

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
Hon. William A. McKinnon, PCR Judge
Hon. J. Derham Cole, Trial Judge

Appellate Case No. 2022-001522

RONNIE BONNER,

Petitioner,

V.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUES.....ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....6

ARGUMENT.....7

I. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective regarding the decision of defense counsel to not strike a juror, who during voir dire declared they formerly worked for the law enforcement agency that arrested petitioner and knew the deputies, where the petitioner has not presented any credible evidence that the refusal to strike the juror would have made a difference at trial.8

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failure to object to the solicitor’s question which improperly introduced petitioner’s prior drug convictions as evidence, where petitioner volunteered the fact that he was a drug user and volunteered testimony that he did not deal drugs, which opened the door to the line of questioning about petitioner’s prior drug convictions and after the door was opened by the petitioner, defense counsel did not have a basis for an objection.10

CONCLUSION.....12

STATEMENT OF ISSUES

- I. Whether the post-conviction relief court erred finding defense counsel was not ineffective where he failed to strike a juror, who during voir dire declared they formerly worked for the law enforcement agency that arrested petitioner and knew the deputies, and where counsel failed to articulate a reasonable strategy for his failure to strike that juror during the PCR hearing?

- II. Whether the PCR court erred finding defense counsel was not ineffective for failure to object to the solicitor's question which improperly introduced petitioner's prior drug crimes as evidence?

STATEMENT OF THE CASE

Procedural History

On May 24, 2018, a Cherokee County Grand Jury indicted Petitioner, Ronnie Bonner, for trafficking in methamphetamine between 28 and 100 grams (2018-GS-11-00653). Christopher P. Thomas, Esquire, represented Petitioner. The case was prosecuted by Assistant Solicitor Matt Kendall and Deputy Solicitor Kim Leskanic of the Seventh Circuit Solicitor's Office. On April 16th -18th, Petitioner proceeded to a jury trial before the Honorable J. Derham Cole. The jury convicted Petitioner as indicted. Judge Cole sentenced Petitioner to life imprisonment based upon an LWOP notice filed by the State.

A motion to reconsider the Petitioner's sentence was filed on April 26, 2019. A hearing on the motion to reconsider was held on June 3, 2019, and an order denying the motion was filed on June 5, 2019.

Petitioner filed a timely notice of appeal on June 18, 2019, that was perfected by Taylor D. Gilliam, Esquire, through filing an Anders¹ brief. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Bonner, Op. No. 2021-UP-155 (S.C. Ct. App. filed May 5, 2021). The remittitur was returned to the circuit court on July 17, 2013. The remittitur was issued on May 26, 2021.

Thereafter, on July 12, 2021, Petitioner filed an application for post-conviction relief, alleging he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for failing to strike juror #18 for being a former employee of the Cherokee County Sheriff's Department, failure to move for a mistrial or moving to strike Angela Upchurch's

¹ Anders v. California, 386 U.S. 738 (1967).

testimony, and failure to move to strike Sharon Stone's testimony where she had no first-hand knowledge of the incident in question and her testimony only improperly bolstered the State's case. Respondent served its return on October 14, 2021, requesting an evidentiary hearing.

An evidentiary hearing was convened on June 6, 2022, before the Hon. William A. McKinnon. Petitioner was present and represented by Rodney W. Richey, Esquire. Respondent was represented by Assistant Attorney General Chelsey F. Marto. At the hearing, Petitioner and trial counsel, Christopher P. Thomas testified. At the start of the evidentiary hearing, Petitioner informed the court he was proceeding forward on four grounds of ineffective assistance of counsel: failure to strike a juror that was a former employee of the Cherokee County Sheriff's Office, failure to object to the State opening the door to allow prior convictions in at trial, failure to convey consequences of a notice to seek life without parole, and failure to prepare Petitioner for his trial testimony. Following the hearing, the Court issued an order of dismissal denying all allegations of ineffective assistance of counsel, which was filed on October 10, 2022. Petitioner filed a timely notice of appeal.

Summary of Facts Adduced at Trial

On March 16, 2018, Petitioner was in the back seat of a car with two co-defendants, Angela Upchurch and Brian Parker, when the car was stopped and searched by officers. Parker provided consent to search the car. (App. pp. 52-56). In the car, 47.45 grams of methamphetamine were found in two baggies. (App. pp. 57, 197). None of the individuals claimed the drugs. (App. p. 64).

