STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County
DeAndrea G. Benjamin, Circuit Court Judge

London A. Kelley #362015,

Petitioner,

vs.

State of South Carolina,

Respondent.

Case No. 2016-CP-43-02038
Appellate Case No. 2018-002268

Return to Petition for Writ of Certiorari

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STATEMENT OF ISSUE ON APPEAL

The PCR court's denial of relief is supported by probative evidence because Applicant failed to show what additional benefits would have accrued from further preparation by counsel and failed to meet her burden of proof to show prejudice from any alleged deficiencies of counsel.

STATEMENT OF THE CASE

Petitioner Kelley was indicted and tried before a jury for murder, accessory after the fact to murder, and conspiracy. Originally, Kelley was represented by Public Defender Timothy Murphy, Esquire. However, Charlie Johnson, Esquire, was hired by a family member to represent Kelley on October 24, 2014, on a Friday. The trial began the next Monday, October 27, before the Honorable George C. James, Jr. and lasted until the verdict was reached on October 31. Kelley was acquitted of conspiracy and murder, but convicted of accessory after the fact. Judge James sentenced Kelley to twelve years imprisonment.

Kelley appealed the conviction and sentence. After appellate defender Lara M. Caudy, Esquire, submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the Court of Appeals affirmed the conviction and sentence on June 29, 2016. 2016-UP-333.

Kelley filed an application for post-conviction relief on October 28, 2016, and was represented by Hemphill P. Pride, II, Esquire. A hearing was held at the Sumter County Courthouse on March 26, 2018, before the Honorable Deandra G. Benjamin. The State was represented by Assistant Attorney General Julie A. Coleman. Judge Benjamin subsequently denied the application for post-conviction relief by order dated November 27, 2018.

STATEMENT OF FACTS

One of the last people to see Victim Darrell Epps alive testified Epps told him he was going to meet a woman. The State's theory of the case was that Kelley and her boyfriend, Quinton Brown, murdered Victim Darrell Epps on the night of April 9, 2011. Epps' car was found on fire after midnight on the morning of April 10, 2011. App. 261-62. The passenger compartment was set on fire and the interior of the vehicle was destroyed. App. pp. 307-310. Victim's body was found about a mile and a half away in between two mobile homes at Gem Mobile Home Park, where Quinton Brown and Kelley lived. App. pp. 296-97. The pathologist testified Victim was shot eight times in the foot, leg, abdomen, and chest with a handgun, and once to the back of the head at close range with a shotgun. App. p. 488.

Victim's fiancé, Krystle Skinner, testified the last time she heard or saw him was when they spoke on the phone at 10 p.m. He was shooting pool. She then tried to call him at 11 p.m., but her phone went dead. She called him when she got home, but her call went to voicemail. She eventually engaged in an increasingly frantic search to locate him. App. pp. 133-36. Victim's friend, Cedric Burgess, testified he last saw Victim at T. Bubba's. Dexter Dickey was also shooting pool with Victim. Victim was texting in between shots. Victim and Dickey parted, Victim told Dickey he was on a mission and was going to meet a "shorty," which Dickey explained meant he was planning to meet a woman. Dickey testified Victim had about $800 on him at the time. App. pp. 174-77; p. 180.

Hope Brown and Andrea Brown were supposed to pick up Kelley to go to a club, Club Miami. They arrived at her trailer. Although Quinton and Kelley's Impala was in the driveway, Kelley did not come outside when they honked the car horn. It was raining outside at the time. She

did not answer when they called her cell phone. App. pp. 227-32; pp. 240-47.

Lack of any leads left the case dormant until Investigator Jennifer Thomas became involved in the investigation in early 2013. She interviewed Edward Brown, who was not related to Quinton Brown, and Edward Brown provided a statement. Edward Brown testified at trial that he was having an affair with Kelley and they met at the American Inn in room 212 for a sexual encounter. Kelley told him she was mad at Quinton for "messing" with an ex-girlfriend and she also felt bad for setting up Victim to get robbed by Quinton and Christopher Lovely. He provided a statement to law enforcement on December 31, 2013. App. pp. 517-21.

