STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2018-001301

Charles Pennell, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

1. Did the PCR court correctly find trial counsel was not constitutionally ineffective where credible testimony established Petitioner was aware Suggs would represent him at trial, and Petitioner never raised the issue during or after his trial?

2. Did the PCR court correctly find trial counsel was not constitutionally ineffective for failing to object when the victim testified Petitioner used a racial slur during their confrontation because there was no basis to object to Petitioner's own statement where the element of force or intimidation was at issue in the trial, so trial counsel was not deficient?

STATEMENT OF THE CASE

Charles Pennell (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In September 2009, the Florence County Grand Jury indicted Petitioner for attempted carjacking (2009-GS-21-1532). B. Scott Suggs, Esquire, and John Etheridge, Esquire, represented Petitioner. On October 11, 2010, Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. The jury found Petitioner guilty as indicted. Judge Russo sentenced Petitioner to ten years' imprisonment.

Petitioner filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal and raised the issue of whether the trial court erred in refusing to direct a verdict, arguing the State had not proven all elements of the charge. The South Carolina Court of Appeals affirmed Petitioner's conviction on June 26, 2013. State v. Pennell, Op. No. 2013-UP-285 (S.C. Ct. App. filed June 26, 2013). The remittitur was returned to the circuit court on July 12, 2013.

Petitioner then timely filed an application for post-conviction relief on July 24, 2013. Respondent made its Return on May 2, 2014. An evidentiary hearing into the matter was convened on March 16, 2017, at the Florence County Courthouse before the Honorable Paul M. Burch. Tristan Shaffer, Esquire, represented Petitioner. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf. B. Scott Suggs, Esquire (Suggs), and John R. Etheridge, Jr., Esquire (Etheridge), testified on behalf of Respondent. The PCR court issued an order filed January 19, 2018, denying and dismissing the application with prejudice. Petitioner filed a motion to alter or amend the judgement pursuant to Rule 59(e), SCRCP, on February 2, 2018. Respondent filed its return to the motion on

June 8, 2018, and the PCR court denied the motion on June 18, 2018.

Petitioner then filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on April 10, 2019.

STATEMENT OF THE FACTS

According to the victim in this case, Petitioner approached him in the parking lot of the Hollywood Video store, when the victim stopped his car to move stereo equipment scattered across the parking lot, blocking the entrance. App. p. 103. The victim testified Petitioner asked him for a ride, which he refused, and at that point, Petitioner became aggressive, told the victim to "suck [his] dick" and called the victim a variety of names, including "motherfucker" and a racial slur – the n-word. App. pp. 103-04. The victim ignored Petitioner and pulled his car around to the parking lot in front of the video store, where Petitioner again approached the victim, this time telling the victim, "I'll take your car." App. pp. 104-05. The victim testified he was scared at that point and felt like he "could really get hurt." App. p. 106.

The victim initially drew his gun and fired into the air. However, because he did not want to shoot Petitioner, the victim punched and kicked Petitioner, then drove off and returned home. App. pp. 106-10. The victim explained he then got in his wife's car, in the hope Petitioner would not recognize him, and returned to the store to let the clerks know what had happened. App. pp. 111, 158-59. However, Petitioner was still in the parking lot, and he and the victim got into another physical altercation. App. pp. 112-13, 165-66. The victim then left again and this time he called the video store from his home, by which point law enforcement had arrived. App. pp. 113-15. At the officers' direction, the victim returned to the store a third time. App. p. 115. Petitioner was questioned and detained and continued to shout vulgarities from the back of the police car. App. pp. 116, 232-33.

On cross-examination at trial, the victim admitted he never saw Petitioner with a weapon, Petitioner never attempted to grab the car keys from the victim or from the car's ignition, and Petitioner "struck at him," but never made physical contact. App. pp. 148-49. He also testified

Petitioner took a step back after he fired a warning shot into the air. App. p. 153. When he returned to the video store in the second car and got into the second fight, Petitioner never threatened to take that car or attempted to get the keys from the victim. App. p. 169.

Further, according to the investigators, Petitioner's version of events was that *he* was actually the victim and had been attacked without provocation. App. p. 231. The lead investigator testified she initially "didn't know who was the victim and who was the suspect." App. p. 231. She also testified the victim appeared to be scared, but remained calm and straightforward, while Petitioner was screaming vulgarities and out of control. App. pp. 232-33. She testified based on her observations of their respective behavior, she determined Petitioner was the aggressor, and he was ultimately charged. App. p. 235.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, questions of law are reviewed de novo without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, a petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "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). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove 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. Second, counsel's deficient performance must have prejudiced the Petitioner 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 688.

