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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2023-000687

RAJSHUN BERNARD FOSTER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Rajshun Foster was indicted by a Cherokee County Grand Jury in 2014 for murder. In his first jury trial, the jury was unable to reach a verdict. He proceeded to a second jury trial on July 14-17, 2019, before the Honorable R. Keith Kelly, circuit court judge, presiding. Tracy Racine, Esquire, represented Petitioner at trial. Petitioner was convicted as charged and sentenced to thirty-five years' incarceration. Petitioner appealed the conviction on the grounds of improper jury instruction. The South Carolina Court of Appeals dismissed the appeal finding the issue was not preserved. Petitioner filed an application for post-conviction relief on April 14, 2022. His PCR hearing was held on October 18, 2022, before the Honorable Brian M. Gibbons, circuit court judge, presiding. Petitioner's application was dismissed with prejudice. This appeal follows.

STATEMENT OF FACTS

Timothy Blair, known as "Slick," was shot and killed on June 22, 2014, at the Connecticut Village Apartment complex in Gaffney, SC. (App. 14). Four men were involved in the shooting: Rajshun Foster (Petitioner), Franklin Dover, Terence Studyvance, and Antron Bonner. Petitioner, Studyvance, and Dover were all charged as co-defendants in the first trial; Studyvance was found not guilty while a jury could not reach a verdict as to Petitioner and Dover. At the trial in question, Bonner testified for the State; Petitioner and Dover were convicted of Murder. (App. 94, 417).

In the days preceding the murder, a witness saw Dover and Petitioner at the Connecticut Village apartment complex looking for Slick, but he was not there. (App. 99). Petitioner and Dover told a witness they were looking for Slick and "had something for him." (App. 99). The day Slick was shot, a witness observed Petitioner speaking with him. (App. 310). A witness testified that Petitioner was an instigator and "ran up on Slick." (App.181). The witness testified she heard Dover say he would get Slick one way or another while holding a rifle. (App. 182). The men left and went to a nearby mobile home park where Dover lived. (App. 387). Bonner stated after conversing, the four men went back to the Connecticut Apartments to get marijuana. (App. 320). Bonner also testified Dover brought with him his rifle and a glove, while Studyvance brought a handgun. (App. 320).

They arrived at the apartment complex at around 5:00 PM. (App. 367). Petitioner drove up to a wooded path that led to where Slick was living. (App. 324). Bonner stated Dover and Studyvance got out of the car with their guns and went towards the apartment. (App. 324). Meanwhile, Petitioner and Bonner drove back into the apartment complex to confront Slick. (App. 324). Witness observed Petitioner and Slick enter into a verbal altercation and Slick

walked away. (App. 324). Slick began to walk back to the apartment; on his way back, he told a friend what had happened. (App. 210). The friend told Slick to go and grab his things so that he could leave the area. (App. 211).

Shortly thereafter, Slick was shot around the corner of the apartment. (App. 284). A witness saw two men fleeing the area on the path after the shooting. (App. 255). According to Bonner, Petitioner picked up the men from the place they were dropped off and drove away. (App. 328). Bonner also testified Petitioner then asked Dover where he shot Slick to which Dover replied, "up in the chest area." (App. 329). Dover and Studyvance went to the residence of Dover's girlfriend. (App. 368). She testified that Dover changed clothes and put what he was wearing in a shoe box. (App. 368). Then Dover and his former girlfriend drove to the Spartanburg mall. (App. 370-371). Later, one of Dover's friends came to pick up the shoebox. (App. 377).

The Court charged the jury, without objection, as follows:

> The use of a deadly weapon gives rise to a permissive inference of malice. You twelve may draw an inference of malice from proof of the use of a deadly weapon if you conclude such an inference is proper after considering all the facts and circumstances in evidence. You are free to accept or reject the permissive inferences, depending on your view of the evidence. The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If the facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would be simply an evidentiary fact to be taken into consideration by you, along with all other evidence, and give it such weight as you determine it should receive. (App. 460, 461).

