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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County
The Honorable Diane S. Goodstein, Trial Judge
The Honorable William H. Seals Jr., Post-Conviction Relief Judge

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Appellate Case No. 2020-001106

MAURIO RIVERS, Petitioner

v.

STATE OF SOUTH CAROLINA, Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II.

Did the post-conviction relief judge properly deny relief for the allegation that trial counsel was ineffective for failing to object to the example given by the trial judge to jury of accomplice liability when the example was not an improper comment on the facts, and even if it were, when it was uncontroverted that Petitioner was the driver of the vehicle?

III.

Did the post-conviction relief judge properly deny relief for the allegation that trial counsel was ineffective for not objecting to the trial judge's opening remark that a trial is a search for the truth when the remark did not prejudice Petitioner and did not affect the outcome of his trial?

STATEMENT OF THE CASE

Petitioner, Maurio Rivers is presently confined in the South Carolina Department of Corrections following his conviction at trial in Colleton County. On July 12, 2011, Deputy Justin Eaches of the Dorchester County Sheriff's Office attempted to stop a black Acura vehicle on Interstate 95 for failure to use a turn signal when changing lanes. (App. 63-64). Eaches identified Petitioner as the driver of the vehicle. (App. 64). Eaches attempted to get the vehicle to pull over, but the vehicle accelerated to speeds over 100 miles per hour. (App. 67). Eaches began to follow the vehicle and also enlisted the help of Lieutenant Joe Burnett of the Dorchester County Sheriff's Office to assist with the chase. (App. 68). The chase extended into Colleton County. (App. 67). Burnett's vehicle eventually hit Petitioner's vehicle which caused Petitioner's vehicle to flip over and crash. (App. 84). Petitioner and his passenger, Bronson Shelley (Codefendant), both fled from the crash scene. (App. 70, 73). Prior to the crash, Burnette testified he heard gunshots and saw the passenger shooting at him. (App. 85, 87). After the crash, Burnette heard another gunshot and observed damage from a gunshot on his windshield. (App. 87). After Petitioner and his passenger fled the scene, Burnette released his K-9 unit which apprehended Petitioner. (App. 86). Burnett later discovered that two bullets hit his vehicle (App. 89). Law enforcement did not fire any shots during the chase. (App. 92).

Law enforcement recovered three guns from the scene of the crash. The first gun was a .38 special with five spent shell casings found inside the weapon. (App. 106-08). Another gun was found with the "slide back" meaning that all eight rounds had been fired from the weapon. (App. 109). A third weapon, a Colt .45 caliber pistol, was found in the cars glove compartment. (App. 111). Four bullet holes were located on the windshield of the Acura extending from the driver's side to the passenger's side. (App. 124-27).

During its August 2011 term, the Colleton County Grand Jury indicted Petitioner for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. (2011-GS-15-549, 550, 551). He was represented on these charges by John D. Bryan, Esquire. Assistant Solicitor Steven Knight of the Fourteenth Circuit Solicitor's Office prosecuted the case.

On December 13, 2012, Petitioner was convicted of a single count of attempted murder (2011-GS-15-549) by a jury in the Colleton County Court of General Sessions before the Honorable Dianne S. Goodstein. Judge Goodstein sentenced Petitioner to a term of thirty years' imprisonment. (App. 228).

Petitioner filed a notice of appeal challenging his conviction and sentence on December 17, 2012. Petitioner was represented in his appeal by Carmen V. Ganjehsani, Esquire. An oral argument was held by the South Carolina Court of Appeals on November 5, 2014. On December 3, 2014, the Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. Op. No. 2014-UP-441 (S.C. Ct. App. filed December 3, 2014) (App. 269-70). Petitioner filed a petition for rehearing which was denied by the Court of Appeals on April 16, 2015. (App. 312-13). Petitioner submitted a petition for writ of certiorari to the South Carolina Supreme Court on April 27, 2015. Certiorari was denied on November 19, 2015 and the remittitur was issued on December 7, 2015. (App. 313).

On June 1, 2016, Petitioner filed a *pro se* application for post-conviction relief alleging three grounds of relief. (2016-CP-15-647)(App. 271-84). Petitioner alleged that trial counsel was ineffective for: (1) failing to object to the jury instruction charging "the hand of one is the hand of all", (2) failing to move for a directed verdict, and (3) failing to object to an example given by the trial judge of the hand of one is the hand of all. (App. 278). Respondent served its return to

the application and requested an evidentiary hearing on the application on April 17, 2017. (App. 285-90).