Both co-defendants cooperated with the State and testified at trial. Upchurch testified that Petitioner sold her a quantity of methamphetamine earlier that night at Sharon Stone's residence.

(App. pp. 97-99). Upchurch denied ownership of the drugs found in the backseat of the car and testified that Petitioner had two bags of meth on him when they got in the car. (App. pp. 101-105). Parker stated he was driving the car and unaware of where the drugs were found and that he never saw them in the car, but remembered Applicant attempting to hand something up to him when they were being pulled over. (App. pp. 141-42).

Sharon Stone testified that Petitioner, Upchurch, and Parker were all at her house on March 16, 2018. (App. p. 169). Stone testified that Upchurch and Petitioner, went into her bathroom and did a drug transaction. Stone stated that she saw Petitioner take a bag of drugs out of his pants and hand it to Upchurch. (App. pp. 170-171).

Petitioner testified on his own behalf at trial and claimed that though he smoked meth the evening of the arrest, the drugs belonged to Upchurch and that she had placed them in the back seat during the traffic stop. (App. pp. 237-238). On cross-examination, Deputy Solicitor Leskanic asked him, “so are you just a meth user”, Petitioner responded by saying, “Yes ma’am, I will not sell drugs”, and then when asked if he will not sell meth, Petitioner responded, “I do not sell meth, period.” (App. pp. 247).

Deputy Solicitor Leskanic than approached Judge Cole, and a hearing was held outside the presence of the jury. (App. p. 248). During proffered testimony at this hearing, Deputy Solicitor Leskanic asked Petitioner about him having two prior convictions for distributing crack cocaine. Judge Cole concluded this hearing by stating that the Petitioner “opened the door to the issue of his selling drugs.” (App. pp. 248-250). After the jury came back in, Deputy Solicitor Leskanic elicited from Petitioner that he had been twice convicted of distributing crack cocaine. (App. p. 251).

During voir dire for the trial, juror 18, Susan Cash, responded to the question from Judge Cole which asked if anyone in the jury panel had ties to the Cherokee County Sheriff's Office. She stated that she was a former employee of the Sheriff's department and that she worked with several of the deputies. Judge Cole asked if this would impact her service as a juror, and she affirmed that this prior employment would have no bearing on her decisions as a juror. (App. pp. 19-20). Susan Cash was later seated as a juror in Petitioner's trial without objection. (App. p. 28). Cash was later chosen by the Court to be the foreperson of the jury (App. pp. 34-35).

Summary of Testimony Presented at the Evidentiary Hearing

At the evidentiary hearing, Petitioner testified on his own behalf. Petitioner testified that he was not guilty of the trafficking charge (App. p. 428). Petitioner testified that he believed Susan Cash should have been struck from the jury (App. p. 425). Petitioner testified that he didn't have any conversations with his lawyer about his testimony at trial and that he was not warned about how his prior record could affect his testimony (App. p. 427). Petitioner testified under cross-examination that he was using drugs on March 16, 2018, that he has a prior record of dealing drugs, and that his prior record of dealing drugs came in at the trial after he testified that he did not sell drugs (App. pp 440-441).

Counsel testified next. Counsel testified that he did not strike Susan Cash because she was a former employee of the Cherokee County Sheriff's Office, and he thought she was possibly "disgruntled". (App. p. 443). Counsel further testified that he believed striking the juror would not have made a difference to the outcome at trial (App. p. 447). Counsel testified that he discussed the decision to testify with Petitioner and that he instructed him to "be short and concise and don't offer up anything that's not asked." (App. pp. 447-448). Counsel testified that

he did not know that Petitioner was going to say that he did not sell drugs. (App. p. 448).

Counsel testified that he did not think he could object to the solicitor's question about using meth and that Petitioner volunteered the answer that he did not sell drugs and opened the door to his prior convictions (App. pp. 450-451).

STANDARD OF REVIEW

When reviewing the rulings of a post-conviction relief court, the standard of review the reviewing appellate court employs depends on the specific issues before the court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, reviewing courts defer 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. Smalls, 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)). Particularly, the reviewing court must give great deference to a post-conviction relief court's findings where matters of credibility are involved since the reviewing court lacks the opportunity to directly observe the witnesses. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citing S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct.App.1984)). 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).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to meet his requisite burden of proof of establishing any constitutional ineffectiveness as to counsel's representation.

