

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2016-002233

RECEIVED
JAN 28 2019
S.C. SUPREME COURT

KOREY LAMAR LOVE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
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RESPONDENT'S QUESTIONS PRESENTED

- I. Did the PCR court properly refuse to allow Petitioner to amend his PCR application on the morning of the evidentiary hearing where Petitioner's additional allegation was based on information contained within the trial record and the original application could have been amended at any time during the ten months between the time of filing and the hearing?

- II. Even if the PCR court abused its discretion by declining to allow the amendment, did the PCR correctly deny Petitioner relief where the portion of the solicitor's closing argument at issue is not an improper Golden Rule argument so Counsel was not deficient in failing to object, and in any event, Petitioner was not prejudiced where the comment did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. During its January 2011 term, the Greenville County Grand Jury indicted Petitioner for possession of a pistol by a person under 18 years of age (2010-GS-23-4508), attempted armed robbery (2010-GS-23-4509, count 1), possession of a weapon during commission of a violent crime (2010-GS-23-4509, count 2), and murder (2010-GS-23-4510). Fletcher N. Smith, Jr., Esquire (Counsel), represented Petitioner. Bryna Seay and Howard Steinberg, Esquires, prosecuted the case on behalf of the State. On November 5, 2012, Petitioner proceeded to trial before the Honorable Edward W. Miller and a jury. The jury convicted Petitioner of all charges. Judge Miller then sentenced Petitioner to concurrent terms of five years for possession of a pistol by a person under eighteen years of age, twenty years for attempted armed robbery, five years for possession of a weapon during commission of a violent crime, and fifty years for murder.

A timely notice of appeal was filed at the South Carolina Court of Appeals. Benjamin J. Tripp, Esquire, of the South Carolina Commission on Indigent Defense – Division of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals ultimately dismissed the appeal. State v. Love, Op. No. 2014-UP-177 (S.C. Ct. App. filed April 23, 2014). The Remittitur was sent on May 19, 2014.

On April 20, 2015, Petitioner filed an application for post-conviction relief. Respondent made its return on July 17, 2015, requesting an evidentiary hearing be convened. An evidentiary hearing was held on February 17, 2016, at the Greenville County Courthouse before the Honorable Daniel D. Hall. Petitioner was present and represented by E. Charles Grose, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General

¹ Anders v. California, 386 U.S. 738 (1967).

represented Respondent.

Petitioner did not testify at the PCR hearing. However, the following people testified: Kendel Love, Petitioner's brother; assistant solicitor Howard L. Steinberg; and Petitioner's trial counsel, Fletcher N. Smith, Jr., Esquire. On March 15, 2016, Petitioner emailed a post-hearing memorandum in support of his application for PCR to Judge Hall. Thereafter, however, Judge Hall denied Petitioner's PCR application by written order filed April 4, 2016. Petitioner subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCR, dated April 8, 2016. Respondent filed a return to Petitioner's motion to alter or amend dated April 18, 2016. Judge Hall denied Petitioner's 59(e) Motion, and the order was filed October 6, 2016.

Petitioner filed a timely notice of appeal. Petitioner filed a petition for writ of certiorari on May 1, 2017, raising nine issues. Respondent filed its return to petition for writ of certiorari on September 15, 2017, and Petitioner filed a reply on October 19, 2017. On June 17, 2018, this Court issued an order instructing the parties to brief the issue of whether the PCR court erred in not allowing Petitioner to amend his application at the evidentiary hearing to raise a "Golden Rule" argument and denying certiorari as to all other questions. Petitioner filed his brief on this question on September 24, 2018. This Brief of Respondent follows.

STATEMENT OF THE FACTS

At approximately 1:30 a.m. on January 27, 2007, twenty-two-year-old Isaac Bass (Bass) finished his shift at Wendy's and went out the back door of the restaurant to get into his car to head home. App. pp. 65, 67, 76, 141. As Bass walked down the ramp at the rear of the building, he was confronted by Petitioner, who brandished a gun and attempted to rob Bass. App. pp. 276-77. Bass and Petitioner struggled, and Bass yelled and banged on the back door of the restaurant trying to get back inside.² App. pp. 67-68, 76. Petitioner eventually shot Bass in the neck, then fled. App. pp. 84-85, 141.

