

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO ORANGEBURG COUNTY

The Honorable Robert Hood, Post-Conviction Relief Court Judge
The Honorable Edgar W. Dickson, Trial Judge

Appellate Case No. 2018-000553

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Apr 15 2020

S.C. SUPREME COURT

GEORGE HUGHES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO SECOND REVISED PETITION FOR
WRIT OF CERTIORARI**

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ISSUES PRESENTED ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

- I. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for making opening arguments to the jury at Petitioner's trial, which undermined Petitioner's trial strategy to present a claim of self-defense?
- II. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegations relating to the testimony of Ketcherside concerning his claim that he took photographs of a knife in Petitioner's car at the scene because he wanted to verify it was the same brand and type as the knife found at the scene?
- III. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning the failure of Trial Counsel to adequately investigate and utilize the forensic evidence in Petitioner's case and his failure to adequately cross-examine the prosecution's witnesses concerning the forensic evidence in this case?
- IV. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegations that Trial Counsel was ineffective for neglecting to discuss the decision concerning whether to argue against a verdict of the lesser-included offense of voluntary manslaughter to the jury with him, for failing to advise him concerning the risks inherent in proceeding only on the charge of murder, for neglecting to advise him that he could assert his claim of self-defense while at the same time arguing that the evidence presented by the State failed to establish malice beyond a reasonable doubt and for neglecting to advise Petitioner that while asserting a claim of self-defense he could alternatively argue that if the jury did not find that he acted in self-defense, they should consider the absence of proof beyond a reasonable doubt of malice as the basis for a finding of guilt only as to the lesser-included offense of voluntary manslaughter?
- V. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for failing to adequate review for the jury in closing arguments all of the evidence adduced at trial by the State and Petitioner which supported a finding of self-defense?

Respondent's Counterstatement of Issues on Certiorari

- I. Whether trial counsel was ineffective for informing the jury in his opening statement that the deceased, "brought a knife to a gun fight" and there "will be evidence, I suspect that the deceased pulled a knife" where counsel enumerated a strategic reason for the statements?
- II. Whether trial counsel was ineffective for questioning Ketcherside concerning the knife found in Petitioner's vehicle where the testimony elicited was beneficial to Petitioner and Petitioner has failed to show any resulting prejudice?
- III. Whether trial counsel was ineffective for failing to utilize forensic evidence and failing to adequately cross-examine the prosecution's forensic evidence witnesses where Counsel properly cross-examined all witnesses concerning any forensic evidence?

- IV. Whether trial counsel was ineffective for properly discussing with Petitioner their trial strategy of solely pursuing self-defense and not pursuing the potential lesser-included offense of voluntary manslaughter?
- V. Whether trial counsel was ineffective for providing the jury an adequate overview of the defense's theory of the case and evidence to consider regarding Petitioner's claim of self-defense?

STATEMENT OF THE CASE

Applicant was indicted at the January 2015 of the Court of General Sessions for Orangeburg County for murder (2015-GS-38-0077). Applicant was represented by Counsel. On July 30, 2015, Applicant proceeded to trial before the Honorable Edgar W. Dickson. The jury found Applicant guilty of murder. Judge Dickson sentenced Applicant to thirty years imprisonment. Applicant did not appeal his conviction or sentence.

Applicant filed an application for post-conviction relief (PCR) on October 26, 2015. The day of the evidentiary hearing, May 25, 2017, Applicant filed an amended application. The State was provided with a preliminary copy of the amendments before the hearing. At the conclusion of the evidentiary hearing, this Court gave Applicant and Respondent leave to draft proposed orders and memoranda in support of their positions. The lower court's Order of Dismissal was filed on January 18, 2018, but was not received by Petitioner until February 26, 2018. Petitioner timely filed a Notice of Appeal on March 30, 2018.

