearly over. At that point, Zantrell Mays intervened to stop him. Petitioner willingly continued arguing and made physical contact with Zantrell Mays, who then pulled out a gun. Rather than withdraw at that point, Petitioner willingly and deliberately obtained a gun from a bystander and immediately started shooting. Since Petitioner was not without fault in bringing on the controversy with Zantrell Mays, he could not establish the first element of his self-defense claim even without the mutual combat language.

Accordingly, Trial Counsel was not deficient for failing to object to this charge, and there was no resulting prejudice. The probative evidence from the trial, including Petitioner's own testimony, and evidence presented at the evidentiary hearing, supports the PCR court's finding the jury charge was proper under the law and supported by the evidence presented at trial. Further, even if Trial Counsel had successfully challenged the mutual combat charge, there is no reasonable probability the trial result would have been different in light of the undisputed evidence Petitioner was not without fault in bringing on the controversy with Zantrell Mays. Thus, this Court should affirm the PCR court's findings and conclusions on this issue.

CONCLUSION

Based on the foregoing, the State submits this Court should affirm the PCR court's findings and conclusions.

Respectfully submitted,

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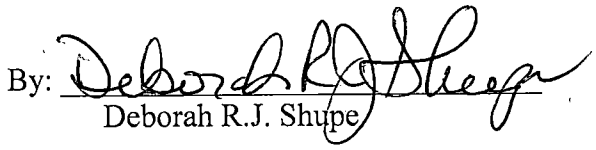
By: 
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January 22, 2019

STATE OF SOUTH CAROLINA
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Appellate Case No. 2017-000850

DEMETRIUS D. SMALLS,

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STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Brief of Respondent on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

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

This 22nd day of January, 2019.

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