Ultimately, the jury convicted Petitioner as indicted. Subsequently, following an unsuccessful appeal, Petitioner filed a petition for post-conviction relief. At the PCR hearing, Petitioner stated that he only met with his attorney a couple of times in the few months leading up to trial. (App. 573). Petitioner stated that counsel went over the witness statements with him

prior to trial. (App. 573). Counsel testified that she met with Petitioner seven times, tried to speak with witnesses, reviewed the evidence with Petitioner, and spoke with the solicitor regarding a plea. (App. 597, 607). Counsel stated she did not believe it would have been beneficial for Petitioner's trial to be sequestered from his co-defendant. (App. 600). Counsel pursued two strategies at trial: that Petitioner was unaware of the weapon, and that they were purchasing marijuana away from the murder when it happened. (App. 597-98). Counsel also testified that they attempted to show Petitioner did not have a reason to harm Slick. (App. 597).

On March 21, 2023, the PCR court issued an order of dismissal. The court found that counsel was not deficient, because State v. Burdette was not decided until after the trial was held and counsel was not required to anticipate changes in the law. (App. 661). The court also found that counsel was not ineffective for failure to move to sequester the trial, because counsel did not think it would be beneficial. (App. 658). Finally, the court found that Applicant failed to show how the outcome of the trial would have been changed by additional communication, hiring a private investigator, or reviewing additional discovery. (App. 656-58).

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 finding 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).

ARGUMENT

I. The PCR court properly found that Petitioner's counsel was not ineffective for failing to object to the jury instructions.

Petitioner contends counsel was ineffective for failing to object to the trial court's instructions regarding inferring malice from use of a deadly weapon. Because counsel is not responsible for anticipating changes in the law before those they occur, the PCR court properly denied the petition. This Court should affirm.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Id. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." State v. Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. Strickland, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

In Gilmore v. State, the South Carolina Supreme Court stated, "We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Petitioner was convicted of possession with intent to distribute cocaine. Id. at 455. Petitioner argued that counsel should have requested a King instruction. Id. It was clear that the King instruction was limited in scope to the crime of murder, until this Court extended its application to drug related offenses in Clifton. State v. Clifton, 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990). Because the requirement to give the King charge for drug crimes did not exist at the time of trial, counsel was

not ineffective for failing to object to the instruction. Gilmore v. State, at 457, 445 S.E.2d 454, 456.

The South Carolina Supreme Court affirmed this holding in Teamer v. State, holding "the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se." Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). The PCR court found counsel to be ineffective for failing to object to the instruction, because an objection would have been preserved for appeal. Id. The Court disagreed with this assertion and held that counsel's performance was not deficient, because the court has never required an attorney to anticipate changes in the law. Id.

The Fourth Circuit Court of Appeals has established that an attorney's failure to anticipate a change in the rule of law is not constitutionally deficient. Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995). In Honeycutt v. Mahoney, Petitioner was convicted of first-degree murder. Honeycutt v. Mahoney, 698 F.2d 213, 214 (4th Cir. 1983). The trial court instructed the jury that if the killing was done with a deadly weapon, that malice could be presumed. Id. at 216-17. Petitioner challenged the instruction on appeal, but the issue was not preserved. Id. After petitioner was convicted, state law changed, and the instructions were declared unconstitutional. Id. Petitioner claimed ineffective assistance of counsel because counsel failed to anticipate this change in the law. Id. The Court held that counsel was not deficient for failing to object, because when given the instruction was in accordance with a well-established rule. Id.

The Fourth Circuit has affirmed this in other rulings. In United States v. McNamara, the Court found trial counsel was not ineffective for failing to object, where Supreme Court decisions supporting challenges to such presumptions had not yet been rendered at time of trial.

United States v. McNamara, 74 F.3d 514, 517 (4th Cir. 1996). Also, in United States v. Palacios the Court stated, "counsel does not perform deficiently by failing to raise novel arguments ... or by failing to anticipate changes in law, or to argue for extension of precedent." United States v. Palacios, 982 F.3d 920 (4th Cir. 2020).

Likewise, this concept is well established in other jurisdictions as well. The Eleventh Circuit Court of Appeals has held "an attorney's failure to anticipate a change in law does not constitute ineffective assistance of counsel." Geter v. United States, 534 F. App. 831, 836 (11th Cir. 2013). Also, the Fifth Circuit Court of Appeals has "repeatedly held that there is no general duty on the part of defense counsel to anticipate changes in the law." Green v. Johnson, 116 F.3d 1115, 1125 (5th Cir. 1997).