On November 15, 2017, Petitioner moved to relieve PCR counsel and filed an amended PCR application. (App. 293-98). An evidentiary hearing was convened on April 3, 2017, before the Honorable William H. Seals, Jr. Petitioner was present alongside counsel Leslie T. Sarji, Esquire. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and presented testimony from trial counsel. At the conclusion of the evidentiary hearing, Judge Seals took the Petitioner's claim under advisement. (App. 392).

On December 21, 2019, Judge Seals issued a written order denying the application in full. (App. 411-20). Petitioner filed a motion to alter or amend judgement pursuant to Rule 59(e) SCRCP. (App. 421-23). Judge Seals denied the motion on July 23, 2020. (App. 425-26). Petitioner filed his notice of appeal to this Court on August 7, 2020.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. 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).

ARGUMENT

I.

The post-conviction relief judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to the trial judge's instruction on the hand of one is the hand of all theory of accomplice liability because the evidence presented demonstrated Petitioner and Codefendant combined together to accomplish an illegal purpose.

Petitioner claims the post-conviction relief court erred by refusing to find trial counsel ineffective for requesting and then failing to object to the trial judge's instruction to the jury on the hand of one is the hand of all theory of accomplice liability. Specifically, Petitioner contends the charge was improper because the State failed to prove there was a prior agreement or arrangement between Petitioner and his codefendant to attempt to kill Lt. Burnette. Petitioner's argument fails for two reasons. First, the State was not required to prove Petitioner and his codefendant had a prior agreement or arrangement to commit attempted murder in order to receive an instruction on accomplice liability. Second, there was evidence in the record to establish Petitioner and Codefendant combined together to accomplish an illegal purpose. Therefore, Petitioner and Codefendant were each criminally liable for everything done by their confederate incidental to the execution of the common design and purpose. Accordingly, the trial judge properly instructed the jury on the hand of one is the hand of all, and trial counsel was not deficient in failing to object to the jury instruction.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that

"counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Moreover, "counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500, 505 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" State v. Langley, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999) (quoting State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989)). "Under the hand of one is the hand of all theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). "A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." Id. At 194, 562 S.E.2d at 325. "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." State v. Gibson, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010).

Here, Petitioner complains that trial counsel was deficient for requesting and failing to

object to the trial judge's instruction on accomplice liability. Petitioner claims trial counsel was deficient for not requesting the charge because there was no evidence in the record to support the charge. However, the State was not required to produce evidence of a formal expressed agreement between Petitioner and Codefendant. The State was merely required to prove Petitioner and Codefendant were acting in concert through circumstantial evidence. Here, there was abundant evidence Petitioner and Codefendant acted in concert to accomplish the illegal purpose of failing to stop for a blue light. The State presented evidence that Petitioner was the driver of a vehicle that accelerated to speeds over 100 miles per hour while fleeing from two law enforcement vehicles. (App. 64, 67). The chase extended over two counties and did not end until law enforcement forced Petitioner's vehicle to crash. (App. 67, 84). Lt. Burnett only witnessed Codefendant shooting at him, but the State also presented evidence that three firearms were found in and around Petitioner's vehicle and that four bullet holes were located inside the vehicle's windshield extending from the driver's side to the passenger's side. (App. 85, 87, 106-08, 124-27). Two of the firearms found had fired all of their ammunition. (App. 106-109). Additionally, after the crash, Petitioner and Codefendant each fled the scene. (App. 86). Therefore, there was sufficient evidence produced to show Petitioner and Codefendant acted with a common design to elude law enforcement and ultimately to attempt to kill Lt. Burnett. Accordingly, even if trial counsel were deficient in submitting a jury instruction on "the hand of one is the hand of all" or in failing to object to the instruction, Petitioner was not prejudiced by this failure because the evidence presented at trial warranted such an instruction. This Court should deny certiorari.

II.

The post-conviction relief judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to the example given by the trial judge to jury of accomplice liability because the example was not an improper comment on the facts, and even if it were, it was uncontroverted that Petitioner was the driver of the vehicle.

Petitioner additionally argues the post-conviction relief court erred by refusing to find trial counsel ineffective for failing to object to the example given by the trial judge of accomplice liability. Petitioner asserts the example of a getaway driver participating in a burglary was an improper comment on the facts that diluted the State's burden of proof. Petitioner's argument fails for two reasons. First, the trial judge's example was not an improper comment on the facts. Second, even if the trial judge had commented on the facts, it was undisputed that Petitioner was the driver of the vehicle. Therefore, Petitioner did not suffer any prejudice from trial counsel's failure to object to the trial judge commenting on uncontroverted facts.