Employees still inside the restaurant heard the gun shots, took cover in an office, and called 911. App. pp. 68, 77. Bass managed to get to his feet and walk around the restaurant to the front, banging on the drive-thru window as he went. App. pp. 68, 144. However, the injury to his neck had rendered him unable to speak, so he was unable to yell for help. App. pp. 90, 143-44. Bass stumbled across the road toward his home at the Mallard Cove apartment complex and flagged down a passing motorist. App. pp. 65, 84. That motorist testified he also saw two black males in their late teens or early twenties running down the road away from the Wendy's. App. pp. 84-85.

Because there was no security footage outside the restaurant and no eyewitnesses to the shooting itself, the case went cold until 2010 when a new detective, Detective Flavell (Flavell), was assigned. App. pp. 70, 79, 155, 167. Favell and Bass's family organized renewed media coverage in order to announce a reward, which eventually led to a tip. App. pp. 169-70. As a result of the tip, Favell began investigating Petitioner; his father, Jerome Love; and his brother, Kendel Love. App. pp. 170, 172. At trial, several witnesses testified to their knowledge of

² The back door was secure door which locked automatically when Bass exited. App. p. 67.

Petitioner's involvement in the murder.

Petitioner's former stepsister, Jalesa Neal (Neal), testified at trial she overheard Petitioner confess to the murder to his father. App. pp. 220-22. Neal also testified she heard Petitioner confess a second time, sometime after Neal's mother and Jerome Love had married, and Neal and Petitioner were living in the same apartment. App. pp. 222-23. Petitioner's girlfriend, Rashida Peters,³ also gave a statement to investigators, which was played at trial, in which she admitted Petitioner had confessed to killing someone. App. p. 237, 245-47.

Additionally, Ricky Simmons, a friend of Petitioner, also testified and admitted he; his twin brother, Rashad; Petitioner; and Petitioner's close friend and stepbrother, Eric Jarod Ransom (Ransom), planned to rob the Wendy's where Peters worked. App. pp. 264-67. According to Ricky, he and his brother snuck out of their house on the night in question to meet up with Petitioner and Ransom. App. pp. 269-70. As Ricky and Rashad walked from their apartment toward the Wendy's, they heard gunshots and ran back to their front porch. App. pp. 270-71. Ricky testified Petitioner and Ransom showed up a short time later, and Petitioner admitted to shooting someone in the course of a robbery attempt. App. p. 272, 276-77. Rashad Simmons also testified and generally confirmed Ricky's testimony, including the inculpatory statement Petitioner made admitting to shooting Bass during the course of the robbery attempt. App. pp. 308-342.⁴ Finally, Petitioner's stepbrother, Ransom, also testified and admitted to being present that night, hiding behind some trash cans as Petitioner shot and attempted to rob Bass.⁵ App. pp. 361-65. Ransom confirmed several details of the Simmons brother's testimony,

³ Rashida Peters worked at Wendy's with Bass. App. pp. 70, 77, 237, 242.

⁴ In fact, according to Rashad, Petitioner called him immediately prior to the incident and told him they were going to rob the Wendy's. App. pp. 315, 336-37.

⁵ Ransom was also charged and pleaded guilty to attempted armed robbery. His sentencing was deferred until after Petitioner's trial. App. pp. 373, 375-76.

including that Petitioner initiated the idea to rob the Wendy's. App. pp. 268, 359-60.

Petitioner presented an alibi defense. A friend of the family, Leslie Jackson, with whom Petitioner was living at the time, testified Petitioner did not have a key to the house and would not have been able to get back inside the apartment without one of the adults in the house knowing he had snuck out. App. pp. 410-12. According to Jackson, Petitioner was home on the night in question between 11:00 p.m. and 1:30 a.m. because his curfew was midnight. App. p. 411. Petitioner also testified on his own behalf and claimed to be at the Jackson home on the night of the murder from 9:00 p.m. until sometime the next morning. App. pp. 432-33. The jury was charged on the defense of alibi, but ultimately, they convicted Petitioner of all charges. App. pp. 483, 498-99.

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, pure questions of law will be 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), SCRPC; 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 (citing Strickland). Second, counsel's deficient performance must have prejudiced 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., 300 S.C. 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 defendant 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. 668.

