STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JUN 04 2019

S.C. SUPREME COURT

Certiorari to Sumter County
Hon. George C. James, Circuit Court Judge
Appellate Case Tracking No. 2018-001121

Nathaniel Bradley, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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ATTORNEYS FOR RESPONDENT

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VII. The record supports the PCR court's finding Bradley was not prejudiced by trial counsel's decision not to object to hearsay testimony by officers Wesley Gardner and Clarence McMillan.

STATEMENT OF THE CASE

Nathaniel Bradley was indicted at the May 2007 term of the Sumter County Grand Jury for Murder and Possession of Firearm During the Commission of a Violent Crime (2007-GS-43-390). On January 14-18, 2008, he proceeded to jury trial before the Honorable R. Ferrell Cothran, Jr. Ernest A. Finney, III, Esquire, represented him at trial. On January 18, 2008, Bradley was found guilty of Murder and not guilty of Possession of a Firearm During the Commission of a Violent Crime. Judge Cothran sentenced him to thirty years' imprisonment for Murder.

Bradley appealed and the South Carolina Court of Appeals affirmed the conviction. State v. Nathaniel Noel Bradley, 2010-UP-494 (filed November 8, 2010). His petition for rehearing was denied in a written order filed December 30, 2010. The South Carolina Supreme Court denied his Petition for Writ of Certiorari on June 21, 2012. The Remittitur was sent July 5, 2012.

Bradley filed a post-conviction relief (PCR) application on July 27, 2012. An evidentiary hearing was convened on April 15, 2015, at the Sumter County Courthouse before the Honorable George C. James. Bradley was present at the hearing and was represented by Bradley M. Kirkland, Esquire. Following the hearing, the record was left open, and another evidentiary hearing was convened on July 5, 2016 at the Sumter County Courthouse. Judge James denied relief in a written order on August 31, 2017. Bradley now appeals Judge James' order.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. The record supports the PCR court's finding that trial counsel provided competent representation even though he did not object to testimony of Bobby Lee Hughes.

Bradley claims the PCR erred by denying relief on the basis that trial counsel did not object to the testimony of Bobby Hughes. Hughes testified that he believed Bradley was somehow involved in the murder, but did not have personal knowledge informing his opinion. At the PCR hearing, defense counsel testified that he did not believe Bobby Lee Hughes's testimony was important, or that he needed to object to it because it showed that Bradley and the victim were close friends. The PCR court found counsel's decision not to object was reasonable trial strategy and counsel was not deficient. The PCR court further found that Hughes' testimony did not change the outcome of the case. App. 1785.

Evidence supports the PCR court's ruling. Hughes' testimony, while speculative, was so weak and inconsequential that it could not have affected the outcome of trial. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (explaining PCR applicant must show prejudice such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Hughes testimony did not damage Bradley's case, and the jurors likely disregarded it without a second thought. Trial counsel offered this as his reason for not objecting, and the PCR agreed that his decision was reasonable. Bradley has not shown an abuse of discretion. This Court should affirm.

II. The record supports the PCR court's finding that trial counsel provided competent representation even though he called Paul Bradley as a witness.

Bradley next alleges trial counsel was ineffective for calling his brother, Paul Bradley, to testify. Paul testified that Bradley told him the victim was dead at around 1pm on Monday, May 23, 2005. However, other testimony indicated police discovered the victim's body around 1:45

on that date. Bradley claims trial counsel was ineffective for calling Paul because of this inconsistency in the evidence.

The PCR court found that trial counsel articulated valid strategic reasons for calling Paul Bradley as a witness. Evidence supports the PCR court's decision. Trial counsel used Paul Bradley's testimony to fill the gaps in Bradley's timeline and show that he was taking his step-daughter to the prom that evening instead of participating in the murder, and to show the jury that Applicant came from a strong family with a good, solid family leader. App. 1777.

The court further found Bradley failed to meet his burden of proving prejudice. Evidence supports the PCR court's decision. Paul Bradley did not specifically state that Applicant told him about the death before law enforcement knew about it; he was only estimating a general time that afternoon that he spoke to Applicant. Even without this testimony, the jury likely would have considered the rest of the State's evidence and found Bradley guilty. Bradley has not shown an abuse of discretion. This Court should affirm.

III. The record supports the PCR court's finding that trial counsel provided competent representation even though he did not present a cell phone expert.

Bradley claims trial counsel was ineffective for failing to present a cell phone expert. The PCR found defense counsel's strategic reasons for not presenting expert testimony were reasonable, and that Bradley suffered no prejudice. App. 1771. Evidence supports the PCR court's ruling.

