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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County
Hon. Robert J. Bonds, Circuit Court Judge
Appellate Case No. 2022-000628

Austin McQuarters, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

I. The PCR Court correctly concluded trial counsel did not provide ineffective assistance when he was not deficient in failing to interview a witness and no prejudice could have resulted when the only testimony provided by the witness would not have exonerated Petitioner but would have merely added to the impeaching evidence already presented against a State's witness.

STATEMENT OF THE CASE

Procedural History

The Beaufort County Grand Jury indicted Petitioner in January 2014 on charges of assault and battery first degree and armed robbery. (App. 623-626). A first trial ended in a hung jury. Petitioner proceeded to trial for the second time on July 20, 2015, before the Honorable Thomas W. Cooper, Jr. and a jury. He was found guilty as charged and Judge Cooper sentenced him to twenty-five years on the armed robbery and ten years, concurrent, on the assault and battery.

On July 28, 2015, Petitioner filed a Motion to Vacate Conviction and Order New Trial based on after discovered evidence related to a statement of a witness who did not testify at trial. (App.616). After response by the State (App. 618), on August 12, 2015, Judge Cooper held a hearing on the motion. (App.570). After considering the impact of the newly discovered testimony, Judge Cooper denied the motion. (App.604-605). After the denial, Petitioner sought the alternative relief of reconsideration of his sentence. Judge Cooper decreased his twenty-five year sentence to twenty. (App. 605-608). Petitioner served and filed a Notice of Appeal and the Court of Appeals affirmed his sentence and conviction. State v. McQuarters, Op. No. 2017-UP-320 (S.C. Ct. App. Filed August 2, 2017).

On January 29, 2018, Petitioner filed an application for post-conviction relief (PCR). (App.1100). The State filed a Return and Partial Motion to Dismiss in May 2018. An evidentiary hearing was held on March 10, 2022, before the Honorable Robert J. Bonds. On April 27, 2022, Judge Bonds issued an Order of Dismissal denying relief. (App.1147). Petitioner served and filed a Notice of Appeal.

Factual Background

John Snodgrass was the general manager for the Northridge Cinemas. (App. 167). On October 20, 2013, Snodgrass left between 10:30 and 11:00 pm carrying a bank bag to his vehicle in the parking lot. (App. 168-169). He noticed someone in a vehicle near his and then an African-American male, maybe 6 feet tall, very broad shouldered and stocky stood up. The man walked toward Snodgrass and asked him about the movie and then for his cell phone. (App.171). After that, the man hit him, and Snodgrass was knocked down. He continued to be hit until he was unconscious. (App. 172-173). When he woke up, he was face down on the pavement and the bank bag was gone. (App.176-177).

At trial Colton Delaplane, a friend of Petitioner's, testified Petitioner and Jackie Perez, another person he knew, came to the movie theater on the night of the robbery. Petitioner asked Delaplane, who was working in the ticket booth, to give him some money from the drawer. (App.311-312). Delaplane also indicated he had previously pointed Snodgrass out to Petitioner. (App. 314). Several hours after the cinema closed, Delaplane met back up with Petitioner and Petitioner gave him $250. Petitioner indicated he "ran into money at your work." (App.316). Petitioner's trial counsel extensively cross-examined Delaplane regarding discrepancies in his testimony, differences between what was reported by officers in statements made by Delaplane, as well as the fact that he had not been charged in the incident.

Jacklyn Perez testified she knew Petitioner. On the night of the attack, he came to McDonald's where she worked around 9pm when she got off. (App.528-529). Petitioner wanted a ride to a movie theater in Hilton Head. (App.530). When they got there, Petitioner spoke with Delaplane. After, Petitioner was standing by Perez' vehicle when a man came out. Petitioner went up to the man and swung to hit him. (App.538). Petitioner hit the man "a few"

times and took the bag he was carrying. (App. 539). Perez drove off and left the man on the ground. (App. 540-541).

After trial, Christi Ross, the current manager for the cinema, gave a statement indicating that Delaplane may have been involved in setting up the robbery. Several days after the incident, Ross was talking with Delaplane. Delaplane told her "I knew about the money, but I didn't know John was going to be hurt like that." (App.613). Additionally, she indicated two weeks before the robbery, Snodgrass yelled at Delaplane and Delaplane told Ross: "If John ever screams at me in my face again. I'm going to punch him." She did believe Delaplane was shocked at what happened to Snodgrass and was "very apologetic." (App. 614).

ARGUMENT

I. The PCR Court correctly concluded trial counsel did not provide ineffective assistance when he was not deficient in failing to interview a witness and no prejudice could have resulted when the only testimony provided by the witness would not have exonerated Petitioner but would have merely added to the impeaching evidence already presented against a State's witness.

The PCR Court correctly found trial counsel was not deficient in failing to investigate Christi Ross and Petitioner failed to demonstrate he was prejudiced by any failure to investigate. Counsel was not deficient because there is no evidence presented he would have obtained any information from Ross or that she would have even spoken to him. Further, as the circuit court previously concluded in deciding Petitioner's new trial motion, any evidence obtained from Ross would have been merely impeaching and would not have altered the outcome of the trial.

