

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 30 2023

SC Court of Appeals

Appeal from Allendale County
Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2019-000230

DEREK MANER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

- 1. The PCR judge properly found trial counsel was not ineffective for not objecting to testimony concerning Petitioner's brother's car because trial counsel indicated a reasonable trial strategy for doing so.**
- 2. The post-conviction relief court properly denied post-conviction relief where there was little meritorious basis for objecting to the testimony of Madoree Pipkins concerning hidden jewelry Petitioner purchased while incarcerated and Petitioner has failed to show prejudice resulting from the testimony being admitted.**

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. Id. 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).

STATEMENT OF THE CASE

In August of 2008, the Allendale County Grand Jury indicted Petitioner, Derek Maner, for murder, (2008-GS-03-0135). On February 9, 2009, Petitioner proceeded to jury trial before the Honorable Michael G. Nettles. Bryon E. Gipson (Counsel) represented Petitioner at trial. T. DeWayne Pearson and Natalie R. Armstrong prosecuted the case. The jury found Petitioner guilty as indicted and Judge Nettles sentenced Petitioner to life in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed Petitioner's sentence and conviction. State v. Maner, 2012-UP-550 (S.C.Ct.App. filed October 10, 2012). (App. pp. 838-839).

On September 12, 2013, Petitioner filed an application for post-conviction relief. The State filed a return on August 20, 2014. On June 9, 2017, an evidentiary hearing was held before the Honorable Diane Schafer Goodstein. Deborah J. Butcher represented Petitioner at the PCR hearing. Ruston W. Neely represented the State. In a written order filed October 11, 2017, Judge Goodstein denied relief and dismissed the application. The notice of intent to appeal was not filed.

On August 27, 2018, Petitioner filed a second PCR application. The State consented to the grant of belated appellate review pursuant to Austin v. State, 305 S.C. 43, 409 S.E.2d 395 (1991). (App. p. 975). In an order signed by the Honorable Perry M. Buckner, III, on January 15, 2019, Judge Buckner granted the belated appeal. On October 4, 2022, this Court granted Austin review as to questions one and two in the Austin brief. On November 2, 2022, a brief of petitioner was filed. This brief of Respondent follows.

RELEVANT FACTS

Ericka Bradley (the victim) was last seen on November 6, 2006. In November of 2006, Bradley had been staying with Petitioner and his family. (App. 672). The victim's cousin, Peter Tony Carter¹, picked her up from work to take her to Petitioner's home where she lived. (App. 91). Petitioner was driving in his vehicle when he was passed Bradley and Carter in a vehicle and was flagged down. (App. 675). Bradley got out of the vehicle with Carter and got a bat out of Petitioner's car and attempted to hit Petitioner with the bat to confront Petitioner about whether he was seeing another woman. (App. 111, 675-679). Petitioner put the bat on the ground and hugged Bradley while they talked. (App. 112, 675).

Eventually Carter left Bradley and Petitioner because Bradley told Carter that she was alright, and he could leave. (App. 112). Petitioner testified that after he calmed Bradley down, she got in the car. (App. 677). They were on their way home, when Bradley got agitated again and began punching and hitting Petitioner. (App. 679). Petitioner testified that Bradley told him she was going to walk and proceeded to put the car in park and got out of the car. (App. 679-680). Petitioner testified that Bradley refused to get back in the car so he left her walking. (App. 681). Petitioner then called Carter to go pick Bradley up. (App. 681, 113).

Cell phone records confirmed Petitioner placed a call to Carter that night at 11:57 p.m. (App. 424). Carter testified Petitioner told Carter "She wouldn't get back in the car" and he left her near a local store. (App. 134). However, Carter could not find the victim. (App. 137). Bradley was not seen again.

¹ Petitioner has this person listed as Peter Tony Cooper in their brief, but the trial transcript shows his name as Peter Tony Carter.

The only portions of the victim's body recovered were blood and tissue – more specifically, “pieces of skeletal muscle and peripheral nerve”– from the undercarriage of Petitioner's vehicle. The DNA testing confirmed the tissue was consistent with a “child of Jackie and Henry Bradley,” the victim's parents. (App. 549). Dr. Michael Eugene Ward, a forensic pathologist, and Chief Medical Examiner for Greenville County, testified his opinion was “the body who was run over by this vehicle would likely receive significant bodily injury which would cause great bodily harm or possibly death.” (App. 550).