Trial counsel testified at the evidentiary hearing that he believed it was more persuasive for the jury to hear evidence supporting Applicant coming from the State's lead investigators and experts than to have it presented by a witness for the defense. Instead of calling his own expert, trial counsel cross-examined the State's witnesses, elicited the desired information, and exposed weaknesses in the State's evidence. Trial counsel thoroughly addressed the weaknesses in the

State's cell phone evidence and made the same points he would have made if he would have called his own expert. Trial counsel was under no obligation to call an expert for every potential contested matter, especially when it was not necessary to elicit the desired information. See Simpson v. Moore, 367 S.C. 587, 596, 627 S.E.2d 701, 706 (2006), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Thus, Bradley suffered no prejudice. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). This Court should affirm.

IV. The record supports the PCR court's finding that Bradley suffered no prejudice even though trial counsel did not present an arson expert.

Bradley claims trial counsel was ineffective for failing to present an arson expert. The PCR found that Bradley suffered no prejudice from trial counsel's decision because the proffered expert testimony would not have been helpful to Bradley. App. 1772–73. Evidence supports the PCR court's ruling.

As with the cell phone expert, an arson expert would not have benefitted Bradley's case. As the PCR court noted in its order, the expert testimony proffered at the PCR hearing would have incriminated Bradley more, by placing the start of the fire closer to when cell phone records showed Bradley was in the vicinity of the car. While Bradley's assertion that an expert should have been called "sounds good on paper," in reality it would not have benefitted Bradley, and would not have changed the result of trial. App. 1773. This Court should affirm.

V. The record supports the PCR court's finding that Bradley was not prejudiced by trial counsel's decision not to object to hearsay testimony from the lead investigator regarding the color of the license tag on the car in which the victim was last seen alive.

Bradley claims trial counsel was ineffective because he did not object to the lead investigator's testimony recounting hearsay statement from the owner of the car dealership that the car in which the victim was last seen had a yellow paper tag. The PCR court found that

while trial counsel was "perhaps technically deficient" for not objecting, no prejudice resulted to Bradley. App. 1763–74. Evidence supports the PCR court's decision.

Even though the testimony was hearsay, trial counsel testified at the PCR hearing that even if he objected, the State could have called the owner of the dealership to testify to the same information. Furthermore, Koenig testified that he recognized Bradley driving the car in question, making the color of the license plate unimportant. Thus, even if trial counsel had objected, the result of trial would have been the same. This Court should affirm.

VI. The record supports the PCR court's finding that Bradley was not prejudiced by trial counsel's decision not to object to Darrell Koenig's testimony that his neighbors told him police were looking for a car with a temporary tag.

Bradley claims trial counsel was ineffective because he did not object to Darrell Koenig's testimony that his neighbors told him police were looking for a 1990 Volvo with a temporary tag. The PCR court found the statement was hearsay, but that Bradley was not prejudiced by its admission. App. 1778. Although the State does not believe the testimony constituted hearsay, evidence supports the PCR court's ruling that Bradley suffered no prejudice.

"'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, SCRE. Koenig's testimony regarding what his neighbors told him about the police search for the Volvo was not hearsay because it was not admitted for the truth of the matter asserted. Koenig's testimony was not offered to prove the police were in fact searching for a Volvo. It was merely an explanation of how Koening discovered this information, which triggered his memory of his earlier observation of the car. His earlier observation of the car was the substance of his testimony. Koenig's mere explanation how he heard about the police investigation was not important, and the investigator's inclusion of this statement could not have bolstered Koenig's

testimony because there was no logical connection between the statement and Koenig's credibility.

Regardless, evidence supports the PCR court's finding that the testimony did not cause prejudice to Bradley. The testimony regarding the police search for the Volvo was admissible through other witnesses, immaterial to guilt or innocence, and not important to Koenig's testimony. This Court should affirm.

VII. The record supports the PCR court's finding Bradley was not prejudiced by trial counsel's decision not to object to hearsay testimony by officers Wesley Gardner and Clarence McMillan.

Bradley next argues trial counsel provided ineffective assistance by not objecting to the testimony of investigators Gardner and McMillan, wherein they explain that Koenig was "100% sure" of his identification of Bradley. The PCR court found that counsel should have objected, but concluded Bradley was not prejudiced because the testimony was made cumulative when Koenig later testified at trial. App. 1786–87. Evidence supports the PCR court's ruling.

Koenig testified at trial about his identification, and the jury had the opportunity to hear him testify and weigh his credibility themselves. The officers' earlier testimony was cumulative to Koenig's and could not have affected the outcome of trial. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (explaining "the admission of improper evidence is harmless where it is merely cumulative to other evidence"). This Court should affirm.

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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S.C. Bar No. 101188

BY: _____
Joshua A. Edwards

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June 4, 2019

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PROOF OF SERVICE

I, Joshua A. Edwards, 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:

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

I further certify that all parties required by Rule to be served have been served.
This 4th day of June, 2019.

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ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

June 4, 2019

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

Re: **Nathaniel Noel Bradley v. State of South Carolina**
Appellate Case No. 2018-001121

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,

Joshua A. Edwards
Assistant Attorney General
SC Bar No. 101188

JAE/ks
Enclosures

cc: Susan B. Hackett, Esquire (2 copies)