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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable Roger L. Couch, Trial Judge
The Honorable H Steven DeBerry, IV, PCR Judge

Appellate Case No. 2021-001556

SHEDRICK SAVAGE Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

1. Did the post-conviction relief (PCR) judge correctly grant Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974)?
2. Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel failed to assert during his closing argument that Petitioner was only guilty of the lesser included offense of voluntary manslaughter as opposed to murder where there was no evidence of malice, rather the evidence showed Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation, and when Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability Petitioner would have been acquitted of murder if counsel had made effective arguments during closing?

Respondent's Counterstatement of Issues on Certiorari

- I. Is Petitioner entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)?
- II. Did the PCR Court properly determine that Petitioner failed to establish counsel was ineffective for failing to make a heat of passion argument in closing when that argument would contradict Counsel's chosen defense at trial that Petitioner was not the shooter and, even if Counsel was deficient, no prejudice was suffered because the jury rejected this theory despite the instruction for voluntary manslaughter and hearing testimony supporting a heat of passion killing during the State's case-in-chief?

STATEMENT OF THE CASE

Shedrick Savage (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its March 2015 term, the Spartanburg County Grand Jury indicted Petitioner for murder (2015-GS-42-0810). Petitioner was represented by Theo Mitchell, Esquire (hereafter “Counsel”). Deputy Solicitor Derrick Balsa Esquire, from the Seventh Circuit Solicitor’s Office, represented the State. On November 28-29, 2016, the case proceeded to trial before the Honorable Roger L. Couch, circuit court judge. On November 29, 2016, the jury found Petitioner guilty of the crimes charged. Judge Couch sentenced Petitioner to thirty years’ imprisonment.

Petitioner filed a notice of appeal and represented by Attorney Candice K. Lapham. The South Carolina Court of Appeals dismissed the appeal for failure to update the Court with the status of the transcript. The remittitur was sent on June 2, 2017.

Petitioner timely filed a PCR application on March 20, 2018. Respondent made its return on August 1, 2018. The evidentiary hearing occurred on August 4, 2021, before the Honorable H. Steven DeBerry, IV, circuit court judge. Susannah Ross, Esquire was Petitioner’s attorney. William Ray, Esquire of the South Carolina Attorney General’s Office represented Respondent. The Court issued an order of dismissal granting belated appellate review pursuant to *White* and denying all other claims with prejudice on December 23, 2021. Petitioner, through Counsel Ross, filed a motion to alter or amend the judgment on January 4, 2022, which was denied by written order filed on January 12, 2022. Petitioner filed a petition for writ of certiorari. This return follows.

STATEMENT OF FACTS

Petitioner's conviction arises out of the November 23, 2014, shooting death of Charles Jackson, Jr. ("victim") at a nightclub. Security ejected both parties after a fight broke out, and while the victim walked away from the scene Petitioner drove his truck alongside the victim and fatally shot him in the chest. (App. 82-83). Doorman Error Graham witnessed the fight and walked the parties outside to diffuse the situation. (App. 98). He testified Petitioner was irate and had his hand in his pants before he got in the truck's driver's seat, pointed towards the victim, and drove in his direction. (App. 98-99). He explained Petitioner was not in a hurry to leave. (App. 99). Graham then heard a gunshot coming from the area of the truck but could not see it. (App. 99). He stated that about "half" of the people who were put out of the club got in a gold Nissan, and the other half got in the truck. (App. 101). On redirect he clarified that he saw two people in the truck. (App. 105).

Spartanburg County Sheriff's Deputy Brad James testified he patrolled the parking lot that night when he heard one gunshot and while he tried to figure out where it came from he saw a blue truck leave. (App. 56-59). He pursued the vehicle but lost it after it left the parking lot. (App. 59-60). He then returned to the scene to tend to the victim. (App. 60).

Club owner John Mitchell testified that the victim was fighting several guys, told to leave, and walked down the driveway while the other participants were held inside for a few minutes. (App. 82). Petitioner was angry at the victim after the fight and commented that he was going to kill him. (App. 82). Petitioner got in his truck with at least one other person. (App. 82). Mitchell saw a flash out of the corner of his eye, heard a gunshot, and discovered the victim was shot and killed. (App. 83). He stated the shot came from the front seat of the vehicle. (App. 86).

Cedrick Jones testified he was with the victim at the club that night. (App. 107). He saw someone put their hands on the victim, a fight ensued, and the victim was escorted from the club. (App. 108). The victim did not have a ride, so he unsuccessfully attempted to get back in the club. (App. 109). Jones left with the victim and the two walked towards his vehicle when Petitioner drove alongside them in his truck. (App. 109). Words were exchanged, the victim threw a beer bottle at the truck, and Petitioner shot the victim in the chest. (App. 110-11). Jones panicked and called 911. (App. 114). He did not talk to police at the scene but gave a statement several weeks later at the victim's family's request. (App. 115).

