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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Dorchester County
Honorable Robert J. Bonds, Post-Conviction Relief Judge
Honorable Diane Goodstein, Trial Judge

Appellate Case No. 2022-001369

HERBERT LEROY HOLMES, SCDC # 139850,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

1. Whether the PCR court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974), where it was undisputed Petitioner asked counsel to appeal, but counsel erroneously filed a notice of appeal from a guilty plea instead of a trial, which resulted in the dismissal of the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, and since the State agrees Petitioner was entitled to a belated direct appeal?

2. Whether the PCR court erred in denying Petitioner's post-conviction relief where it found counsel provided effective representation despite counsel's failure to argue an additional basis to exclude the DNA evidence based on the chain of custody, and where the PCR court erroneously concluded a sufficient chain of custody was established at trial, since the State filed to establish chain of custody as far as practicable, where the prosecution left to conjecture the identity of some of the persons who handled the evidence and the manner in which the evidence was handled?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. Whether the PCR court correctly granted Petitioner a belated direct appeal pursuant to White v. State.

II. Whether the PCR Court correctly found that Petitioner's trial counsel's representation was effective, specifically concerning his opposition to the admission of certain DNA evidence and arguments regarding its chain of custody.

STATEMENT OF THE CASE

Petitioner Herbert Leroy Holmes is currently incarcerated within the South Carolina Department of Corrections following his conviction for first degree criminal sexual conduct and kidnapping, for which he was sentenced to concurrent terms of incarceration for thirty years and life, respectively.

A. Factual Background

On October 25, 1984, Victim P.R. ("Victim," her name has been withheld) was working at a bookstore. App. at 553. A young man came into the store, pulled out a gun, and instructed her to empty the cash register. Id. The man then led her to a back room, where he demanded that she take her clothes off and perform oral sex on him. Id. The man then anally and vaginally raped her. Id.

Victim was taken to the Medical University of South Carolina, where evidence was collected, including her clothing and various swabs from her body (the "rape kit"). Id. Michelle Aimes Vevon and Lisa Cox Schafer were nurses working at MUSC in the trauma unit at the time of Victim's exam. Id. at 99, 120. Neither nurse remembered the Victim's exam at the time of the trial in 2011, Id. at 105, but Vevon recognized her own handwriting on documentation from the exam, Id. at 103. Similarly, Cox testified that she did not recall the exam specifically but testified that she collected evidence during the exam based upon her signature on certain items. Id. at 127. During the exam, Victim's clothes were collected along with several swabs and washes (collectively, the "rape kit"). Id. at 553.

The investigation was led by the Dorchester County Sheriff's Office. Detective James Knight collected Victim's clothes and rape kit from the hospital. Id. at 135, lines 1-11, and at 582. Detective Knight then transported the evidence to Lieutenant Dale Nevins. Id. at 136-137. Lieutenant Nevins placed the evidence in the Dorchester County Sheriff Office evidence locker. Id. at 155-156. In January 1985, the evidence was transported by Lieutenant Nevins to SLED for

testing. Id. at 159-160. The rape kit was transported on January 2, 1985, and the clothing was transported on January 31, 1985. Id. at 581, 583, 584. The evidence was tested, and some of it was returned to the Sheriff's Office by Sergeant Burt Salvely. Id. at 161. Other evidence was returned by Joseph Rivers in April 1988. Id. at 163. In July 1988, evidence was sent back to SLED for additional testing. Id. at 165, 313-314, 585. The evidence was returned to the Sheriff's Office on December 19, 1989, by Emory Rush. Id. at 165-166, 586.

In 1993, Lieutenant Nevins left the Sheriff's Office and custody of the evidence was transferred to Earl Absell. Id. at 167. In 1994, the Sheriff's Office moved. Id. at 204-205. During and after the move, Absell maintained custody of the evidence. Id. at 206.