ARGUMENT

- I. **The PCR judge properly found trial counsel was not ineffective for not objecting to testimony concerning Petitioner's brother's car because trial counsel indicated a reasonable trial strategy for doing so.**

Petitioner contends the PCR court erred in failing to find trial counsel ineffective for failing to object to testimony from an officer that, fifteen months after the victim's disappearance, he stopped Petitioner's brother for a tag violation and noticed that the car was missing a backseat and the trunk would not open when there was no link between the brother's car and the disappearance, making the testimony irrelevant. However, the PCR court properly dismissed Petitioner's allegation where counsel enumerated a valid trial strategy for not objecting to the testimony and where Petitioner failed to show any resulting prejudice from the alleged deficiency.

On January 12, 2008, fifteen months after the disappearance of Bradley, Officer James Hutto with the Allendale Police Department stopped an individual, who the officer testified was Petitioner's brother, for a tag violation. (App. 354-356). The Officer testified about the traffic stop, and trial counsel objected to hearsay statements, but allowed the officer to get into other information about the stop. The officer testified that he asked and was allowed to search the inside of the vehicle but did not complete a search of the trunk because it would not open. He also testified that the vehicle was missing a back seat. (App. 327-329). Trial counsel objected to relevance when the officer began to testify about whether Petitioner's brother went to court for that stop and what happened at court. (App. 328).

On cross examination the officer testified that the brother did not refuse consent to search the trunk but instead told the officer that it would not open. (App. 354). The officer admitted that he never sought a search warrant for the brother's car and trunk and the car and trunk were never

processed. (App. 355). The officer testified that he did not have probable cause to obtain a search warrant. (App. 358).

First, the post-conviction relief court found that Petitioner's testimony at the evidentiary hearing lacked credibility and Counsel's testimony was credible. (App. 951). The post-conviction relief court further found that "Counsel elucidated valid trial strategies in defending Applicant and preparing for trial." (App. 951). During the PCR hearing Petitioner's counsel questioned trial counsel about his failure to object to testimony by Officer Hutto about Petitioner's brother's car. (App. 885-892). Trial counsel testified at length at the evidentiary hearing concerning his defense strategy. He stated that

[M]y strategy and your strategy may be different but in this county where I try many cases, I think there can be some times when there is police mistrust and when a jury can start to see that a police officer or law enforcement are singling people out and trying to do things to people without evidence that substantiates it, then that can cause the jury to begin to understand the theory of our case a lot better because they've experienced that.

So, we try cases a little bit differently, but, in my mind, the way I tried it, I think, was effective in trying to put out there to prove, we could show that with a simple trip down to go see Judge Brown, who was one of the magistrates at the time, they could have cured it by getting a search warrant, which they did multiple times in this case, and they never did regarding this vehicle, and this vehicle was around for a long time after this traffic stop.

(App. 890-891). When PCR counsel questioned trial counsel about the connection between the brother's vehicle and Bradley, trial counsel further explained that the point of not objecting was because there was no connection. "That's correct, and that just tells you, again, the lengths they were trying to go to put something together. And, again, in a jury's mind, the way I try cases, I think that's effective for the jury to see how – they'll [The State] just come and start bringing amorphous things that have nothing to do with the situation in order to try to do something to cast doubt." (App. 891).

Trial counsel testified he wanted the opportunity to strategically cross-examine the witness concerning this testimony in an effort to show that law enforcement had nothing other than a gut feeling and that nothing had resulted from their investigation. (App. 889). Counsel further testified that the State was trying to make a point by eliciting the testimony, however, Counsel was able to show through cross-examination that the State had ample time to get a search warrant and they did not do so because there was no probable cause. (App. 890). Counsel testified that his strategy was to work on the general distrust juries in Allendale have toward the police and specifically the police singling people out without evidence to support their accusations. (App. 890).

To prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. "Judicial scrutiny of counsel's performance must be highly deferential." Id., at 689. To prove a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the

challenged action ‘might be considered sound trial strategy.’” Id. “[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.” Id. at 689.

Trial counsel’s articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated; as Strickland explains: “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690-91.

The question is whether an attorney's representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690. “Under Strickland, counsel’s representation must be only objectively reasonable, not flawless or to the highest degree of skill.” Strickland, 466 U.S. at 688-89. Moreover, counsel’s tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000); Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) (“[E]ven if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.”) (citation and internal quotation marks omitted).

Trial counsel was not deficient where he elucidated a valid trial strategy for not objecting to the testimony and instead deciding to highlight the weaknesses of the State's argument to the jury through cross-examination. Trial counsel was able to highlight to the jury the spurious nature of the State's attempt to connect Petitioner's brother's car to the disappearance of the victim. Trial counsel used his years of experience trying cases in Allendale County to strategically play into the distrust of the police by juries. As noted by Petitioner, there was no direct evidence connecting Petitioner or the victim to the brother's car. Trial counsel strategically presented this fact to the jury on cross-examination. The post-conviction relief court properly found trial counsel was not deficient for failing to object to the testimony because the testimony was relevant to the State's theory of how Petitioner disposed of the victim's body and Petitioner failed to meet his burden.

Further, Petitioner has failed to meet his burden in showing any resulting prejudice from the alleged deficiency because trial counsel was able to use the testimony to Petitioner's advantage. Petitioner contends he was prejudiced such that there is a reasonable probability the outcome of the proceeding would have been different because the State used the testimony in closing argument and the evidence was not overwhelming. However, Petitioner has failed to show how the admission of testimony concerning the brother's car, which was thoroughly cross-examined, affected the outcome of the proceeding. Further, even if the testimony had not been used to Petitioner's advantage it would not have affected the outcome of the proceeding because of the overwhelming amount of evidence of guilt the State produced. See Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) (finding counsel deficient for allowing trial to proceed with applicant in prison garb, but that applicant was not prejudiced in light of overwhelming evidence of guilt).

The State produced testimony that "pieces of skeletal muscle and peripheral nerve" from the undercarriage of Petitioner's vehicle consistent with a "child of Jackie and Henry Bradley,"

the victim's parents. (App. 549). Dr. Michael Eugene Ward, a forensic pathologist, and Chief Medical Examiner for Greenville County, testified his opinion was "the body who was run over by this vehicle would likely receive significant bodily injury which would cause great bodily harm or possibly death." (App. 550).

Petitioner has the burden of proving counsel's alleged deficiency effected the outcome of the proceeding, and Petitioner has failed to meet his burden. The PCR court properly denied relief because Petitioner failed to show prejudice.

II. The post-conviction relief court properly denied post-conviction relief where there was little meritorious basis for objecting to the testimony of Madoree Pipkins concerning hidden jewelry Petitioner purchased while incarcerated and Petitioner has failed to show prejudice resulting from the testimony being admitted.

Petitioner contends the PCR judge erred in refusing to find trial counsel was ineffective for not objecting to testimony by Petitioner's girlfriend about purported hidden jewelry, arguing there was no connection between the jewelry and the disappearance of Ericka Bradley, making the testimony irrelevant. However, the post-conviction relief court properly dismissed Petitioner's allegation where there was little meritorious basis for objecting to the testimony concerning the jewelry and Petitioner has failed to show any prejudice resulting from the testimony being admitted.

When Petitioner was arrested in April of 2008, seventeen months after the disappearance of Ericka Bradley, he was a student at Benedict College and dating another Benedict student, Madoree Pipkins. (App. 601). Pipkins testified that while Petitioner was in jail awaiting trial, he called her and told her that he bought some jewelry from an incarcerated individual who she later learned was Dawan Doe (App. 618-619). Petitioner told her that the jewelry was in a flowerpot at a brown building on Lake Warren. (App. 606-607). Pipkins testified that Petitioner told her to wipe the jewelry off, take it home with her and not tell anyone where it came from. (App. 610). Pipkins testified that she and Petitioner's brother Donald looked for the jewelry, but were unable to find it. (App. 608-609).