On July 31, 2019, the South Carolina Supreme Court ruled that "a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). Prior to this decision, it had long been practice for South Carolina courts to instruct juries they may infer malice from the use of a deadly weapon. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009).

The case at issue was tried from July 14-17, 2019, before State v. Burdette was decided and while Belcher was still valid. Thus, at the time of the jury instructions in question the case law supported the jury charge given. Counsel was not constitutionally deficient by failing to anticipate this change in the law. As held in Teamer, counsel is not required to preserve issues for appeal by anticipating changes in the law. Petitioner failed to prove counsel was deficient in failing to object. Therefore, the finding of the PCR court should be affirmed.

A PCR applicant must prove that 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. The deficient performance must be considered in the entirety of the evidence produced supporting a conviction. Strickland 466 U.S. at 669.

Even if counsel was deficient, it is not reasonably probable that the outcome would have been different, because the State produced substantial evidence of malice. Petitioner entered into a verbal altercation with Slick the day he was murdered. (App. 181). Petitioner dropped off Dover before and picked him up after the murder. (App. 324, 255). After the shooting, Petitioner asked Bonner where he shot Slick. (App. 329). Because of the sufficiency of evidence, the result at trial was not impacted by the failure to object to instructions given, even if the Court finds counsel deficient.

II. The PCR court properly found that Petitioner's counsel was not ineffective for inadequate preparation.

Counsel was not deficient for inadequate trial preparation, because counsel met with Petitioner multiple times, reviewed the evidence with Petitioner, attempted to make an agreement with the solicitor, and developed a strategy for trial.

For ineffective-assistance-of-counsel claims, the brevity of time spent by attorney in consultation with a defendant alone is not indicative of inadequate trial preparation. Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). In Jackson v. State, the South Carolina Supreme Court found that petitioner did not prove ineffective assistance of counsel. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Petitioner was unsuccessful because he did not show what additional evidence counsel could have presented to support his defense, failed to show what could have been discovered, or what other defenses he would have requested counsel pursue. Id. at 345, 495 S.E.2d 768.

Counsel took multiple steps to ensure trial preparation was not deficient. First, Counsel testified that she met with Petitioner seven times. (App. 597). Next, Counsel reviewed the evidence with Petitioner, went to the scene of the incident, talked with investigators, and tried to speak with witnesses. (App. 597). Also, Counsel represented Petitioner in the first trial as well giving Counsel an understanding of the evidence. Further, Petitioner has failed to show what counsel should have discovered or what defenses counsel should have pursued to prove it is reasonably likely Petitioner could have been acquitted.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). When Counsel focuses on some issues to the exclusion of others there is a strong presumption that is done for tactical reasons rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. See McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing).

Counsel had specific trial strategies when it came to portraying Petitioner did not know of the murder weapon, and attempting to show he was not at the scene of the murder. (App. 597-98). Since counsel pursued an avenue of defense, counsel need not alert Petitioner of every possible defense. Counsel also had a valid strategy in regard to severance of the trial where she stated there was no benefit. Further, Petitioner has failed to present an alternative defense that would have changed the result of the trial. Petitioner has failed to rebut the presumption that this

strategy was done for tactical reasons. Since this strategy was valid there was no deficient performance on the part of counsel.

Counsel was not deficient for inadequate trial preparation, because counsel met with Petitioner multiple times, reviewed the evidence with Petitioner, attempted to make an agreement with the solicitor, and developed a valid strategy for trial.

Even if counsel was deficient, it is not reasonably probable that the outcome would have been different. The State produced testimony of Bonner, who was with Petitioner during the incident, testimony of a witness who observed the heated conversation between Petitioner and Slick, testimony of a witness who saw the men at the wooded path, testimony of a witness who heard Slick say he feared for his life, and testimony of Dover's ex-girlfriend who saw Dover shortly after the incident. (App. 320-330, 211, 368). In light of the evidence presented, it is not reasonably likely that the result would have been different absent any deficient performance. Further, Petitioner has not presented a trial strategy or evidence that would have reasonably likely had an impact on the result of the trial. Thus, any deficient performance on the part of counsel did not prejudice Petitioner. Accordingly, this Petition for Writ of Certiorari should be denied.

CONCLUSION

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

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