

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CLARENDON COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis, Post-Conviction Relief Judge
The Honorable R. Ferrell Cothran, Jr., Trial Court Judge

Appellate Case No. 2019-000221

MICHAEL PEARSON #238921,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Did the PCR court err in finding trial counsel effective where trial counsel failed to make a motion to sever Petitioner's trial from that of his co-defendant where evidence was entered at trial that would not have been entered if Petitioner had been tried alone and resulted in the jury being unable to make a reliable judgement about Petitioner's guilt separate from that of his co-defendant?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The PCR court correctly found Petitioner failed to establish trial counsel was constitutionally ineffective for failing to move to sever Petitioner's trial from his co-defendant, where there was no legal basis for severance, and where Petitioner cannot establish any requisite prejudice because trial counsel and the trial court both fully advised the jury that the evidence presented must be considered against each defendant individually.

STATEMENT OF THE CASE

During the January 2011 term, the Clarendon County Grand Jury indicted Petitioner for first-degree burglary, attempted murder, armed robbery, grand larceny - \$2,000 to \$10,000, kidnapping, and possession of a weapon during a violent crime (2011-GS-14-0068). Petitioner was represented by Harry Devoe, Esquire, (Counsel) at trial. On May 18, 2012, Petitioner and his co-defendant, Victor Weldon (Weldon) proceeded to a joint trial before the Honorable R. Ferrell Cothran, Jr., circuit court judge, and a jury. The jury convicted Petitioner of first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during a violent crime. Judge Cothran sentenced Petitioner to imprisonment for thirty years for first-degree burglary, thirty years for armed robbery, five years for grand larceny, twenty years for kidnapping, and five years for possession of a weapon during a violent crime. The sentences for first-degree burglary and armed robbery were consecutive while the other sentences were to be served concurrently.

Petitioner filed a timely notice of appeal. An appeal was perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office Appellate Defense. The issue on appeal was whether the trial court properly denied Petitioner's motion for a directed verdict. The South Carolina Court of Appeals reversed Petitioner's conviction in an opinion refiled on October 8, 2014, finding that the evidence presented by the State did not rise to the level of substantial circumstantial evidence needed to submit the case to the jury. State v. Pearson, 410 S.C. 392, 764 S.E.2d 706 (S.C. Ct. App. 2014). The State petitioned for a writ of certiorari to review the decision of the Court of Appeals, which was granted by the Supreme Court of South Carolina. On March 23, 2016, the Supreme Court of South Carolina reversed the decision of the Court of Appeals and affirmed Petitioner's convictions and sentences, finding that Court of Appeals weighed the evidence and erroneously required the State, at the directed verdict stage, to

present evidence sufficient to exclude every other hypothesis of Petitioner's guilt. State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016).

Petitioner filed an application for post-conviction relief on May 27, 2016, simply alleging "ineffective assistance of counsel." Respondent filed a return and motion for more a more definite statement on June 6, 2017. By email on July 23, 2018, Petitioner informed Respondent he would be amending his application to include the following allegations:

Ineffective Assistance of Counsel

1. "Had been very ill before and during the trial, recovering from heart issues as well as his wife was also very ill at the time. We believe this contributed to ineffective representation in that the Attorney"
2. "Did not interview witnesses provided to him by the defendant prior to the hearing and did not call witnesses"
3. "Did not enter a Notice of Alibi for the Defendant which was provided to him by the defendant and others"
4. "Did not enter evidence provided to him by the defendant"
5. "Did not speak with the defendant prior to trial other than brief encounter the weekend before the trial started"
6. "Did not investigate the facts of the case"
7. "Did not move for separate trial for the defendant from his codefendant"

Newly Discovered Evidence

1. "New evidence that the co-defendant admitted to law enforcement that he did not know the defendant and other evidence exculpating the defendant."

An evidentiary hearing was held on July 24, 2018, before the Honorable Kristi F. Curtis, circuit court judge. Petitioner was present and represented by Timothy L. Griffith, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Office of the Attorney General represented Respondent.

At the commencement of the hearing, Petitioner amended his allegations to include an allegation that Counsel was ineffective for failing to move to sever Petitioner's trial from Weldon's trial. Petitioner and trial counsel testified at the PCR hearing.

