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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2022-000557

MARKESE EAST,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

- I. East is entitled to a belated direct appeal.

- II. Articulation of a valid trial strategy defeats a claim of ineffective assistance of counsel. Trial counsel decided not to call East's co-defendants as witnesses because they had reason to be antagonistic towards East and their testimony was not necessary to establish the defense theory of the case. East did not present testimony from the co-defendants at the PCR hearing. Did the PCR court correctly deny relief?

STATEMENT OF THE CASE

An Aiken County grand jury indicted Petitioner Markese East for armed robbery, first degree burglary, and murder. The indictments stemmed from a home invasion armed robbery committed by East and three others on May 28, 2013, which resulted in the death of Shane Jones. (App.252–57). East gave a confession to law enforcement admitting his role in the robbery and implicating his three co-defendants as the primary actors. (App.315–18). East's co-defendants all ultimately pled guilty and received 30-year sentences. (App.542, lines 10–13).

East proceeded to jury trial on January 5–7, 2016, before the Honorable Doyet A. Early, III, Circuit Court Judge. East was represented by Kevin Beck, Esquire, and Aaron Walsh, Esquire. East was prosecuted under an accomplice liability theory. East's defense was that Jones's death was not a natural and probable consequence of the armed robbery scheme because there was evidence his co-conspirators intended Jones's death from the outset without East's knowledge. East was convicted as charged and sentenced to 30 years' incarceration on each indictment, with the sentences to be served concurrently.

East did not appeal his conviction. He filed an application for post-conviction relief on January 24, 2017. (App.463–68). The State filed a return on March 20, 2017, and an amended return on April 3, 2019. (App.471–80). An evidentiary hearing was convened on May 14, 2019. At the hearing, the State indicated it received a letter from counsel Beck stating he failed to file an appeal as requested by East. (App.484). East also offered testimony to that effect. (App.486–87). The

PCR court granted East's motion for a belated direct appeal pursuant to White v. State, 348 S.C. 215, 559 S.E.2d 581 (2002), and agreed to toll the statute of limitations to allow East to pursue a PCR action. (App.493–94).

East filed an amended application for post-conviction relief on January 24, 2022, alleging trial counsel was deficient for failing to present testimony from his co-defendants, and for allowing his co-defendants to be present in the courtroom during his trial in prison jumpsuits. (App.497). An evidentiary hearing was convened on February 2, 2002, before the Honorable Robert J. Bonds, Circuit Court Judge. Nancy Fennell, Esquire, represent East. Megan Jameson, Esquire, represented the State. East testified on his own behalf, and the State offered the testimony of trial counsel, Kevin Beck. The PCR court denied relief on East's ineffective assistance claims on April 11, 2022. (App.567–82). East filed a White brief and a petition for writ of certiorari on March 8, 2023. This return follows.

STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id.

ARGUMENT

I. East is entitled to belated direct appeal.

The State agrees East is entitled to a belated direct appeal pursuant to White v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). The State has filed its Brief of Respondent concurrently with this return.

II. East failed to show deficiency and prejudice where his attorney reasonably chose not to present testimony from co-defendants because there was a significant risk the testimony would not be favorable and was not necessary to establish East's theory of the case. East failed to proffer testimony from the co-defendants at the PCR hearing, thus failing to establish prejudice.

East alleges trial counsel was deficient for failing to present his co-defendants as witnesses at trial, alleging trial counsel's testimony "evinced that he did not interview the co-defendants prior to trial to determine whether their testimony would be averse to Petitioner." PWC at 9. East's claim that counsel failed to interview the co-defendants is without support in the record, as East did not ask this question at the PCR hearing. Even assuming for argument's sake that counsel did not interview the co-defendants before trial, his decision not to present them as witnesses was still reasonable because counsel had no way of knowing how they would testify on the stand. Counsel testified this was a risky strategy because the co-defendants would be antagonistic to East because East implicated them in his statement to police, greatly bolstering the State's case against them. Furthermore, East failed to show prejudice because he did not present evidence from the co-defendants at the PCR hearing. This Court is left to speculate what the

co-defendants would have said at the PCR hearing, and at trial. This Court should deny certiorari.

To prevail on a claim of ineffective assistance of counsel, a PCR applicant must prove his attorney's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 690 (1984). Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. 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). "Courts must be wary of second guessing counsel's trial tactics; 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).

Counsel testified he discussed with co-counsel whether to call East's co-defendants Simmons and Morton to testify at trial. (App.543). He decided against it because he didn't "think there was anything they could have offered that would have helped" (App.545, lines 18–19). Counsel explained the text messages entered by the defense illustrated the other co-defendants were responsible for planning the robbery and conspired to kill Jones, which showed East was the least culpable and supported the defense theory of the case. (App.546, lines 1–9). He was also concerned the co-defendants would hurt East's case because East's confession implicating them was what "put them where they were." (App.545, lines 20–25). He believed it was too risky to put them on the stand. (App.545, line 25). The PCR

court correctly found counsel was not deficient. See Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (finding trial counsel made a valid, strategic decision not to present a co-defendant as a witness based on his observations of the co-defendant and concerns regarding his credibility); Jackson v. State, 329 S.C. 345, 351–52, 495 S.E.2d 768, 771 (1998) (holding counsel had a valid strategic reason for not calling a co-defendant as a witness where the co-defendant's credibility was a concern and the same evidence would be presented through another witness); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and they made inconsistent statements in the past).

East alleges counsel trial counsel's testimony at the PCR hearing "evinced that he did not interview the co-defendants prior to trial to determine whether their testimony would be averse to Petitioner." PWC at 9. This claim is without evidentiary support because East did not ask counsel whether he interviewed the co-defendants. Even assuming for argument's sake that counsel did not interview the co-defendants before trial, his decision not to present them as witnesses was still reasonable because counsel had no way of knowing how they would testify on the stand. The co-defendants had every reason to want to harm East's case. Counsel acted reasonably by concluding it was too risky to present their testimony at trial.

Additionally, East failed to show prejudice. Defense counsel was able to establish his theory of the case without presenting the testimony of the co-

defendants, whose testimony was risky because it may not have benefitted East. He introduced text messages showing Simmons, Morton, and Butler planning the robbery without East. (App.305–08; 530–31). With this evidence, counsel was able to support his argument that East was not a primary actor and was not privy to his co-defendants secret plan to kill the victim. Accordingly, East failed to show a reasonable probability he would have been acquitted but for counsel's decision not to call his co-defendants as witnesses. Strickland v. Washington, 466 U.S. 668, 694 (1984).

East did not present testimony from any of his co-defendants at the PCR hearing. Because he did not present evidence as to what their testimony would have been, his claim is entirely speculative. Even if his co-defendants did not blame East in their statements to police, there was a significant risk their testimony at trial would have been antagonistic. East was required to present at least some evidence otherwise. The PCR court correctly held East failed to prove his allegation as a matter of law. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (noting our courts have “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 from the witness’ failure to testify at trial”); Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant’s mere speculation as to what the witnesses’ testimony would have been cannot, by itself, satisfy the burden of showing prejudice); Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (Ct. App.

2012) (holding an applicant failed to meet his burden of proof where he failed to present testimony from any of the witnesses he asserts should have been called at trial).

East failed to show deficiency and prejudice. This Court should deny certiorari.

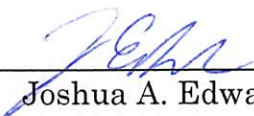
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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