At the PCR hearing trial counsel was questioned about the connection between the jewelry that Petitioner asked Pipkins to go look for and Bradley. (App. 870). Trial counsel testified that there was a picture the State introduced of Petitioner and Bradley and Bradley was wearing a good

bit of jewelry. (App. 870). When asked if there was any testimony presented at trial that Bradley was wearing jewelry the night she went missing trial counsel responded

I don't have any recollection of whether or not there was testimony of her wearing it that particular night. My recollection is that there was a long conversation later after Mr. Maner was incarcerated. There was a long conversation that was taped at the jail. It was probably when he was in housing at the Hampton County detention center wherein he spoke about going out to Lake Warren and finding some jewelry and cleaning jewelry off and getting it back to her. It was extremely clandestine and ill-advised conversation that he had.

(App. 870-871). Trial counsel further testified that the conversation never mentioned Bradley and the State was attempting to use this conversation as a theory that the jewelry had never been found and Bradley was missing. (App. 871). When questioned as to why trial counsel did not object to the trial testimony, counsel explained that there was no body found which showed the State was grasping at straws and "spoke to the weakness of the case because the things that needed to be there weren't there so strategically, I didn't think there was something that needed to be objected to." (App. 874-875).

Trial counsel further testified the conversation Petitioner had with the witness was a recorded call from jail and that the tape was played during the trial. (App. 931-932). Counsel also testified that "the jewelry in itself, in my estimation, is not something that was going to be a major factor, that in conjunction with other matters, I think that caused the issues with the jury." (App. 873).

The post-conviction relief court found that "the State's presentation of the jewelry as circumstantial evidence was not more prejudicial than probative under a Rule 403 analysis." (App. 962). In addition "Applicant was fully aware his jail calls were being recorded and could be used against him," and "the jail calls were statements against Applicant's own interest under Rule 804(b)(3)." (App. 961-962) Petitioner's brief states "The State failed to link the jewelry another

inmate sold to Petitioner, sight unseen, with Ericka Bradley. The State failed to establish that at the time of her disappearance Bradley was even wearing any jewelry. The State only had an earlier photograph of Bradley wearing jewelry. No jewelry was ever found.” This is exactly the point of counsel’s trial strategy for not objecting to the testimony and why there is no prejudice, further highlighting to the jury the tenuous nature of the evidence against Petitioner and the weakness of the State’s case.

Thus, the post-conviction relief court properly found that counsel was not ineffective for failing to object to the admission of the testimony concerning the jewelry and dismissing Petitioner’s allegation for failure to meet his burden. Further, the post-conviction relief court properly found Petitioner had failed to meet his burden in showing any prejudice resulting from the alleged deficiency. Again, Petitioner contends that there is a reasonable probability the outcome of the proceeding would have been different without the inclusion of the testimony simply because the State used the testimony in closing argument. Petitioner’s argument as to prejudice is conclusory in nature and is wholly insufficient in meeting his burden in proving such. The post-conviction relief court properly found as follows:

Applicant failed to prove he was prejudiced by Pipkins’ testimony. Pipkins’ testimony was merely one piece of additional circumstantial evidence. Further, Applicant provided an explanation for the jewelry during his testimony. Tr. 361-363, Vol. III. This Court finds it unreasonable to conclude the jury would not have found Applicant guilty without Pipkins’ testimony.

(App. 962). Petitioner testified at trial that the jewelry he told Pipkins about in the phone call was not the victim’s and that it was sold to him by Dawan Doe. Petitioner testified that the victim did not have jewelry to his knowledge other than gold fitted teeth they purchased together. (App. 693-695). Petitioner did not just testify as to this one issue at trial and presented the entirety of his story to the jury on direct. (App. 669-707). Therefore, the post-conviction relief court properly found

Petitioner had failed to meet his burden in showing any prejudice resulting from the alleged deficiency of trial counsel and dismissed the allegation.

Ultimately, Petitioner has failed to meet his burden of proof in showing prejudice resulting from the alleged deficiency of counsel. The PCR court properly denied relief because Petitioner failed to prove any deficiency or prejudice. The post-conviction relief judge's order denying Petitioner's application for post-conviction relief should be affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

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