

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

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S.C. SUPREME COURT

DEVATEE TYMAR CLINTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001272

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by ruling defense counsel was not ineffective where counsel failed to proffer and argue that the identification statements of the victim's four-year-old son made shortly after the shooting that specifically named someone other than Petitioner as the murdered were admissible as "excited utterances" or "present sense impressions" since the Court of Appeals found the error excluding these statements unpreserved because counsel failed to proffer this testimony at trial?

STATEMENT OF THE CASE

During the late evening hours of January 19, 2012, Jenika Jones was killed by a single gunshot wound to the head. At the time of the shooting Jones was in her mobile home, located in a trailer park off Highway 200 near Great Falls, South Carolina. Unfortunately, Jones' three minor children were also in the home when she was shot. The oldest child, a four-year-old boy known by the nickname "Duce," went next door to get help from the neighbors, who promptly called 911. App. 194-195

Deputies with the Lancaster County Sherriff's office were dispatched at 10:09 P.M. and arrived on the scene within minutes of receiving the call. App. 217, ll. 3-11. Officers entered the mobile home to "clear the residence." Upon entering the residence, the officers observed Jones laying on the couch and her two youngest children in the living room area next to her. The children were secured, and officers confirmed that Jones was deceased. App. 221-222.

Multiple officers and crime scene investigators with the Lancaster County Sherriff's Office processed the scene. Despite the close proximity of the trailers to one another, officers were unable to find any neighbors who heard gun shots or saw anyone entering or leaving the victim's home. App. 230-233; App. 922, ll. 1-8. Evidence was collected, DNA swabs were taken from various locations in the mobile home, photographs were taken of the scene, and various surfaces were dusted for fingerprints. App. 464-472.

The children were initially secured by first responders in an ambulance at the scene. While in the ambulance the eldest child, Duce, spontaneously stated "Shi's daddy shot my momma." His statement then changed to "Shortycake shot my momma." He repeated this spontaneous statement to various officers and emergency medical workers on the scene. The

investigation revealed that “Shi” was Duce’s younger half-brother. Shi’s father was Rashad Johnson, whose street name was “Shortycake.” App. 158-168.

Despite the statements by Duce, the investigation focused on Petitioner, Al Martinez Green, and Wayne Blakeney – all three were ultimately charged with the murder of Jones. In June 2012, a Lancaster County grand jury indicted Petitioner for murder. App. 1089-1090. On March 10, 2014, the state, represented by Douglas Barfield, called the case to trial in front of the Honorable R. Knox McMahon and a jury. App. 1. Petitioner, who was represented by William Frick, was tried with his co-defendant Al Martinez Green.¹ App 1-2.

Prior to the start of the trial defense Counsel Frick made a motion in limine to determine the admissibility of the statements made by Duce to law enforcement and EMS personnel regarding the identity of the shooter. App. 158-168. Counsel Frick argued that the statements made by Duce should be admissible under Rule 803(2), SCRE, as excited utterances. App. 161. The state argued that even if a hearsay exception applied, the defense had to show the minor child was competent at the time of the statements. App. 161-162. The trial court ruled that based on the current case law the competency of a minor child did not have to be established for a hearsay exception to apply. The court further stated that the admissibility of the statement would depend upon how the testimony developed. Mainly, the court was concerned with whether defense counsel would be able to lay the proper foundation for a hearsay exception. App. 177-179.

At trial the state put forth the theory that Jones died during an attempted robbery organized by Petitioner. The key evidence relied upon by the state was the testimony of co-defendant Blakeney. Blakeney had provided inconsistent statements to the police during the

¹ Al Martinez Green was represented at trial by Amy S. Raney. App. 2.

investigation of the case. Blakeney originally told police that there were two other people in the car with him the night of the incident and then changed it to three other people. He said that Petitioner was driving the car and then later admitted he was the driver. Additionally, he changed the caliber of the gun from a nine-millimeter to a .380. App. 759-761; 770-771. He further stated that Petitioner asked him to hold onto a gun for him and that he had buried that gun in the woods. He later stated he had sold that gun to a relative and never buried it. App. 775, ll. 15-19.

At trial Blakeney directly implicated Petitioner, Green, a third individual named Delrico McDow, and himself in the murder of Jones.² Blakeney's trial testimony also contained details and statements not mentioned in his prior statements to police. App. 1057, ll. 11-15. To rebut the state's theory and highlight the inconsistent, biased testimony of Blakeney, Counsel Frick sought to elicit the statements made by Duce through crime scene Investigator Ken Taylor.