Following the hearing, Judge Curtis denied and dismissed Petitioner's application with

prejudice and a written order of dismissal was filed on November 20, 2018. Judge Curtis found there was no legal basis to sever Petitioner's case from Weldon's, and therefore, Counsel was not ineffective for failing to move to sever Petitioner's case from Weldon's.

Petitioner filed a timely notice of appeal challenging the denial of post-conviction relief. On November 27, 2019, Petitioner filed a Petition for Writ of Certiorari in this Court. This return follows.

STATEMENT OF THE FACTS

On May 15, 2010, Edward “Slick” Gibbons (Victim) walked out of his garage and was attacked by three men who came out of the storage room of his carport. (App. p. 90, l. 1-9). The men beat him, robbed him, and stole his vehicle. (App. p. 96-99, p. 102, l. 12) Petitioner and his co-defendant, Victor Weldon, were arrested and charged with attempted murder, first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime.

At trial, Victim testified he left his house around 6:15 or 6:20 a.m., came out of the garage, and bent over to put on his shoes. (App. p. 89, l. 11-25). At that point, three men came out of the storage room of his carport and jumped him. (App. p. 93). The men were black and wore masks. (App. p. 93, l. 7-10, 16). Victim testified the men robbed him of approximately \$840 and then beat him, asking where the rest of the money was. (App. p. 95, l. 19; p. 100, l. 14-20). He described how the men sat on him, kicked him, stomped on his chest and stomach, and wrapped duct tape around his face. (App. p. 96-100). Victim testified that one man had what he thought was a gun and he heard one man ask if they were going to shoot him. (App. p. 96-100). After being beaten and robbed, he heard the men leaving and got up to see what kind of car they were driving. (App. p. 102) Victim heard someone say, “He’s up, he’s up,” and saw one of the men jump out of the back of Victim’s El Camino and run back in to hit him. (App. p. 102, l. 16-20; p. 106-107). Victim testified the value of his El Camino was approximately \$6,500. (App. p. 110, l. 3-20). Victim testified he was taken to Clarendon Memorial Hospital by ambulance and then transported via helicopter to Columbia, where he spent more than a week in intensive care and then a week in a rehabilitation center. (App. p. 113).

Victim's wife, Kay Gibbons, testified next. On the morning of the incident she was in bed, heard the doorbell, and opened the door to find her husband bloody, wrapped in tape, and barely able to stand. (App. p. 148-149). She called her daughter, who called 911 and came to their house. (App. p. 150-151). Gibbons testified that law enforcement and an ambulance arrived at the scene and Victim was taken to the hospital. (App. p. 150).

The State called Cecil "Mac" Eaddy, Jr., to testify about finding Victim's car in the road. (App. p. 169). He found the car running with the passenger door open at about 6:40 a.m. about a mile and a half from Victim's store. (App. p. 172, l. 1-6). Eaddy described how he pulled the car out of the road and turned it off, took the keys to Victim's store, and drove one of Victim's employees back to the car so the employee could drive it to Victim's store. (App. p. 172, l. 17-19).

Ricky Richards, an investigator with the Clarendon County Sheriff's Office, testified that he processed the vehicle after it had been found and taken to Victim's store. (App. p. 180-181). He found fingerprints on the rear quarter of the driver's side and the driver's side door jamb and sent them to Marie Hodge, a fingerprint technician with the Sumter Police Department. (App. p. 181-182). Richards admitted on cross-examination that there was no way to tell when the fingerprints were left. (App. p. 190, l. 6-13).