ARGUMENT

I. The PCR court correctly found trial counsel was not constitutionally ineffective where credible testimony established Petitioner was aware Suggs, rather than Etheridge, would represent him at trial and Petitioner never raised the issue during or after the trial until filing his PCR application.

The PCR court correctly found Suggs was not deficient, nor was Petitioner prejudiced by Suggs' representation. Petitioner alleges he was represented at trial by Suggs, when he believed instead he had retained and would be represented by Etheridge; Suggs claimed to have been unpaid even though he received fifty dollars from Petitioner which he gave to the solicitor; and Suggs did not make any objections at trial.[1] PWC p. 4. The issue of whether Petitioner was aware Suggs would represent him at trial was addressed at the evidentiary hearing by Petitioner, Suggs, and Etheridge, and the PCR court found Petitioner's testimony on the issue not credible. Accordingly, the PCR court correctly found Petitioner had failed to meet his burden proof and denied relief. Appellate courts give great deference to a PCR court's credibility findings because appellate courts "lack the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). This Court should deny certiorari as to this issue.

In the PCR hearing, Petitioner testified he retained Etheridge to represent him, and they spoke three or four times before trial. App. pp. 372, 378. Petitioner further testified he was unaware Suggs would be representing him at trial or that Etheridge would leave the courtroom after jury selection. App. pp. 377, 379. Petitioner testified he was never told Suggs would be the only attorney representing him at trial. App. p. 379. Petitioner testified he briefly spoke to Suggs before trial regarding his version of events, and Suggs told him just to sit and be quiet during the

[1] The last two components of this first issue have no bearing on Petitioner's ultimate claim he received ineffective assistance of counsel by having Suggs, rather than Etheridge, represent him at trial, and/or they are explained by the record of the trial and PCR hearing. Therefore, Respondent declines to address them.

trial. App. pp. 377-78. Petitioner testified he understood the defense strategy would focus on the language of the carjacking statute and whether his actions fit the elements of the statute. App. pp. 377, 380. Petitioner also admitted he never objected to continuing the trial with Suggs or told the trial court he did not want Suggs to represent him. App. pp. 389-90.

Conversely, Suggs testified he and Etheridge have an unofficial partnership and often assist one another. App. pp. 397-98. Suggs testified Petitioner consulted with Etheridge, and Etheridge asked Suggs to help with the case. App. p. 397. Suggs testified Petitioner was released on bond before trial, and he felt he talked to Petitioner a sufficient number of times to prepare the case. App. p. 398. Suggs testified he believed Petitioner understood the relationship between himself and Etheridge, and Petitioner was aware Suggs would be the attorney handling the trial, although there was no formal agreement between Petitioner and Suggs. App. pp. 398, 408. Etheridge also testified he told Petitioner Suggs would be handling the trial, he and Petitioner spoke to Suggs together at the courthouse, and then he turned the case over to Suggs and notified Petitioner. App. pp. 415-18.

Most importantly, the trial transcript indicates Etheridge informed the trial court, with Petitioner present, he would be in and out of the courtroom during the trial because he was working on other matters. App. p. 29. Petitioner never objected to proceeding with the trial without Etheridge present, and he never informed the trial court he did not know Suggs or want Suggs to represent him – including after the verdict when he spoke to the court during sentencing. App. pp. 29, 340-41. The fact Petitioner sat through the entire trial without raising the issue lends credence to the PCR court's credibility finding crediting Suggs and Etheridge over Petitioner. It also precludes Petitioner from raising the issue for the first time in PCR. See State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the

result will be and then, take advantage of the error on appeal."). Because the PCR court's decision finding no deficiency is based on Suggs and Etheridge's credible testimony, the PCR court's conclusion is supported by probative evidence in the record. Therefore, this Court should deny certiorari as to this issue.

II. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object when the victim testified Petitioner used a racial slur during their confrontation because there was no basis to object to Petitioner's own statement where the element of force or intimidation was an element at issue in the trial, so trial counsel was not deficient.

Petitioner alleges Suggs was constitutionally ineffective because Suggs failed to object when the victim testified at trial that Petitioner used a racial epithet, the "n-word," during their first confrontation at the video store when Petitioner threatened to take the victim's car. PWC p. 10. Because this testimony was relevant to the element of force or intimidation, Suggs had no basis to object, and therefore, the PCR court correctly found he was not deficient. This Court should thus deny certiorari on this issue.