Taylor testified that he interacted with the victim's children the night of the incident and had a conversation with the oldest child. App. 501-502. Counsel Frick asked only if the child had said anything to Taylor which immediately drew an unspecific objection from the state. The trial court sustained the objection without explanation and defense counsel moved on with the cross examination of Taylor. App. 502. At no other point during the trial did Counsel Frick

² Blakeney was originally charged with murder. The state asserted that, outside of consenting to a PR bond, no deal or consideration had been given to Blakeney for his testimony. After the trial of Petitioner and Green, Blakeney's murder charge was reduced to accessory after the fact. He was sentenced under the Youthful Offender Act to a term of imprisonment not to exceed six years, suspended upon time served and eighteen months' probation. *See*, <https://publicindex.sccourts.org/Lancaster/PublicIndex/> (search case number 2014GS2900566); *See, also* Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) (stating a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records).

proffer the excited utterance or present sense impression statements Duce made identifying Rashad Johnson as the person who killed Jones.

After three and a half days of trial the jury found both Petitioner and Green guilty as charged. App. 988-989. Petitioner was sentenced to life without the possibility of parole. App. 1011. Petitioner appealed his conviction and sentence arguing that the trial court erred in excluding Duce's statements to first responders that implicated someone other than Petitioner in the charged crime. Following oral argument, the Court of Appeals affirmed Petitioner's conviction finding that the issue of the admission of the excited utter or present sense impression statements had not been preserved for appellate review. State v. Clinton, 2016-UP-206 (S.C. Ct.App. May 11, 2016); App. 1092-1094. The Court of Appeals denied rehearing. This Court subsequently denied certiorari on August 4, 2017. App. 1021-1022.

Petitioner filed an application for post-conviction relief on February 6, 2018. App. 1014-1020. The state filed a return dated June 11, 2018. App. 1021-1039. PCR Counsel Donae Minor filed an amended PCR application dated December 4, 2018 raising three grounds for relief. Notably, all three grounds centered on trial counsel's failure to have the hearsay statements admitted or the exclusion of the statements preserved for review. App. 1040-1042. An evidentiary hearing was convened on January 23, 2019 before the Honorable Paul M. Burch. App. 1043. The state was represented by Samuel Key.

During the PCR hearing Counsel Frick testified that he had been practicing law for about thirteen years at the time of Petitioner's trial and had handled numerous murder cases as both a prosecutor and defense attorney. App. 1047-1048. Frick stated that the strategy at trial was to get the statements from Duce admitted through a hearsay exception. Counsel Frick thought that the excited utterance exception applied to the facts of Petitioner's case. App. 1050, ll. 20-25.

Counsel Frick conceded that it was also possible that the present sense impression exception would have applied but that he did not raise that as a ground for admitting Duce's statements. Id.

Counsel Frick testified that he disagreed with the ruling from the Court of Appeals and thought that he had preserved the record for appeal. Frick argued it was the state's motion in limine to exclude the statement made by Duce and stated that he did not know how he was supposed to protect an objection that he did not make. Notably, at trial, Counsel Frick argued that it was the defense motion in limine to admit the statements. App. 162, ll. 11-12. Counsel Frick admitted that he did not proffer any testimony or attempt to argue for the admission of the statements by Duce after the state objected during Taylor's testimony. He conceded that the Court of Appeals ruled that he had in fact failed to preserve the record. App. 1051-1055.

In the order denying Petitioner's PCR application the PCR court found that Counsel Frick had employed a valid trial strategy in attempting to have the statements of Duce admitted at trial through a hearsay exception. The court stated that because counsel had articulated a valid trial strategy Petitioner had received effective assistance of counsel. The PCR court stated that "[w]hile trial counsel arguably needed to proffer the child's testimony to preserve the issue for appellate review, the Court will not second-guess trial counsel's decision to move on with his questioning." App. 1080.

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective where counsel failed to proffer and argue that the identification statements of the victim's four-year-old son made shortly after the shooting that specifically named someone other than Petitioner as the murdered were admissible as "excited utterances" or "present sense impressions" since the Court of Appeals found the error excluding these statements unpreserved because counsel failed to proffer this testimony at trial.