Next the State called Investigator Thomas "Lin" Ham (Ham) of the Clarendon County Sheriff's Office. (App. p. 193). He testified that he was called to the scene on May 15, 2010, and had known Victim and Gibbons his entire life. (App. p. 193, l. 20-25). Ham testified that his assignment was to assist and oversee Investigator Kenneth Clark's investigation because Clark was a new investigator. (App. p.194, lines 9-19.) Ham identified photographs from the crime scene showing black duct tape, blood spots, and Victim at the hospital with the tape still wrapped around his head. (App. p. 197). Ham described how he wore gloves and helped the nurse get the tape off

Victim's head. (App. p.198, l. 10-13.) After removing the tape, Ham testified that he put it in a bag and turned it over to Investigator Clark as evidence so it could be taken to SLED and processed. (App. p. 198, 20-25.) Next, Ham testified to taking fingerprints from Petitioner. (App. p.201, l. 20-25). The State moved Petitioner's fingerprint card into evidence and it was admitted without objection. (App. p. 202, l. 20-25). Ham testified regarding Investigator Clark's interview with Petitioner, for which Ham was present. (App. p. 205, l. 19-25). He testified that Petitioner adamantly denied knowing Victim and said he did not know where Victim lived, had never been to Victim's home or place of business, and had never come into contact with Victim's vehicle. (App. p. 206).

Next, the State called Marie Hodge, the fingerprint examiner for the Sumter Police Department. (App. p. 215). The trial court qualified her as an expert in the field of fingerprint identification without objection. (App. p. 218, l. 20-25). She testified that she examined the latent print sent by Richards and determined it was made by Petitioner's right thumb based on a comparison with Petitioner's fingerprint card. (App. p. 222, l. 12-16). On cross-examination, Hodge admitted there was no way to age or date a fingerprint. (App. p. 231, l. 17-20).

The State called Kenneth Clark, the investigator in charge of the case. (App. p. 249). He testified Victim described the men who robbed and beat him as three black males, of mid age and medium build, who wore dark clothing and masks. (App. p. 258-259). Clark verified that a fingerprint lifted from the rear quarter panel of Victim's stolen vehicle matched Petitioner. (App. p. 264, l. 6-12). He also testified concerning his interview with Petitioner, confirming Investigator Ham's earlier testimony that Petitioner denied having been around Victim's property or vehicle. (App. p. 265, l. 11-19). The State then asked Clark to describe why Petitioner was charged with each of the six charges he faced. (App. p. 266-269).

During Clark's investigation, he discovered Richard Gamble, a landscaper who verified that Petitioner had previously been to Victim's house because he had taken Petitioner with him to the home on several occasions to do landscaping. (App. p.224, l. 22-p.225, l. 7.) Although Petitioner and Weldon claimed not to know each other, Investigator Clark testified he discovered that both men were at the South Carolina Vocational Rehabilitation Center (Voc Rehab) at the same time. (App. p. 277.) The State called John Hornsby to verify that Petitioner and Weldon had worked together at Voc Rehab from December 9-12, 2008. (App. p. 278, l. 8-25).

The State called Richard Gamble, (Gamble) the landscaper who claimed to have taken Petitioner to Victim's house to do yard work. (App. p. 322.) Gamble testified that Petitioner had worked with him on landscaping projects at Victim's home and next door at Victim's son's home. (App. p. 324). He estimated they spent about a week at both homes in the spring of 2010, trimming and cleaning up. (App. p. 325-26). He further testified that Petitioner had been in Victim's garage to get tools while they were working. (App. p. 327, l. 12-20; p. 335-338).

Next, the State called Catherine Leisy, a DNA analyst for SLED. (App. p. 342). Leisy testified she received DNA samples taken from the duct tape around victim's head and a wallet found on the scene, and determined that the DNA profile matched a "mixture of at least two individuals," one of them being Weldon. (App. 347, l. 19-25). Leisy further testified that the DNA profiles of Petitioner, and two other individuals George Frierson and Mathew Weldon, did not match the DNA found on the duct tape. (App. p. 348). Petitioner's DNA profile was excluded as contributors from other DNA found at the scene.

After the State rested, Petitioner moved for a directed verdict, arguing the only evidence was a fingerprint on the vehicle and that it could have gotten there at any time. (App. p. 383-84). The trial court denied the directed verdict motion, finding the fingerprint, coupled with Petitioner's

statement that he had never had contact with Victim's home or vehicle, was sufficient evidence to send the case to the jury. (App. p. 391-392). Ultimately, the jury found Petitioner guilty of first-degree burglary, armed robbery, grand larceny, kidnapping, and possession of a weapon during the commission of a violent crime, and the trial court sentenced him to a total of sixty years' imprisonment. (App. p. 466, l. 23- p. 467, l.9).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and review those conclusions de novo. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Petitioner sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the Petitioner must prove “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 (quoting Strickland, 466 U.S. at 694).