Petitioner's Original Petition for Writ of Certiorari was filed on August 14, 2019. Thereafter, he filed a Petition to Exceed the twenty-five page limit on the length of his Certiorari Petition imposed by Rule 243(e)(3), SCACR. That petition was denied. Petitioner filed a Revised Certiorari Petition on March 27, 2019. In said Petition, Counsel for Petitioner incorporated by reference the Summary of Relevant Testimony, the arguments and authorities advanced in the Memorandum in Support filed by her in support of Petitioner's Questions Presented 6-22. In so doing, Petitioner submitted that it was impossible to address all the meritorious allegations perfected

in this collateral review action in the allotted twenty-five pages and further argued that Petitioner's case presented this Court the opportunity to address the question in South Carolina concerning whether cumulative prejudice might serve as the basis for the grant of relief on Collateral Review. Respondent subsequently filed a Petition to Strike the portions of the Amended Petition for Writ of Certiorari addressing Questions Presented 6-22. Respondent's Motion to Strike was granted by Order of the Chief Justice Beatty dated December 12, 2019.

STATEMENT OF FACTS

Applicant was the landlord of the victim, Michael Kemmerlin. Tr. 437. Applicant went to the victim's house to collect money from the victim for an unpaid electric bill. Applicant was armed with a handgun at the time. Tr. 438. Applicant had a concealed weapons permit for the handgun he was carrying. Tr. 470. Applicant shot the victim five times, resulting in the victim's death. Tr. 330. The shot to the victim's face was from a distance of mere inches. Tr. 333. Applicant called law enforcement and reported the shooting. Tr. 382. There were four shell casings inside the victim's house and one against the under-skirting of the house. Tr. 255. When law enforcement arrived, there was a knife in the hand of the victim. Tr. 337. Dr. Janice Ross testified it would be atypical for a weapon to remain in the hand after the victim was shot and went unconscious. Tr. 338. Officer William Ketcherside took pictures of a knife (car knife) found in Applicant's vehicle, but did not take it into evidence. Tr. 222. Ketcherside testified he took a picture of the knife because he wanted to determine if it was the same brand as the knife (victim knife) in the victim's hand. Tr. 221. The deputy admitted he did not see any evidentiary value in taking the car knife into evidence. Tr. 222. The brand name of the car knife was Frost Cutlery. Tr. 224. The victim knife was a different type of knife and not of the same brand as the car knife. Tr. 222-224; Applicant Ex. 12.

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 give great deference 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. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. 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).

ARGUMENT

QUESTION 1

In Trial Counsel's opening statement to the jury he informed them that the deceased, "brought a knife to a gun, a gunfight" and that there "will be evidence, I suspect that the deceased pulled a knife." Counsel enumerated his strategy for these comments was to support their self-defense theory.

Counsel's enumerated strategy was to establish that the victim had a knife during the incident and that Petitioner was acting in self-defense. Evidence established at trial, through Petitioner's statements and photographs introduced, that the victim did indeed have a knife on his person. Trial Counsel was aware that Petitioner had a concealed weapon permit and was carrying a weapon with him when he collected money from his tenants. ROA p. 815, ln. 20. Trial counsel stated that he "suspected" that evidence would be introduced to show that the deceased pulled a knife on Petitioner. ROA p. 67, ln. 7. Petitioner argues that the use of the word "suspected" is in itself ineffective representation by counsel in a trial where self-defense was being asserted and there was evidence showing the victim had a knife. PWC p. 9. Counsel testified that he chose to use the colloquialism in his opening statement in an effort to connect with a jury that would understand the sentiment and to help explain why Petitioner had a gun. ROA p. 648, ln. 10-11. The jury was going to be made aware that Petitioner had a gun on his person the day of the incident. Counsel saying that the victim brought a knife to a gunfight does nothing more than help to illustrate that Petitioner was acting in self-defense, but happened to be aptly prepared to properly defend himself. The saying does not automatically imply that Petitioner went to the victim's residence in search of a fight, it simply implies that Petitioner was prepared to properly defend himself against the knife pulled on him by the victim. The prosecutor eluded to the saying used by counsel in their closing in an effort to say that Petitioner

did not have clean hands in this case. Argument by the solicitor in closing is not evidence and counsel was able to argue throughout the case that Petitioner was acting in self-defense in this incident. Petitioner argues that counsel using the word “suspect” is per se deficient as counsel knew that evidence would be entered that proved the victim pulled a knife on Petitioner.

Petitioner places too great a weight on one word used by counsel in his opening statement.

Counsel intended on introducing evidence and testimony to show that the victim pulled a knife on Petitioner, however, counsel is never certain that he will be able to prove anything to a jury.

Counsel stating that he “suspects” evidence will be presented that the victim pulled a knife on Petitioner is simply a way to introduce the jury to what he expects will happen during the trial.