In dismissing Petitioner's PCR application, the PCR court relied on the "valid trial strategy" reasoning expressed in Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The reliance on Whitehead was misplaced. The question before the PCR court was not whether the strategy employed by counsel to admit the statements was valid but whether counsel's failure to preserve the record for appellate review when the trial judge excluded the admissible statements was error.

The failure to make a proffer of excluded evidence will preclude review on appeal. State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct.App.2006) (holding a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been). Where no proffer of excluded testimony is made, the court is unable to determine whether the appellant was prejudiced by the trial court's refusal to admit the testimony into evidence. TNS Mills, Inc. v. S.C. Dep't. of Revenue, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998).

Accordingly, it is well settled that failure to preserve an issue for appellate review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518

S.E.2d 265 (1999); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel can be found deficient for failing to object, failing to place an argument on the record, failing to obtain a final ruling, or failing to proffer testimony. See Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018); Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In the present action, Counsel Frick failed to obtain a final ruling on a motion in limine that involved a critical, exculpatory, piece of evidence. Counsel Frick had a duty, as the party seeking to admit the evidence, to proffer the testimony that was excluded in order to preserve the matter for appellate review. The failure to preserve the record for appellate review constituted deficient performance.

In Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999), this Court found trial counsel ineffective for failing to subpoena medical records of the victim and introduce them at trial. Dove was accused of murdering his wife and asserted that she had committed suicide. The medical records at issue confirmed that Dove's wife suffered from depression and suicidal ideations. Dove at 303, 523 S.E.2d at 461. This Court held that trial counsel was deficient because the medical records were "replete with evidence" about the victim's past suicidal tendencies. Id. Further, this Court held Dove was prejudiced because "he was unable to present relevant and important evidence supporting his assertion that his wife committed suicide" to the jury. Id.

Here, as in Dove, the jury never had a chance to consider crucial, exculpatory evidence. If the jury had heard this evidence, it can be reasonably deduced that the outcome of Petitioner's trial would have been different. Additionally, had Counsel Frick successfully preserved the record for appellate it is highly probable that the appellate court would have ruled the exclusion of the evidence was improper and reversed Petitioner's conviction. Thus, the confidence in the outcome of Petitioner's trial has been severely undermined.

The PCR court excused Frick's performance by ruling that he employed a valid trial strategy in attempting to have Duce's statements admitted through a hearsay exception. Notably, the PCR court admitted that Frick should have proffered the testimony at issue but then inexplicably reached the conclusion that the failure to proffer the testimony was not deficient performance. Even if Frick's strategy to admit the statements of Duce through a first responder was valid, there is nothing in the record that supports the holding of the PCR court. The failure to proffer the testimony and failure to preserve the record for appeal was not valid strategy, particularly considering that trial counsel thought he had properly persevered the record.

This Court has held that trial counsel's decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if *the reasons given for the strategy are not sound*. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) (emphasis added). In justification of his performance, Frick testified that he did not pursue the matter further because "[t]he judge shut that down." He stated that he did not "think it would be fruitful to argue anymore" and the judge had "clearly decided he wasn't going to let it in at that point." App. 1051, ll. 14-18. These "justifications" are similar to the ones provided in Stone, *supra*, which this Court held were not sound strategic reasons for failing to preserve a matter for review.

Further, Counsel Frick maintained multiple times that despite the ruling of the Court of Appeals he had properly preserved the record for appellate review. This continued denial of his error would indicate that Counsel Frick was unaware of the numerous cases holding that in order to preserve excluded evidence for appellate review the proponent of the evidence must proffer the testimony and obtain a final ruling on the matter. See State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) (holding a ruling in limine is not final; unless an objection is

made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review); State v. Simmons, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004) (finding an issue unpreserved where the state objected to a witness's testimony, the objection was sustained, and the defendant failed to raise his argument regarding the trial court's exclusion of the testimony or proffer what that witness's testimony would have been had the witness been allowed to continue testifying).