On March 6, 2009, the evidence was again submitted to SLED for DNA testing. Id. at 317. Dr. Kenneth Bogan at SLED, who had previously tested the evidence, extracted DNA from the Victim's panties and skirt. Id. at 321. Dr. Bogan identified a DNA mixture from at least two individuals. App. at 322. Dr. Bogan later received a reference sample of Petitioner's DNA, developed a profile, and compared it to the DNA extracted from Victim's body and clothing. Id. at 324. Dr. Bogan determined that Petitioner's DNA matched the DNA found on Victim's panties. Id. at 331.

B. Procedural History

In May 2011, Petitioner was indicted by the Dorchester County Grand Jury for first degree criminal sexual conduct (2011-GS-18-0257) and kidnapping (2011-GS-18-0256). Id. at 575-578. On April 22-25, 2013, Petitioner proceeded to a jury trial before the Honorable Diane Goodstein. Id. at 552. Mitchell Farley and Ash Chisholm ("Trial Counsel") represented Petitioner, and Glenn Justis and Phil Giese prosecuted the case. Id.

During trial, Trial Counsel objected to the admission of Dr. Bogan's testimony regarding the DNA testing. Id. at 274-287. Trial Counsel objected to the chain of custody for the evidence

and argued that the State had not fulfilled its obligations under State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011). App. at 278. The Trial Court overruled the objection and admitted the evidence. App. at 298.

At the conclusion of trial, the jury found Petitioner guilty as indicted, and Judge Goodstein sentenced Petitioner to concurrent terms of thirty years and life imprisonment, for criminal sexual conduct and kidnapping, respectively. Id. at 579-580.

Petitioner's trial counsel attempted to file a notice of appeal, but the notice of appeal inadvertently cited Rule 203(d)(1)(B)(4), which governs guilty pleas. Id. at 543. As a result, on June 10, 2013, the Court of Appeals dismissed Petitioner's direct appeal. Id. at 548.

On October 16, 2017, Petitioner wrote the Court of Appeals and stated that his conviction stemmed from a trial not from a guilty plea.[1] Id. at 552. On November 21, 2017, Petitioner filed his petition for post-conviction relief.[2] Id. at 441-447. On January 4, 2022, the State made its return, Id. at 448-461, and an evidentiary hearing was held on May 19, 2022, before the Honorable Robert J. Bonds, Id. at 463-541. Christopher Geel represented Petitioner, and the State was represented by Assistant Attorney General Samantha Weidauer. Id. at 551. At the hearing, Petitioner's counsel submitted an amended petition for post-conviction relief. Id. at 462.

During the hearing, Petitioner testified, and Petitioner's trial counsel, Mitchell Farley, testified. Id. at 551. Mr. Farley testified that "Mr. Holmes asked me to file the appeal" and that he had inadvertently filed the incorrect notice of appeal. Id. at 517.

The PCR court held that Petitioner was entitled to a belated direct appeal pursuant to White

[1] The Clerk of Court later replied that because a remittitur had been issued, the court no long had jurisdiction over the appeal. App. at 552.

[2] Petitioner filed this post-conviction relief application *pro se*. Counsel, Christopher R. Geel, was appointed on December 9, 2019.

v. State, but Petitioner was not entitled to post-conviction relief. Id. at 551.

Petitioner then initiated this appeal.

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, 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 PCR correctly granted Petitioner a belated appeal pursuant to White v. State.

The one-year limitations period in which to file an application for post-conviction relief does not apply where the defendant alleges he was denied a direct appeal due to ineffective assistance of counsel. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002). Here, Petitioner sought, and received, a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). In White, the PCR judge found the applicant did not knowingly and intelligently waive his right to direct appeal due to ineffective assistance of counsel. Id. at 119, 108 S.E.2d at 39. As a result, the PCR court directed PCR counsel to attempt to secure a belated appeal to the Supreme Court from his original conviction and sentence. Id. On appeal, our Supreme Court explained that it did not have jurisdiction to entertain a belated direct appeal absent the timely filing of notice of appeal. Id. at 119, 208 S.E.2d at 39. However, because the post-conviction relief appeal was properly before it, the Court reviewed the trial record and all issues properly raised as if the direct appeal had been perfected. Id. at 119, 208 S.E.2d at 39–40. The Court ultimately held that "that there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served." Id. at 119, 208 S.E.2d at 40.