ARGUMENT

- I. **The PCR court properly refused to allow Petitioner to amend his PCR application on the morning of the evidentiary hearing where Petitioner's additional allegation was based on information contained within the trial record and the original application could have been amended at any time during the ten months between the time of filing and the hearing.**

Petitioner alleges the PCR court erred by not allowing Petitioner to amend his PCR application to include an allegation trial counsel was ineffective for not objecting to the solicitor's "Golden Rule" argument. Prior to testimony being taken at the evidentiary hearing, Petitioner attempted to amend his application to include matters not pled in the original application. App. p. 538. Included in this amendment was an allegation that trial counsel was ineffective for failing to object to the solicitor's purported "Golden Rule" argument urging the jurors to "be instruments of justice" for the victim. App. p. 634. Respondent objected to this amendment, along with several others, explaining to the court the case had been scheduled for more than a month, and Petitioner had filed his original application some ten months prior. App. p. 538. Counsel for Respondent noted the amendment had only been presented to her twenty minutes before the hearing commenced. App. p. 538. The PCR judge ultimately decided to not allow the amendment because it had just been presented to Respondent, and Respondent had not had any opportunity to respond.⁶ App. p. 539.

Here, refusing to allow the Petitioner to proceed with his amended application was well within the authority of the court. The Uniform Post-Conviction Procedure Act governs the procedure for PCR actions, and the South Carolina Rules of Civil Procedure apply only so long as they do no conflict with the express wording of the statute. S.C. Code Ann. §§ 17-27-10 to -

⁶ Although Petitioner asked for a continuance in order to investigate a different amendment – namely, an after-discovered evidence claim based on a letter Petitioner allegedly received from his codefendant – Petitioner never sought a continuance in order to allow the State time to review and research this particular allegation. App. pp. 528-29.

160; Rule 71.1, SCRCPP. Under the Act, an applicant must “specifically set forth the grounds upon which the application is based” and include in his or her application all supporting facts which are within the applicant’s “personal knowledge” and set them out “separately from other allegations of facts.” Id. § 17–27–50. Additionally, the Act requires “[a]ll grounds for relief available to an applicant. . . be raised in his original, supplemental, or amended application.” Id. § 17–27–90. The Act allows a judge to permit amendments to an application “when appropriate.” Id. § 17–27–70(a). Rule 15(a) of the South Carolina Rules of Civil Procedure allows a party to amend his pleadings “once as a matter of course at any time before or within 30 days after a responsive pleading is served. . . .” Rule 15(a), SCRCPP. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Id.

The PCR court’s decision not to allow the amendment should not be overturned on appeal absent a showing of an abuse of discretion. See Mylin v. Allen–White Pontiac, Inc., 281 S.C. 174, 180, 314 S.E.2d 354, 357 (Ct. App. 1984) (“Courts have wide latitude in amending pleadings and, while this power should not be exercised indiscriminately or to surprise or prejudice an opposing party, the matter of allowing amendments is left to the sound discretion of the trial judge. His decision will not be overturned absent an abuse of discretion or unless manifest injustice has been done.”). In this case, the State objected to the amendment, and the PCR judge decided not to allow it because counsel for the State had only been shown the proposed amendment twenty minutes prior to the hearing, despite Petitioner having all information necessary to plead this allegation at the time of his original application ten months earlier. Additionally, the allegation is based on the conduct of the solicitor, Bryna Seay, who was not available to the parties as a witness the evidentiary hearing due to medical issues. App. pp. 600, 634. Therefore, the PCR court did not abuse its discretion in refusing to allow

Petitioner to make a last-minute amendment, and the decision of the PCR court should be affirmed.

II. Even if the PCR court abused its discretion by declining to allow the amendment, the PCR court's decision to deny Petitioner relief should be affirmed because the portion of the solicitor's closing argument at issue is not an improper Golden Rule argument so Counsel was not deficient in failing to object, and in any event, Petitioner was not prejudiced where the comment did not so unfairly infect the trial so as to make Petitioner's conviction a denial of due process.