In the present case the failure of trial counsel to protect the record cannot be deemed reasonable under prevailing professional norms. A threshold for evaluating the reasonableness of counsel's conduct is whether counsel performed the function of making the adversarial testing process work in a particular case. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). The adversarial process broke down in Petitioner's case due to counsel's error. The jury did not receive important, necessary, and exculpatory evidence that was crucial to Petitioner's defense that he was actually innocent. Further, by not proffering the testimony Petitioner was denied the opportunity to have the appellate courts review the trial court's exclusion of this key piece of evidence. In failing to protect the record for appellate review Counsel Frick was deficient. Petitioner was prejudiced because he was unable to present relevant and important evidence to the jury that supported his assertion that he was not involved in the death of Jones and had never been inside of her trailer.

Petitioner's defense at trial was that he was actually innocent. There was no forensic evidence that linked Petitioner to the scene of the murder and no motive for Petitioner to kill Jones. The strongest evidence the state had to offer was the testimony of Petitioner's co-defendant Blakeney. However, that testimony was extremely biased as Blakeney stood to gain, and did in fact receive, a great benefit in return for testifying against Petitioner. Also, as stated

above, Blakeney had given previously inconsistent statements to law enforcement that weakened his credibility. Based on the total lack of evidence against Petitioner, it was imperative that the admissible, exculpatory statements made by Duce be introduced into evidence at trial.

Duce's statements identified Rashad Johnson, "Shortycake," as the individual that shot his mother. Importantly, the state conceded during the pre-trial motion that Duce did in fact make the statements identifying Johnson as the shooter to both EMS and law enforcement shortly after the murder had occurred. App. 158-161. A fair reading of the record shows that the statements fell into a hearsay exception as either excited utterances or present sense impressions.

Under Rule 803(2), SCRE, an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Rule 803(1), SCRE. Both exceptions require showing that the declarant had personal knowledge of the event. See State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (holding statements which are not based on firsthand information are not admissible under the excited utterance exception to the hearsay rule).

The record shows that all three children were in the trailer at the time of the murder, that Duce immediately went to the neighbor's house upset and crying to tell them what had happened, that Duce and the other children had blood on them from their mother, and that Duce repeated the statements to EMS and law enforcement several times without being prompted shortly after the murder was committed. Importantly, Johnson was someone Duce was familiar with – Johnson was the father of Duce's younger half-brother, Shi. Duce repeatedly identified the person responsible for shooting Jones as "Shi's daddy" or "Shortycake." The police

investigating the case confirmed that “Shi’s daddy” was Rashad Johnson who was also known as “Shortycake.” Based on the record it can be reasonably concluded that Duce perceived the shooting of his mother, recognized the shooter and identified that person to first responders once they were on the scene. To find that Petitioner had a fair trial when this important piece of exculpatory evidence was kept out of the record would be fundamentally unfair.

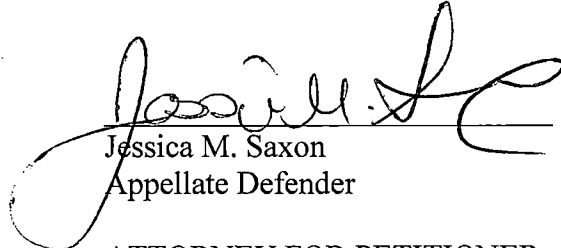
A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel’s performance was deficient and that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

In the present case, Petitioner has shown both error and prejudice. Counsel Frick’s failure to preserve the record for appellate review cannot be justified as a valid trial strategy. The failure to proffer the testimony and obtain a final ruling on the admission or exclusion of the exculpatory hearsay statements was in no way reasonable under prevailing professional norms. The statements made by Duce were critical to Petitioner’s defense and should have been admitted for the jury to consider. When that did not occur, it was incumbent upon trial counsel to insure a higher court

could review the decision of the trial court. Failure to preserve the record on this issue was ineffective assistance of counsel. See Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999).

CONCLUSION

Based on the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of March, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

DEVATEE TYMAR CLINTON,

PETITIONER

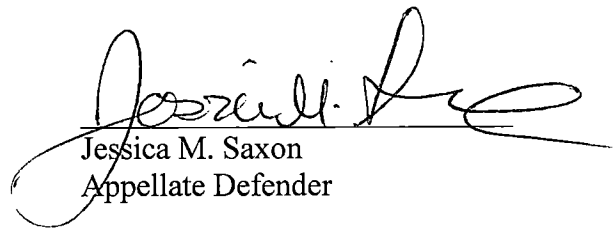
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Samuel Key, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Devatee Tymar Clinton, #317521, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of March, 2020.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of March, 2020.

Marcy Allgood (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.