

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County
Hon. Jean H. Toal, Circuit Court Judge
Appellate Case Tracking No. 2018-000734

Marvin Xavier Porcher,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

I. The PCR court properly found no ineffective assistance of counsel because the evidence presented at the hearing failed to establish any additional voir dire was necessary or demonstrate a motion to strike was appropriate when the juror had no recollection of any prior interaction with the victim, any interaction would have been short term multiple years before the trial, and the juror certainly did not have a close or personal relationship with the victim such that Petitioner failed to receive a trial before fair and impartial jurors.

STATEMENT OF THE CASE

Procedural History

On July 8, 2013, the Charleston County Grand Jury indicted Petitioner for burglary in the first degree.¹ He proceeded to trial on July 18-19, 2013, before the Honorable Deadra L. Jefferson and a jury. The jury found Petitioner guilty of first degree burglary and he was sentenced to fifteen years in prison.

Petitioner served a Notice of Appeal, which was perfected by Lanelle C. DuRant. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Porcher, 2015-UP-124 (S.C. Ct. App. filed March 11, 2015). Remittitur was issued April 3, 2015. (App. 350-351).

On April 10, 2015, Petitioner filed an application for post-conviction relief (PCR). (App.354-427). The Honorable Jean H. Toal conducted an evidentiary hearing on September 15, 2016. (App. 434). Former Chief Justice Toal denied relief by Order of Dismissal filed April 9, 2018. (App. 491-505). On April 19, 2018, Petitioner served his Notice of Appeal. He served and filed his Petition for Writ of Certiorari on September 21, 2018. This Return follows.

Factual Background

Mr. Salgado was a neighborhood resource officer for the North Charleston Police Department. (App.124-125). Just after midnight on November 4, 2011, he was patrolling on shift when he passed a bicyclist wearing dark clothing and without a rear light. (App.128). He made a U-turn and made contact with the bicyclist. Salgado recognized the bicyclist, but when

¹ In April 2012 and January 2013, Petitioner was indicted for breaking and entering a motor vehicle. He pled guilty as charged and received a 5 year sentence.

asked for his name, the cyclist gave him a different name from the one Salgado knew. (App.130-131). Petitioner gave him the name Marvin Swinton and his date of birth and then told Salgado he was from New York. Salgado had the North Charleston Police run the name and birthdate through South Carolina and New York records and found no one with that combination. (App.131-133).

Salgado testified Petitioner appeared nervous and sweaty. He also indicated there was a bulge under Petitioner's jacket. Salgado asked consent to search Petitioner's person and Petitioner gave consent. Salgado found a laptop and charger under Petitioner's jacket, and his wallet with ID in his pant pocket. The ID contained Petitioner's real name, Marvin Porcher. (App.133-134). Salgado also found a pearl necklace in Petitioner's jacket pocket and a cylinder, ultimately found to contain jewelry, in Petitioner pant pocket. (App.135). Petitioner also had a razor knife, a wrench, an allen wrench, and a zip tie in his pocket. (App.137). Petitioner tried to explain the laptop indicating he was going to a friend's house to use the internet. (App.137).

Salgado arrested Petitioner for providing false information to a police officer. Petitioner was taken to the North Charleston City Hall to meet with a detective. He met with Detective Evans. (App.137-138). Evans was a detective assigned to the persons crime unit. (App.149). Evans met with Salgado and was given the laptop and charger taken off Petitioner's person. Evans turned on the laptop and located information linking the laptop to the victim. He called the victim, provided his name and job title, and asked if she knew where her laptop was located. The victim responded it was at her residence. (App.151). Evans asked her to return to her residence and meet someone from Charleston County Sheriff's Office and North Charleston Police Department. (App.152).

Evans then interviewed Petitioner. After reading Miranda warnings to Petitioner, Evans discussed the laptop. Petitioner indicated he bought it from someone on Remount Road. He did not provide any details about from whom he purchased the laptop, where exactly on Remount he purchased it, or “any other pertinent details.” (App.157-158). He did not provide the name of the person or even a description of the person that allegedly sold him the laptop. (App.158).

The victim lived in a mobile home with a roommate. The home was near the residence of Petitioner and his girlfriend. (App.169-171). Petitioner came to her house to do some exterior work several weeks before the burglary. (App.172-173). On November 2, 2011, Petitioner, his girlfriend, and another friend came over to the victim’s home so Petitioner could put a tattoo on the victim. While in the victim’s home, Petitioner used her laptop to go on Facebook. (App.175).

On November 3, the victim and Petitioner’s girlfriend visited Petitioner where he worked so the victim could give him a payment for the work he performed on her house. While there, he asked if the victim and his girlfriend were planning to go out that night. (App.176-177). At that time, the victim did not plan to go out, but later changed her mind and around 9:30 p.m. picked up Petitioner’s girlfriend at Petitioner’s house. (App.178).