South Carolina's courts prohibit the use of a "Golden Rule" argument, in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (citing Reese, 370 S.C. at 38, 633 S.E.2d at 901). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Here, the solicitor never told the jury to place themselves in the position of the victim or to view the evidence from his shoes. Rather, the solicitor suggested the jurors could be instruments of justice for the victim by finding the defendant guilty, which is permissible. In State v. Rice, the prosecutor, during closing argument, “asked the jury to give the victim’s wife peace and the victim justice.” 375 S.C. 302, 333, 652 S.E.2d 409, 424 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). Defense counsel objected on the ground that the comment “improperly injected passion or sympathy into the trial of the case” and asked the trial court to give a curative instruction, which the trial court declined to do. Id. at 335, 652 S.E.2d at 426. This Court agreed with the trial judge, explaining, “Arguably, the prosecutor’s comment was consistent with his duty, not to convict a defendant, but to see justice done. Viewed from that perspective, the prosecutor merely asked the jury to do the duty that was already required of them. The prosecutor’s comment did not call for the jurors to put themselves in the victim’s place and did not rise to the level of a Golden Rule argument.” Id. at 336, 652 S.E.2d at 426. Similarly, in Petitioner’s case, the comment at issue was not objectionable as a Golden Rule argument, and Counsel was not deficient in failing to object.

Neither was the comment so prejudicial as to amount to a denial of due process, particularly in the context of the closing as a whole. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). Petitioner objects to two lines in a closing argument which spans approximately fourteen pages of the trial record. These two sentences occur at the end of the solicitor’s argument and were immediately followed by a discussion of reasonable doubt. Petitioner’s case is therefore comparable to Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), abrogated on other grounds by Smalls v. State, 422 S.C. 174,

810 S.E.2d 836 (2018) (concluding any impropriety in the solicitor's closing argument was not sufficient to grant defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsels' statements as evidence); cf. State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (finding solicitor's use of "you" forty-five times during closing argument asking the jurors to put themselves in the place of the victim constituted reversible error and warranted a new trial).

In Smith, this Court found the solicitor's comments came at the very end of his closing argument and were limited in duration, and therefore, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Id. See also Von Dohlen, 360 S.C. at 613-14, 602 S.E.2d at 746 (holding trial counsel, during the penalty phase of a capital case, was deficient in failing to object to solicitor's comment for the jurors to put themselves in the victim's shoes, but finding such deficient performance was not prejudicial). Importantly, the trial court in Petitioner's case specifically instructed the jury its "verdict [could] not be based on sympathy, passion, prejudice, emotion, or any other consideration which is not in evidence," emphasizing the jury had "no enemies to punish. . . and no friends to reward." App. p. 484. Therefore, taken in the context of the State's closing argument as a whole, in combination with the trial court's jury instructions, the comment, even if deemed to be an impermissible Golden Rule argument, was not so prejudicial as to taint the entire trial and make Petitioner's conviction a violation of due process.

Accordingly, because Petitioner has failed to prove either deficiency or prejudice, the PCR court's finding denying post-conviction relief should be affirmed.

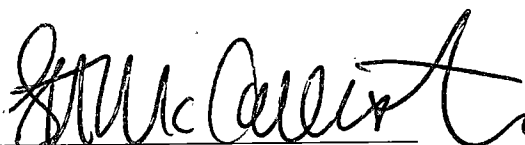
CONCLUSION

For all of the foregoing reasons, the decision of the PCR court rejecting Petitioner's last-minute amendment and finding Petitioner was not entitled to post-conviction relief should be affirmed.

Respectfully submitted,

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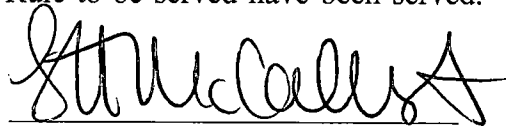
Respondent.

CERTIFICATE OF SERVICE

I, Lindsey A, McCallister, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood SC 29646

I further certify that all parties required by Rule to be served have been served. This 28th day of January, 2019.



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

Re: Korey Lamar Love v. State of South Carolina
Appellate Case No. 2016-002233
Lower Court Case No. 2015-CP-23-2618

Dear Mr. Shearouse:

Attached are the original and fourteen (14) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar #79054

LAM/jacc

cc: E. Charles Grose, Jr., Esquire
Victim Advocacy Division (without enclosure)