Shaniaqua Oaks was released from the detention center three weeks prior to trial. She was at the Detention Center at the beginning of the year. She was in the same area of the detention center with Kelley during the weekend before she was released. Kelley told her she was in the detention center for a murder case and she was supposed to have robbed someone and ended up killing them. She said the plan was to rob the person to take drugs and money. App. pp. 546-50. Kelley explained they robbed Victim in their backyard and later let law enforcement know he was there. She explained the robbery went bad. App. pp. 558-59.

Kelley ended up with Shaniaqua's mother, Suzie Oaks Thomas, as a cellmate after the water in Kelley's cell was not working. She told Oaks that Quinton found out Kelley and Victim were having an affair. Quinton told Kelley she could live if she set Victim up for a robbery. They did not go through plans with the robbery initially, but then Victim showed up at their home. Quinton drove Victim's car while Victim rode in the front seat. They drove to a wooded area and Quinton shot Victim in the vehicle. They drove back to Gem Mobil Homes and dumped the body out between the

trailers. On the way, Victim's red hat flew out the car window. Quinton drove away with Victim's vehicle in order to get rid of the vehicle. Victim washed up at their home. Quinton later told Kelley he could not find anyone to take the vehicle, so he burned it. App. 572-77. Kelley told Oaks that she burned both Quinton's and her own bloody clothes. App. p. 597.

According to Oaks, when Kelley found out law enforcement obtained a statement from Ed Brown, she at first said she did not know who he was. But when she saw a picture of him, she realized she did know him. She told Oaks that Mr. Johnson (this is presumably the same Mr. Johnson, John Johnson, who later testifies at the PCR hearing) said it would be a problem if she said she knew Ed Brown, so Kelley said she did not know him. App. pp. 597-99.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Because the issues presented by Petitioner in the instant case are questions of fact, they should be affirmed if supported by probative evidence.

In a post-conviction relief action, an applicant bears the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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

The PCR court's denial of relief is supported by probative evidence because Applicant failed to show what additional benefits would have accrued from further preparation by counsel and failed to meet her burden of proof to show prejudice from any alleged deficiencies of counsel.

The substance of Petitioner Kelley's argument is the PCR court erred in granting relief because trial counsel was hired on Friday and the trial started Monday. However, the operative question is whether there were any errors or omissions by trial counsel that fell below professional norms, and if so, was Kelley prejudiced by the errors or omissions. Kelley failed to prove any deficiencies of counsel and further, failed to show any prejudice from the alleged lack of preparation.

First, Kelley simply failed to meet her burden of proving prejudice from the supposed lack of preparation. In Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998), this Court found the PCR court erred in granting relief on the basis counsel was ineffective in adequately preparing the case because Jackson failed to "present any evidence of what counsel could have discovered or what other defenses [Jackson] would have requested counsel pursue had counsel more fully prepared for trial."

In Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 474, 749 (1997), this Court reversed the lower court's grant of relief on the basis that counsel was ineffective after he was appointed twenty minutes before Davis pled guilty because Davis failed to show how additional preparation would have resulted in a different outcome.

In the instant case, PCR counsel's unrelenting focus at the hearing was on his belief it was wrong for trial counsel to accept the case three days before trial and his contention trial counsel did

not receive some materials until trial began, but Kelley failed to offer proof of what additional benefits would accrue from additional preparation. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to relief because no evidence was presented to show how additional preparation would have affected the result of trial).

Evidence at the PCR hearing contradicts his claim trial counsel had inadequate time to prepare. Kelley's previous counsel, Public Defender Timothy Murphy, testified he had the case for ten months. App. p. 955. Trial counsel Charlie Johnson notified Murphy on Friday evening that he was just hired by Kelley's family. Murphy and trial counsel spoke at length on Friday night and twice more during the weekend. Murphy e-mailed the State's discovery to trial counsel on Friday night. He handed Johnson the physical discovery items, such as exhibits, on Sunday. Murphy testified he spoke with Johnson about the case for an hour and a half on Saturday. App. pp. 955-58.