Police located the truck the next morning after a BOLO was issued. (App. 136-37). Petitioner and Rashawn Miller were inside the vehicle with Petitioner driving. (App. 140-41). No weapons or contraband were found in the vehicle. (App. 143). Petitioner's hands tested positive for gunshot residue and less gunshot residue was found on Miller. (App. 162-65). Gunshot residue was also found on the victim. (App. 176).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the PCR court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the petitioner shouldering the burden of proof. Rule 71.1(e), SCRCPP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs only if no probative evidence to support the findings. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts only conduct a *de novo* review if evaluating questions of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Respondent takes no position on whether Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.*

South Carolina's Appellate Courts have no jurisdiction to entertain appeals when the notice of appeal is not timely given and served. *White*, 263 S.C. 110, 119, 208 S.E.2d 35, 40 (1974). Nevertheless, if a PCR court finds that a petitioner has been denied his right to direct appeal from trial due to counsel's errors, his request for post-conviction relief may be denied, but he may be permitted to seek belated review of trial errors in conjunction with his appeal of the order dismissing his PCR application. *Id.*

At the PCR hearing, Counsel testified that she was retained to handle the direct appeal, but that Petitioner encountered difficulties getting together the money for the transcript. (App. 332-33). Counsel testified that she attempted to front the money, but the time to file had lapsed. (App. 333). Counsel stated she called Petitioner, explained the difference between PCR and a direct appeal, and offered to move all money taken for the direct appeal toward payment for a PCR. (App. 333). Respondent takes no position on whether Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

II. The PCR Court properly determined that Petitioner failed to establish counsel was ineffective for failing to make a heat of passion argument in closing when that argument would contradict Counsel's chosen defense at trial that Petitioner was not the shooter and, even if Counsel was deficient, no prejudice was suffered because the jury rejected this theory despite the instruction for voluntary manslaughter and hearing testimony supporting a heat of passion killing during the State's case-in-chief.

Petitioner argues the PCR court erred in denying relief. Counsel was allegedly ineffective for failing to argue the shooting occurred as a heat of passion killing to obtain a voluntary manslaughter conviction. However, the PCR court properly rejected this argument, finding that Counsel was reasonable in choosing a closing argument that better fit in line with his chosen defense at trial and, even if Counsel was deficient, Petitioner suffered no prejudice because the jury was charged on voluntary manslaughter and evidence supporting the charge was offered in the State's case-in-chief.

The petitioner bears the burden of proving allegations contained in the PCR application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner must show “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 v.*

Washington, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant because of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The right to effective assistance of counsel extends to closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 4 (2003). Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. *Id.* 540 U.S. at 6, 124 S.Ct. at 4. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen and how best to clarify them are questions with many reasonable answers. *Id.* (citing *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550 (1975)).

Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland*, 466 U.S. at 680. If

there is only one line of defense, counsel must conduct a “reasonably substantial investigation” into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* “[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.” *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the petitioner of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Here, Counsel’s closing argument was reasonable. He reminded the jury of the elements of the offense and the State’s burden of proof. (App. 251-52). He acknowledged that there was a deadly shooting at the Universal Club. (App. 252). He argued Cedric Jones’s testimony was not

credible because he had not given a statement to investigators until well after the shooting took place, did not truthfully disclose all information to the 9-1-1 operator, was biased in favor of the victim, and had been drinking at the time of the shooting. (App. 253-54). Counsel argued that Ruben Landrum stated he saw three people in the truck. (App. 254). “Whether before, during, or after, or after, three people got out of it” he explained, in an obvious attempt to minimize the fact that Landrum had not placed a person in the backseat at the time of the shooting. (App. 254). He stated that there was testimony that half of the people who vacated the club entered the truck, and the other half entered another vehicle. (App. 255). In short, his closing argument was framed around his chosen defense theory at trial: that the shooter was someone other than Petitioner. Arguing heat of passion would have directly conflicted with this theory and likely would have undermined the defense at trial. The fact that there was evidence to support a voluntary manslaughter conviction should not coincide with a requirement that Counsel exhaust this theory in closing as well, especially when it directly conflicts with Counsel’s chosen defense theory. *See Strickland*, 466 U.S. at 680 (finding that counsel is not required to pursue every line of defense).

Additionally, even if this Court found Counsel was deficient, no prejudice was established. Petitioner has not established how this argument would have altered the outcome at trial. Evidence supporting a heat of passion argument was presented at trial. Specifically, several eyewitnesses noted that a fight broke out in the middle of the club, that Petitioner was acting irate and angry, and the killing occurred immediately thereafter. (App. 82, 98-99, 110-11). Additionally, the judge instructed the jury on voluntary manslaughter and heat of passion. (App. 278-79). Petitioner failed to show what a closing argument would accomplish that relevant testimony and the pertinent jury instruction did not, or why that argument would be more effective than the one chosen by Counsel. Thus, relief should be denied on this ground.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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