Standard of Review

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter *de novo* and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if

the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Standard Applicable to Ineffective Assistance of Trial Counsel

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (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. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally

ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective

reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see 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). Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

Furthermore, the reviewing court will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal

proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687.

In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Ineffective Assistance of Counsel for Failing to Investigate/Interview

Counsel's performance under the first prong of the Strickland test is judged under the standard of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). The South Carolina Supreme Court has stated previously "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts

and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). However, counsel need only interview potential witnesses "when it is reasonable to do so." Id. at 457, 710 S.E.2d at 65. As the United States Supreme Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690–91.

Initially, trial counsel must only interview and investigate to the extent of what is reasonable. As counsel explained at the PCR hearing:

> That individual was just one of the people listed as being an employee of the movie [theater], but there was no indication in any of the discovery that she had ever given any statements to police or ever claimed to have any information about it. There wasn't even any information that she was on duty at any of the times that were relevant.

(App.1119-1120). In the instant case, there was no reason to investigate Ross. From what little information counsel had, she was not likely to have known anything regarding the attack and robbery.

Further, counsel explained a strategic reason not to have spent the time to investigate and interview Ross:

> [I]t wasn't a situation where I had the resources to have them go interview every single person listed in discovery unless there was something in there that indicated they might have some information that was going to be helpful to me in my case or if my client said, "Go talk to this person, they have got something

> helpful." Neither of those things were present when it came to [Ross].

(App.1125). In this case, it was a reasonable strategic decision not to spend time and resources to investigate and interview Ross when he had no reason from law enforcements' reports or his client to believe she would be helpful. Asking counsel to interview every employee of the movie theater, especially when they have not provided any information to law enforcement, is simply asking counsel to go on fishing expeditions. See Edwards, 392 S.C. at 456, 710 S.E.2d at 64 ("there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case."); Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Finally, Ross specifically indicated she did not want to be involved in the investigation. As the Supplemental Report states:

> I asked Ross why she didn't come forward when we first approached her about this at the end of October of 2013. Ross stated she was a victim in an unrelated domestic violence incident and was badly beaten. Ross stated she didn't want anyone else after her and was afraid of her safety.

(App.613). Significantly, Petitioner presented no evidence at the PCR hearing that Ross would have actually spoken with his trial counsel or an investigator prior to trial had they attempted to speak to her. As a result, there is no proof he would have obtained any information even if he had investigated and interviewed Ross.[1] Accordingly, there is no evidence counsel was deficient and, instead, all evidence indicates he made a reasonable strategic decision not to spend

[1] Additionally, it should be noted counsel served and filed the Motion to Vacate Conviction as soon as he learned of the new evidence from Ross.

resources to investigate and interview a witness who likely would not have spoken with him or investigators.

Further, even if counsel's reasonable decision not to interview Ross could be found deficient performance, Petitioner has utterly failed to present any evidence of prejudice which resulted because he has failed to show how the newly discovered testimony would have altered the outcome of trial. As noted above, in order to prove prejudice, Petitioner must demonstrate counsel's deficient performance prejudiced him 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added). In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695.

In order to find the statement by Ross to be likely to change the outcome of the trial, Petitioner argues it would have weakened Delaplane's credibility and seems to contend its inclusion more likely would result in jury nullification. Petitioner's counsel was able to thoroughly cross-examine and impeach Delaplane. Further, the new evidence would inure more to inculpating Delaplane and provides nothing exculpatory to Petitioner. He relies on mere speculation that a jury would ignore their instructions, be upset that Delaplane was not charged, and participate in jury nullification in order to have a different result. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (finding mere speculation and conjecture is insufficient

to substantiate allegation that counsel's deficient performance was prejudicial to respondent) (citing Glover, 318 S.C. at 498, 458 S.E.2d at 540)

The new evidence provided by Ross does not exculpate Petitioner.[2] Nothing in the statement provides him with an alibi, changes the description of the person who attacked Snodgrass, or establishes a reliable case of third-party guilt. Instead, it merely brings additional evidence against Delaplane as complicit in a conspiracy to commit armed robbery. As a result, there is certainly evidence to support the PCR Court's determination that Petitioner failed to demonstrate how he was prejudiced by the failure to investigate and interview Ross. Accordingly, this Court should deny the Petition for Writ of Certiorari.

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[2] It is important to note that the circuit court has already made a determination that Petitioner was not entitled to a new trial based on the after discovered evidence of Ross' statement. In order to obtain a new trial, Petitioner was required to demonstrate the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999). The court specifically found the testimony was not inconsistent with Petitioner's guilt and did not meet the standard required under element one that it would have changed the result of Petitioner's trial. There is no reason for this Court to find differently than both the circuit court and the PCR Court who have examined this evidence and concluded it would not have reasonably led to a different result at trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

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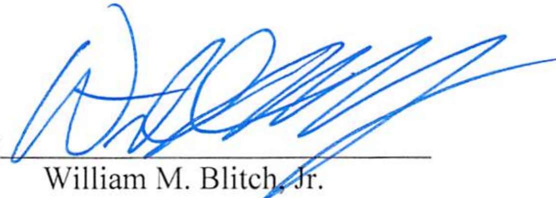

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