Murphy used an investigator, John Davis, on the case who interviewed many of the State's witnesses. Davis wrote up a report and Murphy provided Johnson the report on Monday. App. p. 961. He testified he provided Johnson with everything he had. App. p. 975. Murphy testified that even before he handed the report to Johnson, he discussed the investigator's impressions of the witnesses during their phone conversations during the weekend. App. pp. 979-80. Importantly, Murphy testified he did not know what more Johnson could have done at trial. App. pp. 978-79.

The record itself reflects counsel's preparation and familiarity with the evidence. Counsel's opening argument reflects his knowledge of the case in the following:

> They don't have a gun. There is no DNA. There's no fingerprints. There is no blood evidence. They have phone records that they will produce of the victim the night he was killed going all the way back years. They haven't produced one phone call between my client [and]

> the victim. They will not produce one witness that ever saw them together, ever say they even knew each other. You won't see that in this case. [Take] your time and look at the evidence. It is too important for you not to look at the evidence.
>
> They have to prove this. They can't just stand here and say something. They are going to put up, as they say, witnesses. You ever notice he didn't say anything about evidence, not physical evidence. He is going to put up witnesses. These witnesses he is going to put up, they are in jail. The main witness they have will walk in here with shackles on her legs. And he's going to tell you [believer her]. Look at the story. They're not going to give you – they might give you three stories where supposedly my client confessed. And none of the stories even match. A confession has to be consistent. You are the judges of truth. The judge will make the judgment about the law. You make the judgment about truth.

App. pp. 126-27.

Trial counsel's cross-examination of the State's witnesses was consistently fruitful for the defense. Victim's wife, Krystle Skinner, admitted on cross-examination she never saw Victim with Kelley. App. pp. 145-46. She admitted to counsel that the red hat found near the scene of Victim's burned out car looked similar to the hat Victim wore, but she could not confirm it was his hat. App. pp. 154-55. Later, Officer Willie McFadden admitted to counsel that he retrieved the red hat, but did not have any knowledge how it might be connected to the case. App. p. 335. Victim's friend, Cedric Burgess, admitted to trial counsel that he also never saw Victim and Kelley together, even though he spent a lot of time with Victim. App. p. 162. Likewise, Dexter Dickey, Victim's cousin, also admitted he never saw Kelley before. App. p. 181. Later in the trial, Dionne Moore, Kelley's close friend, testified during cross-examination that she never saw Kelley and Victim together, that she was unaware of any information that Kelley and Victim knew each other, and Victim seemed shocked about finding a dead body. App. pp. 451-55.

Trial counsel used his cross-examination of Tiffany Witherspoon to capitalize on her recantation of her statement to police. App. pp. 218-19. Hope Brown testified for the State that she and Andrea Brown went to Kelley's to pick her up. Quinton Brown's Impala was at the trailer and they honked their horn, but no one came out. App. pp. 227-28. Andrea Brown testified similarly. App. p. 240. During cross-examination of Hope Brown, trial counsel elicited testimony emphasizing that it was raining heavily that night, that Hope and Andrea did not get out of the vehicle to knock on Kelley's trailer door, and that Hope did not know for sure no one was home. Hope agreed with counsel she did not see Kelley at Club Miami that night, contradicting one of Kelley's admissions. App. pp. 235-36. Trial counsel elicited similar testimony from Andrea Brown and also elicited testimony that Kelley sounded surprised when Andrea told her about Victim's body being found. According to Andrea, Kelley did not seem to know Victim. App. p. 249-50. Jeremy Holland called 911 to report Victim's burning vehicle. He admitted to trial counsel on cross-examination that he originally reported seeing two males by the vehicle even though at trial he claimed he could not determine the gender of the second person he saw by the burning vehicle. App. p. 274.

Counsel did an extensive cross-examination of former Sumter County Deputy Robert Richardson, establishing that brain matter and skull pieces found by the body indicated Victim was shot where his body was found, contradicting Suzie Oaks' later testimony. He elicited testimony that Victim was also shot in the leg and foot, which was not discussed in any of Kelley's admissions to the State's witnesses. He also established that no tire tracks were found by the body. App. pp. 373-77; p. 381.