While out with Petitioner’s girlfriend, the victim received a phone call from a detective who asked if she reported a burglary and also if she owned an Acer laptop. The victim indicated the laptop was left on her bed on top of papers. (App.179). The victim then met a county sheriff and someone from North Charleston Police at her home. (App.180). Walking through her home with the officers, the victim indicated her laptop, some of her jewelry, and her roommate’s television was missing. (App.182). The victim later learned Petitioner was found with her laptop.

She was surprised he would have it. (App.188). She also indicated she never gave him permission to be in her home or have her computer. (App.185).

Deputy Baldwin was the Charleston County Deputy who met the victim at her residence. (App.206-207). He indicated that upon entering the residence and making certain it was secure, he noticed the rear door was pried open from the outside. He testified the door frame was pried so the door could open. (App.208-209). He explained many metal objects could be used to pry the door open, including some of the objects found on Petitioner's person when he was arrested. (App.209; 215-216).

STANDARD OF REVIEW

An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). "We do not defer to a PCR court's rulings on questions of law. 'Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law.'" Mangal v. State, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017) (internal citations omitted)(quoting Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

- I. **The PCR court properly found no ineffective assistance of counsel because the evidence presented at the hearing failed to establish any additional voir dire was necessary or demonstrate a motion to strike was appropriate when the juror had no recollection of any prior interaction with the victim, any interaction would have been short term multiple years before the trial, and the juror certainly did not have a close or personal relationship with the victim such that Petitioner failed to receive a trial before fair and impartial jurors.**

The PCR court correctly determined trial counsel was not ineffective for failing to request further voir dire or for not moving to strike the foreperson. The juror did not conceal any connection to the victim as she could not recall ever having met the victim. Further, additional voir dire would not have exposed any additional information and Petitioner fails to explain how additional voir dire would have assisted the trial court in making its determination. Additionally, the juror had no connection to the victim in the case sufficient to support a motion to strike. Finally, the minimal connection that existed failed to establish any question regarding the outcome of the trial such that Petitioner was prejudiced by counsel's failure to request additional voir dire or move to strike the juror.

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] 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.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

In the instant case, Petitioner has failed to establish counsel was deficient in his representation. The minimal contacts between the foreperson and the victim, which were not even conclusively established, did not require further examination and certainly did not justify a motion to strike the juror. As a result, trial counsel was not deficient for failing to request any further voir dire or move to strike.

Criminal defendants have the right to a trial by an impartial jury. U.S. Const. amends. VI and XIV; S.C. Const. art. I, § 14. A trial judge, upon motion of either party, to determine whether a juror is impartial:

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein ... If it appears to the court that the juror is not indifferent in the cause, he must be placed aside ... and another must be called.

S.C. Code Ann. § 14-7-1020 (Supp. 2018).

During the initial jury voir dire, the trial court asked: “Does any member of the panel have a close personal or social relationship with Nancy Wohlford [the victim] . . . if so, please stand at this time.” (App. 52). There was no response by the foreperson or any other juror. Ms. Wohlford was also listed as a witness and, again, no juror indicated they had a close personal or social relationship with her. (App.53). Additionally no members of the jury venire indicated they had a bias either in favor of or against either the State or the defense. (App. 55). Finally, all members of the panel indicated they could be fair and impartial to both the State and defense. (App. 61).

Later, upon learning about the possible connection between the victim and the foreperson, trial counsel requested additional questioning by the court and the court conducted additional voir dire of the foreperson to determine whether she had any recollection of the victim. (App.102). Based on the voir dire it appeared possible that the victim’s child went to a one week summer camp program in which the jury foreperson was a teacher. The victim acknowledged she merely recognized the foreperson’s face and any interaction would have been solely in a professional setting. (App. 105). When asked, the jury foreperson specifically indicated she did not remember any children with the last name Wohlford and did not remember

Nancy Wohlford, the victim. (App. 108). The trial court concluded there was no reason for additional examination because it was apparent the foreperson had no recollection of the victim even if they did have some interaction four years prior. (App.110-112). This colloquy supports the PCR Court's factual finding that "there is no indication any member of the jury pool knew the victim." (App.504).

Petitioner maintains counsel was deficient in failing to request further voir dire. However, Petitioner has failed to provide any additional evidence which would have been obtained by further voir dire. He cannot just indicate more questions could have been asked and not provide something more. More questions can always be asked, but whether they are necessary or whether counsel was deficient in failing to request them requires a showing of what further information would have been obtained and how it would have provided relevant information for a determination of whether the juror concealed a relationship during the initial voir dire or whether the juror should have been struck. Petitioner has utterly failed to provide the court with any additional information which could have been obtained through additional voir dire and does not even speculate as to how additional voir dire would have altered the trial court's analysis of the juror's relationship with the victim. As a result, he has failed to meet his burden of proof to establish counsel was deficient in failing to request additional voir dire.²

Additionally, Petitioner seems to argue counsel should have moved to strike the jury foreperson for cause because of the possible relationship with the victim. However, "the fact that a juror has some relationship with the victim does not automatically require the trial judge to