Petitioner asserts trial counsel was constitutionally ineffective in his representation of him and that he is entitled to a new trial based on this ineffectiveness. He asserts the post-conviction relief court erred in failing to grant him relief as to two grounds: first, he asserts counsel erred where he failed to strike a juror that was previously employed by the law enforcement agency that arrested him; and second, he asserts counsel erred in failing to object to the solicitor's question which introduced Petitioner's prior drug convictions. The post-conviction relief court correctly denied Petitioner's allegations after reviewing the record and observing the witnesses and testimony presented at the evidentiary hearing. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. 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).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant 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, 286 S.C. at 442, 334 S.E.2d at 814. "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). The applicant 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 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.

I. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective regarding the decision of defense counsel to not strike a juror, who during voir dire declared they formerly worked for the law enforcement agency that arrested petitioner and knew the deputies, where the petitioner has not presented any credible evidence that the refusal to strike the juror would have made a difference at trial.

In the order of dismissal, the post-conviction relief court rejected Petitioner's claims that counsel was ineffective for failure to strike a juror who was a former employee of the Cherokee County Sheriff's Office. In denying relief, the post-conviction relief court specifically found counsel's testimony regarding this issue to be credible, when he testified that he was not concerned with the juror because she was only formerly employed by the Sherriff's Office. (App. p. 472). The post-conviction relief court found that Petitioner did not present any credible

evidence at the evidentiary hearing that the refusal to strike the juror would have made a difference at trial. (App. p. 472).

At the evidentiary hearing, counsel testified that he did not strike Susan Cash because the juror was a former employee of the Sheriff's Office, and it was possible she was, "disgruntled". (App. p. 443). "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546-47 (Ct. App. 2014) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[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." Strickland, 466 U.S. at 691.

At the evidentiary hearing, Counsel did articulate a possible reason for not striking Susan Cash. Petitioner argues that Counsel did not articulate a reasonable strategy for not striking the juror, but even if Counsel's strategy is considered unreasonable, Petitioner has failed to meet the second prong of Strickland. Petitioner has not shown that Counsel's failure to strike the juror prejudiced the 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.

Petitioner has failed to show that Counsel's refusal to strike Susan Cash prejudiced the outcome of his trial. "[A] criminal defendant has no right to trial by any particular jury, but only

a right to a trial by a competent and impartial jury.” Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). Further, “[i]n PCR proceedings, a defendant must provide credible evidence that the trial attorney’s refusal to strike a juror prejudiced the defense.” Id. The post-conviction relief court properly denied relief on this issue because the Petitioner did not present any credible evidence that decision of Counsel to not strike the juror would have made a difference to the outcome of the trial. Where matters of credibility are involved the Court gives great deference to a judge’s findings. See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (internal quotations omitted)). Certiorari should be denied.

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failure to object to the solicitor’s question which improperly introduced Petitioner’s prior drug convictions as evidence, where Petitioner volunteered the fact that he was a drug user and volunteered testimony that he did not deal drugs, which opened the door to the line of questioning about Petitioner’s prior drug convictions and after the door was opened by the Petitioner, defense counsel did not have a basis for an objection.

In the order of dismissal, the post-conviction relief rejected Petitioner’s claims that counsel was ineffective for failing to object to the solicitor eliciting testimony about the Petitioner’s prior drug convictions. The post-conviction relief court found that Petitioner volunteered the testimony that he did not deal drugs and this answer opened the door to his prior convictions (App. p. 473). The post-conviction relief court further found that Counsel did not have a basis for an objection because Petitioner opened the door and there cannot have been any prejudice for failure to object (App. p. 473)

On cross-examination at trial, Deputy Solicitor Leskanic asked Petitioner if he is just “a meth user”, and in response Petitioner answered, “yes ma’am, I will not sell drugs”. (App. p. 247). When asked if he would not sell meth, Petitioner answered that he does not sell meth.

(App. p. 247). After this admission, the State requested to open the door to asking about Petitioner's prior drug convictions. The post-conviction relief court correctly found that the Petitioner opened the door himself to the line of questioning about his prior convictions. Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant. Ellenburg v. State, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006).

Petitioner has not established how the Defendant was unfairly prejudiced by this question, beyond arguing that the word "just" in the solicitor's question implied an answer. Petitioner answered the question by saying "yes ma'am", he then went further and volunteered the information that he did not sell drugs. After the door was opened by the Petitioner, Counsel did not have a basis for objection. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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