One element of carjacking is the use of force or intimidation. S.C. Code Ann. § 16-3-1075(B) ("A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force or intimidation while the person is operating the vehicle or while the person is in the vehicle."). Here, the victim specifically testified he felt afraid of Petitioner after the confrontation over the stereo equipment, during which Petitioner used the racial slur,[2] and the lead investigator testified Petitioner's continued use of verbally abusive language

[2] Petitioner notes in his petition he denied using the slur, yet the Order of Dismissal includes a finding he admitted to doing so at the evidentiary hearing. PWC p. 12. Petitioner first testified he "said something foul. . . . what I had actually said." App. p. 384. He then denied using the racial language, however. App. p. 384. The Order of Dismissal was prepared without the benefit of a transcript, and it appears upon review, Petitioner was admitting he used some vulgar and aggressive language toward the victim, but he is denying use of the racial slur. Regardless, whether Petitioner actually used the word is irrelevant to Suggs' alleged deficiency because whether the

and aggressive behavior prior to his arrest was a large part of her determination as to who was the perpetrator and who the victim. App. pp. 103-04, 231-35. Petitioner's use of a racial slur coupled with his aggressive demeanor was therefore relevant to that element of the State's case, and admissible under Rule 401, SCRE.

Petitioner argues even if the racial slur was relevant, Suggs should have objected on the grounds of undue prejudice under Rule 403, SCRE, and contends its admission was so prejudicial as to violate Petitioner's right to a fair trial. PWC p. 13. As discussed above, in Petitioner's case the use of the n-word was relevant to explain the State's version of events and helped establish one of the elements of the crime. Suggs specifically testified he felt he had no objection because Petitioner himself used the racial slur; Suggs testified he would have objected had someone else other than Petitioner used the slur. App. pp. 401-02, 411. This testimony by Suggs was found to be credible, and it is supported by the trial transcript. As Petitioner himself points out, the trial transcript reflects Suggs did in fact object to the law enforcement officer testifying Petitioner screamed racial epithets from the back of the police car while the officers were interviewing the victim on the scene. PWC pp. 11-12; App. p. 56-57. Suggs correctly argued those statements had no relevance to any of the elements of the crime, which is true because those statements were made *after* the commission of the crime. App. pp. 59-60. However, simply because Suggs had a valid objection to the officer's testimony does not mean he had a valid objection to the victim's testimony, where the victim's testimony was directly relevant to the use of force or intimidation *during* the commission of the crime.

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victim was telling the truth about the statement was an issue for cross-examination, not the basis for an objection to the testimony.

Petitioner's reliance on United States v. Massey is misplaced. In Massey, the defendant was convicted of manslaughter after driving drunk, running a red light, and striking another car, killing one of the passengers. 50 C.M.R. 346, 347 (1975). In the hospital after the accident, the defendant used a racial slur to refer to the deceased victim. Id. The Massey court found the admission of the statement to be improper, based on relevance rather than prejudice, because there was no evidence the defendant knew the victim's race at the time of the accident such as to make the statement probative as to defendant's negligence. Id. at 347-48.

Probative value "is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." State v. Gray, 408 S.C. 601, 610 (Ct. App. 2014). As discussed above, Petitioner's statement was probative as to the issue of force or intimidation; in Massey, which Petitioner cites to support his argument for unfair prejudice, the appellate court found the statements at issue had *no* probative value, and therefore, the statements were unfairly prejudicial. That is not so in Petitioner's case. Here, the words were Petitioner's own, directed toward the victim during the commission of a crime requiring the use of force or intimidation. The admission of the victim's testimony regarding Petitioner's actual statement was therefore not so prejudicial as to render Petitioner's trial constitutionally unfair because it was relevant and highly probative to an element of the crime at issue in the case.

Thus, Suggs reasonably believed he had no valid objection, and the PCR court correctly found Suggs was not deficient for failing to object. See Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (finding a post-conviction relief judge's grant of relief based on defense counsel's failure to raise an objection to be without factual support where "there was no sustainable objection" defense counsel could have made). Suggs cannot be deficient for failing to object to admissible evidence, and therefore, the PCR court's determination Suggs adequately explained his

lack of objection, on the basis of his testimony he saw no valid objection, was correct. Because Suggs was not deficient, Petitioner has failed to meet his burden of proof, and this Court should deny certiorari on this issue.

CONCLUSION

For all the foregoing reasons, the State requests this Court deny the petition for a writ of certiorari and affirm the PCR court's denial of Petitioner's application for relief.

Respectfully submitted,

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September 27, 2019

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The Honorable Paul M. Burch, Circuit Court Judge

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by placing two copies in the interagency mail.

This 27th day of September, 2019

KASEY KNOX
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

September 27, 2019

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

Re: **Charles Pennell v. State of South Carolina**
Appellate Case No. 2018-001301
Lower Court Case No. 2013-CP-21-1949

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,

Samuel L. Kay

for Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/kk
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)