² Petitioner did not call either the victim or the foreperson to further explore the relationship or to seek answers to any possible questions that he asserts should have been asked on additional voir dire. See Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018) ("The PCR applicant bears the burden of proving his allegations by a preponderance of the evidence.").

remove the juror.” State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010). This Court has held for many years that a relationship with a witness, or even the victim, does not require disqualification of a juror. See State v. Jones, 298 S.C. 118, 121, 378 S.E.2d 594, 596 (1989) (“The mere fact that a person is a friend or acquaintance of the deceased does not render him incompetent as a juror.”); State v. Wells, 249 S.C. 249, 259–60, 153 S.E.2d 904, 909–10 (1967) (affirming qualification of a juror who directly employed victim a year or more prior to trial); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) (“There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree.”). As a result, there would have been no basis for counsel to move to strike the foreperson for cause and counsel could not be deficient in failing to request a relief to which he had no right.

Petitioner’s counsel also appears to raise an issue related to the juror’s concealment of her association with the victim. As this Court has explained regarding concealed information during jury voir dire:

When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party’s peremptory challenges.

State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (citing Thompson v. O’Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)). In this case, the voir dire conducted of the foreperson clearly established no grounds for a finding of concealment. Even after being questioned about the relationship and even after seeing the victim in the courtroom, the juror indicated no knowledge of any interaction, much less a close or personal relationship with the victim. Certainly any possible concealment was not intentional and would not have been the

basis for striking the juror. See e.g., State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004) (Potential jurors were asked during voir dire if they were close personal friends or business associates with any of the witnesses. A seated juror did not respond to this question, despite information that the juror knew the victim's mother and that the juror's brother-in-law rented land from someone in the victim's extended family. The Court of Appeals found no intentional concealment where the juror accurately answered the specific question posed and the alleged relationships did not amount to close personal friends or business associates.). Because no voir dire question required the foreperson to respond to any relationship established between herself and the victim, no concealment occurred and, thus, it cannot be inferred that juror was not impartial. See Woods, 345 S.C. at 587, 550 S.E.2d at 284. The trial court's determination that the foreperson did not intentionally conceal the "relationship" with the victim properly ended the court's inquiry. See State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375, 377-78 (2004).

Additionally, trial counsel during the PCR hearing explained if he believed a juror was related to or knew the victim he would have struck the juror. (App.470). He was asked: "And you mentioned, I believe, that if a juror said she knew the victim, you would have struck her, as your normal procedure?" His response was very telling: "As my normal procedure, **part of that probably depends on how well and what the nature of knowing the person would be.**" (App. 477) (emphasis added). As a result, and especially in light of the additional voir dire of the foreperson which revealed no relationship with the victim, trial court articulated a very valid trial strategy to not remove a juror who had at most a very innocuous relationship with the victim. See Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) ("where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Finally, even if counsel was deficient for failing to request additional voir dire or seek to remove the juror, Petitioner has not demonstrated how he was prejudiced. Petitioner presented no evidence of a connection between the foreperson and the victim sufficient to undermine confidence in the final verdict of the jury. Further, he has failed to establish any basis for bias or prejudice, especially in light of the juror's acknowledgement of the ability to be fair and impartial and not to have a bias for or against either party.

Petitioner has failed to establish how, "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 (quoting Strickland, 466 U.S. at 694). He was found in possession of a laptop and jewelry belonging to the victim. Petitioner also had burglary tools which could have been used to access the victim's residence. He had previously been in the victim's home and used her laptop. Additionally, he knew she would be out of the house at the time of the burglary. The strength of the State's case is considerable and it is not reasonable to think that had trial counsel been successful in removing the juror that it would have altered the outcome reached. See Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) ("In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.") (internal citation omitted).

Accordingly, Petitioner has failed to meet his burden of establishing deficient performance by trial counsel. Even if counsel could be considered deficient, Petitioner has failed to establish any resulting prejudice. As a result, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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January 31, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County
Hon. Jean H. Toal, Circuit Court Judge
Appellate Case Tracking No. 2018-000734

RECEIVED

JAN 31 2019

SUPREME COURT

Marvin Xavier Porcher,

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PROOF OF SERVICE

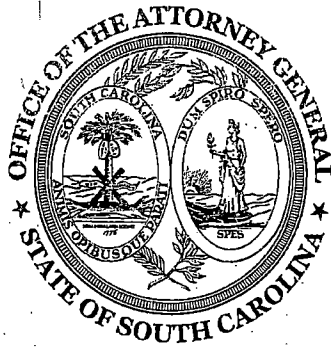
I, William M. Blitch, Jr., certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 31st day of January, 2019.



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ALAN WILSON
ATTORNEY GENERAL

January 31, 2019

RECEIVED

JAN 31 2019

S.C. SUPREME COURT

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

RE: Marvin Porcher v. State of South Carolina
Appellate Case No.: 2018-000734

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar # 15608

WMB/jj
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division