Counsel’s opening and closing arguments were well within the bounds of professional norms as required by Strickland. Also, Petitioner has failed to show any resulting prejudice from counsel’s alleged errors. Counsel’s statements did nothing more than lay a foundation for their defense strategy and provide the jury with an idea as to what the defense intended to prove. Therefore, the post-conviction relief court properly found that counsel was not ineffective and that Petitioner was not prejudiced by any alleged deficiencies.

QUESTION 2

Petitioner alleges that trial counsel was ineffective for failing to object to or further clarify testimony from an investigating officer concerning the knife found in the victim’s hand and the knife found in Petitioner’s vehicle. Counsel was not ineffective where he elicited beneficial testimony from the officer concerning the knives and where photographs of the two knives clearly show that they are different brands.

Petitioner contends that counsel was ineffective for eliciting testimony from the officer that he collected the knife from Petitioner’s vehicle because he “wanted to verify that it was the

same brand and type of knife that was found at the scene” and failed to either confirm that the knife collected was the same brand or that it was not. PWC p. 9. Petitioner contends multiple times that counsel failed to clarify to the jury whether or not the officer was able to conclude whether or not the two knives were the same brand and type. PWC p. 9. Petitioner argues that any ambiguity in this testimony would have been interpreted in favor of the State by the jury, the State attempted to argue that the knife was planted in the victim’s hand by Petitioner, and that the jury concluding that the two knives were the same “brand and type” would cause irreparable damage to Petitioner’s case. PWC p. 9.

On cross-examination, counsel was able to elicit testimony from the officer that he did not collect and take the knife into evidence because it ultimately “had no bearing on the case.” Counsel testified that he did not object to the testimony about the knife because it aligned with his strategy that Petitioner’s knife was in his car. ROA p. 221, ln. 12. Counsel’s theory was that few men carried knives anymore making it less likely for a person to own multiple knives, therefore showing that Petitioner did not plant the knife on the victim because his knife was still in his vehicle. ROA p. 654, ln. 8. Respondent admitted during the PCR hearing that if the State had been able to show that the two knives had been the same brand and type that it would have been a big part of their case against Petitioner. This is true, however, trial counsel was able to bring out on multiple occasions that the knife found in Petitioner’s car had no bearing on the case and that it had no significance. The fact the officer testified that he wanted to verify if the knives were the same brand and type is not an assertion that was able to do so. Even if the jury misinterpreted the officer’s testimony as to verifying the brand and type of the knives, it would have become abundantly clear from the photographs in evidence and the officer’s clarification that the knife found in Petitioner’s car was not the same as the one found on the victim.

Petitioner has failed to show how the officer's testimony concerning the two knives, when taken as a whole, was anything other than helpful to Petitioner. Ultimately, counsel was able to get the officer to testify that the knife found in Petitioner's car had no bearing on the case and was not relevant. There was no need for counsel to elicit further testimony on cross-examination that could have been detrimental to Petitioner when the testimony already presented showed clearly that the knives were not the same brand and type. Therefore, Petitioner has failed to show how counsel was ineffective for eliciting beneficial testimony in accordance with their trial strategy or any (non-speculative) prejudice resulting from the alleged deficiencies.

QUESTION 3

Petitioner alleges that trial counsel was ineffective for failing to adequately investigate or utilize forensic evidence and failing to adequately cross-examine the prosecution's witnesses concerning the forensic evidence. Counsel was able to properly examine the prosecution's witnesses concerning the forensic evidence in this case and where further examination may have been beneficial, Petitioner has failed to show counsel was deficient or that he was prejudiced by the alleged deficiency.

Petitioner argues counsel was ineffective for failing to subpoena a witness from SLED in order to introduce the toxicology report and for failing to question Dr. Ross concerning the report being adopted into her autopsy report. PWC p. 15. Petitioner simply states that there was THC and Amphetamine indicated to have been detected in the report, without elaborating as to how elaborating on this at trial would have been beneficial to Petitioner. PWC p. 15. Counsel testified that he did not feel that the findings of the toxicology report were relevant and did not want to pursue attacking the victim's character in this manner. ROA p. 675, ln. 7-21. Counsel made a

valid strategic decision to not address the toxicology report in this case, whether it be through SLED or through Dr. Ross.