Similar to White, Petitioner did not knowingly and intelligently waive his right to direct appeal. Petitioner's trial counsel filed a notice of appeal. App. at 543. That notice inadvertently cited Rule 203(d)(1)(B)(4), which governs guilty pleas. Id. at 543, 515. As a result, on June 10, 2013, the Court of Appeals dismissed Petitioner's direct appeal. Id. at 544. Trial Counsel testified that Petitioner never instructed him to withdraw the appeal. Id. at 515. Thus, Petitioner did not knowingly or intentionally waive his right to direct appeal and was correctly granted a belated appeal pursuant to White v. State.

II. Petitioner's Trial Counsel provided effective assistance of counsel throughout Petitioner's trial, including his opposition to and arguments regarding the admission of DNA evidence.

The representation provided by Petitioner's Trial Counsel constituted effective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The PCR Court made factual findings regarding the actions of Petitioner's Trial Counsel. 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 v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018) (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)). Specifically, the PCR Court found Petitioner's Trial Counsel was not ineffective in regards to the chain of custody.

App. at 570. The PCR Court based this on testimony that Trial Counsel had investigated and challenged the chain of custody. Id. There is evidence in the record to support the PCR Court's factual findings regarding Trial Counsel's actions, so those should be upheld.

Turning back to Strickland, the first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. Id.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." Strickland, 466 U.S. at 687. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" Id. (alteration in original) (emphasis added) (quoting Titlow, 571 U.S. at 23–24).

Review of counsel's actions is hallmarked by deference, 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. No

particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688–89; see id. at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn, 141 S. Ct. at 2410 (quoting Harrington v. Ritcher, 562 U.S. 86, 106–107 (2011)). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires 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. Strickland, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

In this case, Petitioner has asserted his Trial Counsel was ineffective when challenging and objecting to the chain of custody for DNA evidence. Trial Counsel's motion and argument regarding the chain of custody was extensive. App. at 274-287. He cross examined nearly every prosecution witness regarding the chain of custody and their treatment of the evidence. See, e.g., App. at 140-143 (cross examination of Detective Knight), 170-174 (cross examination of Lieutenant Nevins), and 336-340 (cross examination of Dr. Bogan). Trial Counsel was well prepared and provided cogent legal arguments against the admission of the DNA evidence. App. at 274-287. Trial Counsel testified that the chain of custody constituted Petitioner's main defense. App. at 442-443. Trial Counsel may have lost his motion to suppress the DNA evidence, but

Petitioner has not, and cannot, point to a particular act or omission which deprived him of effective assistance of counsel on this point. Losing an evidentiary motion does not constitute ineffective assistance of counsel.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant 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; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695. It is not sufficient "to show [counsel's] 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). "An 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." Id. at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

Regarding Petitioner's claim, certainly a different ruling on the motion to suppress would have had enormous impacts on the trial, and potentially its outcome; however, the Court does not need to reach this question because Petitioner has not identified any specific actions taken by Trial Counsel regarding this motion which were inadequate or unprofessional. Therefore, the second prong is moot.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. 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). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

Thus, the post-conviction relief court properly denied relief based on a claim of ineffective assistance of counsel, and this Court should deny certiorari.[3]

[3] Concurrent with this Return to Petition for Writ of Certiorari, Respondent is submitting a brief regarding the chain of custody issues relevant to Petitioner's White appeal.

CONCLUSION

The PCR Court correctly granted Petitioner a direct appeal pursuant to White v. State, but because the PCR Court properly determined Petitioner failed to establish any constitutional deprivations in the effectiveness of Petitioner's representation, 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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