Counsel's cross-examination of Terrell Hudson was effective. He testified "Tank" would

have walked by the body before riding with Hudson, Kelley, and Quinton Brown to Tank's mother's house. He testified Tank did not seem surprised when the body was found, but Kelley and Quinton were surprised. App. pp. 412-15. Trial counsel made sure to elicit testimony from the pathologist establishing that Victim was shot nine times and four shells were recovered. He tried to establish the order of shots with the pathologist. Victim was not wearing a wristband (like those used at clubs). App. pp. 495-99.

Investigator Tripp Mays, the original investigator assigned to the case, had to admit to trial counsel that he spoke with Kelley, Quinton Brown, and Terrell Hudson, and he did not have enough evidence to make an arrest. Investigator Mays admitted to counsel he did not find any evidence against Kelley. App. pp. 509-14. The highlight of trial counsel's thorough cross-examination of Suzie Oaks was her admission she has lied in court before. App. p. 620. The last witness was the investigator that ultimately charged Kelley, Investigator Jennifer Thomas. Counsel's cross-examination was well-structured: Investigator Thomas admitted that each of Kelley's three admissions were contradicted by evidence, or lack of evidence, the remainder of Investigator Thomas' investigation revealed. App. pp. 683-88. In particular, Investigator Thomas admitted that Suzie Oaks' statement that Victim was shot inside his vehicle was inconsistent with the evidence because the physical evidence indicated the shotgun blast to the head occurred at the site where the body was found. App. p. 693. Johnson's closing argument was thorough. His arguments about the inconsistencies between Suzie Oaks' statement compared to the physical evidence is an example of his effectiveness during his closing argument. App. p. 802.

The focus of Kelley's petition generally strays from a discussion of any particular alleged

deficiency. Also, minimal discussion is presented concerning any particularized prejudice. Kelley merely echoes PCR counsel's declaration that counsel was ineffective and PCR counsel's conclusory assertion that Kelley would have been acquitted of all the charges, not just murder and conspiracy, if trial counsel had not taken the case the weekend before trial.

The only evidence offered at the PCR hearing to show prejudice was testimony by John Johnson and the investigator he hired, Benny Webb, that the gun used in this case were linked to other murders. Webb alleged this was according to James Green, the ballistics expert at SLED. App. pp. 987-88. However, Green was not called as a witness at the PCR hearing and no evidence, including any written reports, were offered into evidence to support Webb's hearsay statement. Webb also claimed the supposed weapon was found in a home belonging to Corey Gaddy and his brother when they were arrested for another murder. However, no evidence was offered to prove this claim beyond Webb's hearsay assertion. Webb and John Johnson's vague hearsay account of these claims are insufficient to establish prejudice. See Bannister v. State, 333 S.C. 298, 302-03, 509 S.E.2d 807, 809 (1998). Further, evidence linking the gun to another murder without more is not sufficient in and of itself for admission as evidence of third party guilt. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (Evidence offered by a defendant of the commission of the crime by another person is limited to facts inconsistent with defendant's guilt). Therefore, the PCR court's finding that Kelley failed to meet her burden of showing prejudice is supported by the record.

Because Kelley failed to establish any particular deficiency of counsel and failed to meet her burden of establishing prejudice, the petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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May 14, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2018-002268

LONDON A. KELLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Kaitlyn Slice, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Eleanor D. Cleary, Esquire
Cleary Law, LLC.
Post Office Box 40086
Columbia, South Carolina 29240

I further certify that all parties required by Rule to be served have been served. This 14th day of May, 2019.

KAITLYN S. SLICE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

May 14, 2019

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

Re: **London A. Kelley v. State of South Carolina**
Appellate Case No. 2018-002268
Lower Court Case No. 2016-CP-43-02038

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General
SC Bar No. 68751

DS/ks
Enclosures

cc: Eleanor Duffy Cleary (2 copies)