Petitioner argues counsel was ineffective for failing to more thoroughly cross-examine Dr. Ross concerning her assertion that one of the wounds displayed stippling from a shot fired within inches of the victim and her claim that “it’s not typical to see a weapon remaining in the hand that way.” PWC p. 15. Counsel made a perfectly reasonable decision not to further examine Dr. Ross concerning the distance from which the weapon was when her testimony was beneficial to Petitioner’s theory of the case. Dr. Ross testified that the shot was fired within inches of the victim, which would go to support Petitioner’s theory of self-defense. ROA p. 333, ln. 6. The closer Petitioner was to the victim, the greater the threat would have been if he was threatening him with a knife. Dr. Ross testified at the PCR hearing that she could not conclusively say that the shot was fired within inches, but could have been feet away from the victim. ROA p. 632, ln 15. If counsel were to have elicited this testimony at trial it would have done nothing but weaken the testimony Dr. Ross already provided that was more beneficial. Similarly, counsel strategically chose not further examine Dr. Ross concerning the weapon remaining in the victim’s hand. Dr. Ross’ testimony at trial was relatively ambiguous on this point, stating that it was not typical for a weapon to remain in a hand that way. ROA p. 338, ln 3. The testimony at trial, although not great for the defense, still leaves open the possibility that a weapon could potentially have remained in the victim’s hand. Dr. Ross testified at the PCR hearing that she was ninety-nine percent sure the weapon would not remain in the victim’s hand that way and that the picture was consistent with cases she has had where the weapon was staged. ROA p. 635, ln 9. Clearly, counsel made a wise decision to transition away from this line of questioning and did not continue to examine Dr. Ross on this matter at trial.

Petitioner argues counsel was ineffective for failing to cross-examine Ketcherside concerning his claim about the blood trail in this case, not challenging his qualifications to give opinion testimony concerning the knife handle, and not challenging his opinion on the blood pattern. PWC p. 17. Petitioner fails to argue how counsel was deficient or how he was prejudiced by these alleged deficiencies. Counsel properly objected to Ketcherside testifying as to his opinions about what the blood on the knife meant and this objection was sustained by the trial court. Counsel testified that he did not object to or cross-examine Ketcherside's testimony concerning the blood pattern because his testimony was consistent with Petitioner's version of events. ROA p. 754, ln. 9-15. Ketcherside testified the blood trail showed movement back toward the kitchen, which aligned with Petitioner's story that the victim continually backed up into the house after being shot. Counsel properly objected to improper testimony and allowed testimony in that was beneficial to Petitioner.

Petitioner alleges that counsel was ineffective for failing to cross-examine SLED Agent Green concerning ballistics testing that could have been done to determine the average distance Petitioner's gun would eject a spent cartridge casing. PWC p. 18. Agent Green testified at the PCR hearing that SLED does not give opinions on the distance shell casings will eject because the distance is not sufficiently predictable. ROA p. 824, ln. 18-20. Petitioner has failed to argue how counsel was deficient for failing to elicit this testimony or how he was prejudiced by the alleged deficiency.

Petitioner has failed to show any deficiency on the part of counsel in relation to the handling of any aspect of the forensic evidence in this case. Counsel properly cross-examined the forensic witnesses, objected to improper testimony, and allowed testimony be presented that was

beneficial to their defensive strategy. Petitioner has failed to show how any one of these alleged errors was sufficiently prejudicial as to merit relief be granted.

QUESTION 4

Petitioner alleges counsel was ineffective for failing to discuss with him the strategy of proceeding only on self-defense as it relates to the murder charge and not arguing to the jury that he should be convicted of voluntary manslaughter if they find that he did not act in self-defense. PWC p. 18. Petitioner acknowledged at the PCR hearing that he rejected entering a plea to anything in connection with this killing because he was innocent and did not want to plead to something he did not do. ROA p. 847, ln. 13-14. Petitioner testified that he did reject the plea, but if he had known he could argue self-defense and voluntary manslaughter he would have wanted to do so. ROA p. 847, ln. 18. Counsel testified at the PCR hearing that he objected to the voluntary manslaughter be given by the court. ROA p. 663, ln. 21. Counsel also argued against the jury coming back with voluntary manslaughter as their verdict in his closing argument. Counsel testified that he advised Petitioner as to elements and potential sentences of both offenses and that he advised him that voluntary manslaughter would not be served day-for-day. ROA p. 664. Counsel testified that he discussed the option of voluntary manslaughter with Petitioner and that Petitioner wanted to solely pursue a verdict of not guilty based on self-defense. Counsel testified that he considered alternative defenses, but that he chose to pursue Petitioner's strongest defense and not to muddy the waters for the jury with the additional consideration of a lesser-included offense. Petitioner's refusal to consider pleading to voluntary manslaughter because he "was innocent and did not want to plead to something he didn't do" also is a strong indication that Petitioner agreed with counsel's strategy to solely pursue self-defense against the murder charge.