ARGUMENT

The PCR court correctly found Petitioner failed to establish trial counsel was constitutionally ineffective for failing to move to sever Petitioner’s trial from his co-defendant, where there was no legal basis for severance, and where Petitioner cannot establish any requisite prejudice because trial counsel and the trial court both fully advised the jury that the evidence presented must be considered against each defendant individually.

Petitioner argues the PCR court incorrectly found Counsel was not ineffective for failing to move to sever Petitioner’s trial from Weldon’s trial because additional evidence was entered at trial that would not have been entered if Petitioner had been tried alone and that resulted in the jury being unable to make a reliable judgment about Petitioner’s guilt separate from that of Weldon. As the PCR court found, for reasons discussed below, there was no legal basis to sever Petitioner’s case, and therefore, Counsel was not deficient for failing to make a motion to sever. Furthermore, Petitioner has failed to establish any requisite prejudice, as both Counsel and the trial court advised the jury that the evidence presented must be considered against each defendant individually. Petitioner’s argument is without merit, and therefore, certiorari should be denied on this issue.

In a post-conviction relief action, a petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. 668. A petitioner must overcome this presumption in order 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. Id. at 117, 386 S.E.2d at 625. First, a Petitioner must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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.

Petitioner's assertion that Counsel was constitutionally ineffective for failing to move to sever his trial from his co-defendant is without merit, as there was no legal basis to make such a motion, and because Counsel, Weldon's counsel, and the trial court instructed the jury to consider the evidence against each defendant individually.

In South Carolina, criminal defendants indicted for connected crimes are not entitled to separate trials as a matter of right and ordinarily may be jointly tried together. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see also United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990) ("Barring 'special circumstances,' the general rule is that defendants indicted together should be tried together." (citation omitted)). In fact, joint trials are preferred due to the vital role they play in the criminal justice system. Zafiro v. United States, 506 U.S. 534, 537 (1993); see also State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (recognizing the principles espoused by the United States Supreme Court in regard to joint trials are fully consistent with South Carolina law); see generally Kansas v. Carr, 136 S. Ct. 633, 645 (2016) ("Joint proceedings are not only permissible but are often preferable when the joined defendants' criminal conduct arises out

of a single chain of events.”). Specifically, joint trials are vital because they promote efficiency in the administration of justice. Zafiro, 506 U.S. at 537. Likewise, joint trials serve the interests of justice by avoiding inconsistent verdicts, preventing inequity, and enabling more accurate assessments of relative culpability in cases involving multiple defendants, which may operate to the advantage of some defendants. Richardson v. Marsh, 481 U.S. 200, 210 (1987).

However, even though joint trials are generally preferred, severance is warranted when there is a serious risk a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Zafiro, 506 U.S. at 539; see United States v. Smith, 44 F.3d 1259, 1266 (4th Cir. 1995) (“[P]rejudice [warranting severance] may be shown **only** where there is a ‘serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.’ ” (citation omitted and emphasis added)). Situations in which a joint trial might potentially be improper include: (1) when prejudicial evidence that would not be admissible against one defendant is admitted against a co-defendant; (2) when there is a marked difference in the degrees of culpability between different defendants; and (3) when essential exculpatory evidence would be available to a defendant only if he or she was tried alone. Zafiro, 506 U.S. at 539. Importantly though, “less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice” that might result from a joint trial. Id.; see Hughes, 346 S.C. at 559, 552 S.E.2d at 317 (“A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial.”). Moreover, “defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” Zafiro, 506 U.S. at 539; see State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.

App. 2005) (“The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime.”).

In ruling on a motion for severance, a trial judge is vested with broad discretion. Nichols, 325 S.C. at 122, 481 S.E.2d at 124. When seeking severance, a criminal defendant bears an “exacting” burden and must make a strong showing to the trial judge prejudice would result from a joint trial. United States v. Martinez, 922 F.2d 914, 922 (1st Cir. 1991). Significantly, a trial judge should **only** grant severance when there is a serious risk a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from reliably determining the guilt or innocence of one of the defendants. Hughes, 346 S.C. at 559, 552 S.E.2d at 317.