The South Carolina Constitution provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "[I]t is generally held that in the course of the trial of a criminal case, the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of the witnesses, the guilt of the accused, or as to the controverted facts." State v. Pruitt, 187 S.C. 58, 61, 196 S.E. 371, 373 (1918). "However, where the facts stated in a charge are not in dispute, the instruction is not erroneous." State v. Norris, 270 S.C. 552, 553, 243 S.E.2d 440, 440 (1978)."Even if a charge is erroneous, prejudice must be shown to require reversal." Litchfield Co. of South Carolina, Inc. v. Sur-Tech, Inc., 289 S.C. 247, 253, 345 S.E.2d 765, 768 (Ct. App. 1986).

Here, Petitioner claims the example of a getaway driver participating in a burglary provided by the trial judge to illustrate accomplice liability was an improper comment on the facts. Notably, the only similarity between the trial judge's example and the facts of Petitioner's case is the use of a car. The mere fact the trial judge used an example that also involved the use of a car, does not render her example a constitutionally improper comment on the facts. Other than the common denominator of a getaway driver and Petitioner's both using a car, there is no similarity between a burglary and shooting at a police officer. Indeed, trial counsel testified he believed the jury was capable of making such a simple distinction. (App. 378-79). Therefore, trial counsel was not deficient in failing to object to the trial judge's example.

However, even if the example provided by the trial judge was an improper comment on the facts, trial counsel's failure to object to the example did not prejudice Petitioner because it was uncontroverted that Petitioner was the driver. As argued above, the only similarity between the example given and the facts of Petitioner's case was the use of a car. Petitioner never contested the fact that he drove the car that fled from police. Petitioner merely contested that he was the shooter. During his closing argument at trial, trial counsel declared: "There's no doubt who was the passenger. Eaches was the first. He said [Codefendant] was the passenger. Mr. Burnette said [Codefendant] was the passenger, and Mr. Burnette said he saw the passenger shooting at him." (App. 175, lines 20-25). In his testimony at the PCR hearing, Petitioner admitted he was the driver but denied he ever shot at police or knew anything about a gun. (App. 324-25). Therefore, Petitioner could not possibly suffer any prejudice from the trial judge commenting on a fact that Petitioner readily agreed was true; namely that he was the driver. Contrary to Petitioner's assertion, he was not convicted simply because he was the driver of a car fleeing from the police. Rather, the State explicitly argued that Petitioner also fired a weapon at

Lt. Burnette after his vehicle crashed. (App. 172). The trial judge's example did not comment on whether Petitioner possessed or fired a weapon. Therefore, Petitioner was not prejudiced by the example. This Court should deny certiorari.

III.

The post-conviction relief judge properly denied relief for the allegation that trial counsel was ineffective for not objecting to the trial judge's opening remark that a trial is a search for the truth because the remark did not prejudice Petitioner and did not affect the outcome of his trial.

Finally, Petitioner argues the post-conviction relief court erred in refusing to find trial counsel ineffective for failing to object to the trial judge's preliminary remarks that a trial was a search for the truth. Petitioner contends this comment diluted the State's burden of proof. On the contrary, Petitioner was not prejudiced by the search for the truth language in this case because the language did not affect the outcome of Petitioner's trial. The trial judge only used the aforementioned phrase one time at the beginning of Petitioner's trial. Furthermore, the trial judge gave the jury a thorough and accurate instruction on reasonable doubt and the presumption of innocence in her closing instructions. Therefore, counsel's failure to object to the isolated comment did not prejudice Petitioner.

"[A] trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). "We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." Id. When search for the truth language comes at the beginning of a trial rather than during the charge on the State's burden of proof at the end of a trial, the language is less prejudicial. State v. Patterson, 425 S.C. 500, 512, 823 S.E.2d 217, 224 (Ct. App. 2019).

Here, like in Patterson, the language Petitioner complains of came at the beginning of the trial and not at the end where it would be more prejudicial. Additionally, the trial judge dampened any prejudicial effect from her opening remarks with her thorough and accurate instruction on reasonable doubt and the presumption of innocence at the end of trial. (App. 184-85). While trial counsel acknowledged he did not know the trial judge's remarks were objectionable, even if he were deficient in not objecting to the remarks, his failure did not prejudice Petitioner because the isolated remark did not affect the outcome of Petitioner's trial. (App. 360). While our State's appellate courts have consistently cautioned trial judges against using such language, no court has previously found such language to be reversible error. Notably, in each of the cases cited by Petitioner to support his argument, this Court found the trial judge's remarks were not reversible error. See State v. Alesky, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). This Court should likewise find the trial judge's isolated remark did not prejudice Petitioner and trial counsel was not ineffective for failing to object to the remark. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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