Petitioner has failed to show how counsel was ineffective for discussing the trial strategy with Petitioner and how he was prejudiced by the alleged deficiency. Counsel was not deficient where counsel pursued the not-guilty verdict Petitioner desired or where counsel put forth Petitioner's strongest defense.

QUESTION 5

Petitioner alleges counsel was ineffective for omitting factors in his closing argument supporting Petitioner's claim of self-defense that could have been reviewed again for the jury. Counsel's closing argument was well with the reasonable professional standards and counsel has leeway as to what points he believes are pivotal to argue to the jury.

Petitioner contends counsel failed to expressly refute the State's claim that under the law the use of a deadly weapon is malice and shooting someone five times is malice. Petitioner contends counsel should have argued the prosecutor misstated the law and that the statement did not make logical sense. PWC p. 21. This argument is not a valid interpretation of the law. The State is allowed to argue in closing that the jury can infer malice from the use of a deadly weapon, just as the defense is allowed to argue the absence of malice per self-defense. Generally, counsel testified that he typically only objects during the State's closing argument when an egregious error occurs. Counsel did not have grounds to object to this argument by the State and therefore did not do so. Petitioner contends counsel neglected to point out to the jury where the victim bled after being shot did not establish where he was shot. PWC p. 21. Petitioner argues counsel should have pointed out to the jury that the shots could have come from a further distance away and still gone with the defense's theory of the case. PWC p. 21. However, counsel arguing that the shots could have been fired from a further distance away does not assist the defense or align with their defense theory. Throughout the case the theory was that Petitioner was at the front of the home, shot the victim at close range in self-defense, and the victim drifted

back into the home after being shot. Arguing to the jury that the shots could have come from further away would not have assisted Petitioner's self-defense argument.

Petitioner contends counsel should have highlighted the physical state of the front door of the trailer in an effort to demonstrate why Petitioner would have been afraid to back out of the trailer. PWC p. 21. Petitioner makes no argument as to why counsel would be deficient for failing to argue this to the jury or how Petitioner was prejudiced by the alleged deficiency. Petitioner simply argues counsel should have highlighted these factors to the jury. Again, counsel highlighted the important aspects of the defense to the jury in his closing argument.

Petitioner goes on to argue numerous other points that he believes counsel should have raised in his closing argument. PWC p. 22-24. As previously stated, counsel enumerated that he highlighted the points to the jury that were most helpful to their theory of self-defense. Petitioner is also attempting to ask this Court to grant relief by using a cumulative error analysis.

Petitioner argues, essentially, the cumulative effect of all trial counsel's errors prejudiced him to the extent he is entitled to a new trial. This argument is without merit, as not only did trial counsel not commit any errors, but this Court has never recognized the cumulative-error doctrine as a basis for post-conviction relief. See, e.g., Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.").

Many other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative-error analysis of the prejudice prong of Strickland is inappropriate, and the correct analysis focuses upon each individual allegation of ineffective assistance. Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error. . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (citations omitted). See also Mueller v. Angelone, 181 F.3d 557, 586 n.22 (4th Cir. 1999) (“Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in Fisher, 163 F.3d [...at] 852-53 [...]”). The Fourth Circuit further explained, “legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.” Fischer, 163 F.3d at 852 n. 9.

In this case, none of the actions Petitioner alleges were error were found to be so by the PCR court, nor did the PCR court find Petitioner was prejudiced by any of the alleged errors. As a result, a cumulative-error analysis would be inappropriate on these facts under any

interpretation of the doctrine. This Court should therefore deny the Petition, and the PCR Court's findings should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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April 15, 2020