"A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Spears, 393 S.C. 466, 475, 713 S.E.2d 324, 329 (Ct. App. 2011) (citing State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005)). In Spears, the South Carolina Court of Appeals held that the defendant was not prejudiced by a joint trial with his co-defendant where the evidence against both defendants for armed robbery and kidnapping was interconnected and no specific trial right was prejudiced by the joinder of these trials.

Petitioner has failed to prove that Counsel was deficient for failing to make a motion to sever Petitioner’s trial. At the PCR hearing, Counsel testified that, at the time of the trial, he was not aware of any valid legal basis to file a motion to sever the trials. (App. p. 529, l. 1-4). Counsel stated he discussed this decision with his client, and they did not make the motion. (App. p. 528, l. 17-20). Although he opined that perhaps in retrospect he should have done so, he reiterated that he

was still not 100 percent sure if he would have severed the trials based on the facts of the case. (App. p. 529, l. 1-4; p. 533, l. 12-14).

Counsel was not and could not have been deficient for requesting a separate trial because a motion to sever would not have been granted by the court, as there was no valid basis to sever Petitioner and Weldon's trial. None of the factors conceivably warranting a severed trial were present in Petitioner's case. The State did not present any evidence against Weldon that was prejudicial to Petitioner and that would have been inadmissible as to Petitioner. To the contrary, the evidence presented against Weldon was Weldon's own DNA, which could not be confused as belonging to Petitioner. Furthermore, the degrees of culpability between Weldon and Petitioner were nearly identical. Both Petitioner and Weldon were equally involved in the crime and they were indicted for the same charges. Finally, Petitioner was not deprived of any exculpatory evidence due to being tried during the same trial of Weldon, and the joint trial did not compromise any specific right of Petitioner's. Petitioner essentially makes the simplistic argument that he was entitled to a separate trial because, according to Petitioner, he would have been less likely to be convicted if he had been tried alone. However, such an argument is not sufficient to show that Petitioner was entitled to a separate trial. See Zafiro, 506 U.S. at 539. Accordingly, Counsel was not deficient for failing to move to sever Petitioner's trial, and Petitioner failed to meet his burden proving any deficiency on behalf of Counsel.

Additionally, Petitioner has not and cannot prove he was prejudiced by any alleged deficiency, as the jury was properly instructed to consider the applicable evidence as to each individual defendant. Both Counsel and Weldon's counsel explained to the jury in their opening statements that they must determine guilt based on the individual evidence brought against each

defendant. (App. p. 75, l. 11 – p. 76, l. 14; p. 79, l. 19). Furthermore, in the final jury charge, the Court instructed the jury as follows:

“I charge you that there are two defendants in this case; each of whom are charged with the crimes that I have gone over with you listed on the indictment. The case of each defendant and the evidence and law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for both or all of the defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendant. Moreover when one person I charged with the crime if the evidence warrants it you may convict him and acquit the other. You may acquit both or you may convict both. It will depend upon your view of the testimony and evidence. You must take each defendant and consider the evidence as to that defendant and my instructions on the law as to that defendant.”

(App. 455, l. 23-456, l. 15).

Clearly, the jury was informed that it should consider the evidence as to each individual defendant. Counsel argued to the jury in his opening statement that there was no DNA evidence belonging to Petitioner found at the scene, and the main piece of evidence the State would present against Petitioner was a fingerprint left on Victim’s El Camino, which, Petitioner argued, could have been left on a prior occasion. Accordingly, Petitioner has not met his burden proving he was prejudiced by any failure of Counsel’s to move to sever his trial from Weldon’s trial.

Counsel was not deficient for failing to move to sever the trials, and Petitioner has failed to prove any resulting prejudice from his choice not to do so. Accordingly, this Petition is without merit and certiorari should be denied.

CONCLUSION

Based on the foregoing arguments, Counsel was not deficient and Petitioner was not prejudiced by any alleged deficiency. Therefore, the State requests certiorari be denied. Should this Court grant Petitioner's petition, the State would request the opportunity to more fully brief the issue.

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APRIL 13, 2020.

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