

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Sep 29 2023

S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas
The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-001590

Gene D. Evans, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER’S STATEMENT OF THE ISSUE PRESENTED ii

RESPONDENT’S COUNTERSTATEMENT OF THE ISSUE PRESENTED..... ii

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 2

ARGUMENT 3

 1. The PCR court correctly found that Counsel was not ineffective regarding the motion to suppress because the uncontradicted evidence presented at trial established that Petitioner voluntarily consented to the blood draw..... 3

CONCLUSION..... 10

PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

1. Did the PCR court err in finding trial counsel provided effective assistance where counsel challenged the blood draw and results during a pre-trial suppression motion but failed to secure a ruling on both grounds argued in support of suppression and failed to object to the admission of the blood results during trial which precluded appellate review of the motion?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

1. The PCR court correctly found that Counsel was not ineffective regarding the motion to suppress because the uncontradicted evidence presented at trial established that Petitioner voluntarily consented to the blood draw.

STATEMENT OF THE CASE

On February 12, 2017, Shonda Brown and Andrew Moye were traveling on Saint Paul Church Road in Sumter when they were forced to the side of the road by an RV driving toward them in the wrong lane. As the RV passed them, Brown saw the driver, whom she later identified as Petitioner. The RV overcorrected, went off the road, and struck a tree. Moye left Brown and ran to the RV to render assistance. He opened the door of the RV and found the driver, whom he later identified as Petitioner, under the steering wheel. Moye unhooked him from his seatbelt and pulled him out of the wreckage. Once Moye got Petitioner out of the RV, he could see that another person, Robert Skidmore, was still in the RV.¹ Moye first tried to get to Skidmore through the passenger-side door of the RV, but it would not open. He tried again from the driver's side, but the RV had caught on fire and was smoking. Moye was unable to rescue Skidmore due to the flames. (App.pp.154–78).

During its October 2017 term, the Sumter County Grand Jury indicted Petitioner for felony driving under the influence resulting in death (2017-GS-43-1104). Timothy L. Griffith, Esquire (“Counsel”), represented Applicant. Assistant Solicitor John P. Meadors, of the Third Circuit Solicitor's Office, prosecuted the case.

From February 20–22, 2018, Petitioner proceeded to a jury trial before the Honorable Howard P. King, circuit court judge. The jury found Petitioner guilty as indicted. Judge King sentenced Petitioner to imprisonment for twelve years.

Petitioner timely sought direct appellate review and was represented on appeal by Appellate Defender David Alexander, who submitted a brief pursuant to *Anders v. California*, 386

¹ At Petitioner's trial, Trooper Brian Trotter was qualified as an expert in the field of accident reconstruction. He testified that, based on the position of Skidmore's body after the crash, Skidmore would have been in the passenger seat of the RV at the time of the accident. (App.pp.180–218).

U.S. 738 (1967) along with a petition to be relieved as counsel. Petitioner then submitted his own *pro se* brief of appellant. Following a review of the entire record as required by *Anders*, the South Carolina Court of Appeals dismissed the appeal and granted appellate counsel's request to be relieved. *State v. Evans*, Op. No. 2020-UP-119 (S.C. Ct. App. filed April 29, 2020). The remittitur was issued on June 30, 2020.

Petitioner filed an application for post-conviction relief ("PCR") on June 24, 2020. An evidentiary hearing into the matter was held before the Honorable Clifton Newman at the Sumter County courthouse on June 28, 2022. Judge Newman denied and dismissed the application with prejudice on October 24, 2022.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Jessica M. Saxon, Esquire, Petitioner filed a petition for writ of certiorari on April 10, 2023. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- 1. The PCR court correctly found that Counsel was not ineffective regarding the motion to suppress because the uncontradicted evidence presented at trial established that Petitioner voluntarily consented to the blood draw.**

Following the accident, Trooper Kevin Boland visited Petitioner at the hospital as part of his investigation of the wreck. He testified that, when he entered Petitioner's room, Petitioner was awake and was able to follow Boland with his eyes. Boland testified that Petitioner could mumble, but was hard to understand, so he communicated with Boland by nodding or shaking his head in response to yes or no questions. In this way, he acknowledged that he knew who he was, that he did not remember what had happened, and that he realized he was in the hospital. Boland then requested a voluntary blood sample, and Petitioner replied with a "clear up and down" nodding of the head. A nurse then took a blood sample from Petitioner, and Petitioner did not shake his head no, withdraw his arm, or otherwise indicate that he was unwilling to give the blood sample. Boland acknowledged that Petitioner was strapped to a board and in a neck brace, but he testified that he was still able to shake and nod his head. He testified that he asked several nurses if there was any reason Petitioner was unable to talk, and they told him they did not know of any obvious reasons. He testified that he was not made aware of any medications Petitioner was taking or whether Petitioner had a concussion. Boland also testified that, if he had been unable to obtain consent, he would not have proceeded with the blood draw but would have sought a search warrant. (App.pp.36–52).

Prior to Petitioner's trial, Counsel moved to suppress evidence of the blood test on the ground the blood sample was taken in violation of S.C. Code Ann. § 56-5-2950. (App.pp.28–29). After hearing testimony from Trooper Boland, the trial court ruled that section 56-5-2950 did not

apply because Petitioner was not under arrest at the time of the blood draw. (App.pp.66–67). At trial, Petitioner admitted he was under the influence of methamphetamine at the time of the crash; however, he claimed the RV was being driven by Skidmore, rather than by Petitioner. (App.p.290, line 22–p.293, line 14).

Petitioner argued to the PCR court that Counsel was ineffective for failing to adequately argue that the blood draw was taken without Petitioner’s consent in violation of the Fourth Amendment, and for failing to object at the time the blood draw evidence was admitted. Petitioner alleged that Counsel’s failures prejudiced him because the issue was rendered unpreserved for appellate review. In support of this argument, Petitioner testified at the evidentiary hearing. Petitioner claimed that Trooper Boland was lying; however, he admitted that he could not remember anything about his interaction with Trooper Boland, and that he would have consented to a blood draw if he had been able to. (App.p.453, lines 1–17).

The PCR court found that Counsel was not ineffective on this ground because the uncontradicted evidence before the trial court established that Petitioner had voluntarily consented to the blood draw. The PCR court also noted that Trooper Boland’s testimony at trial was consistent with Petitioner’s testimony at the evidentiary hearing that he would have given consent to the blood draw if it was properly requested. The PCR court found that Counsel was not deficient because he properly made a motion to suppress and based it on the best arguments available. The court also found that Petitioner had failed to prove prejudice because he had not shown that additional argument would have resulted in the suppression of the evidence or that the issue would have been successful on appeal. (App.pp.492–93).

Petitioner now seeks a writ of certiorari on the ground that the PCR court erred in finding that Counsel was not ineffective as to the constitutional issue because Counsel relied solely on his

statutory argument during the motion to suppress and the trial court ruled against Petitioner only on the statutory ground, not on the constitutional one. Petitioner also claims the PCR court erred in finding the evidence of voluntariness was “uncontradicted” because there was evidence presented at trial that, when the blood draw was taken, Petitioner had a concussion, was in a highly medicated state, and had memory loss.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR applicant 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, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *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.

Second, counsel's deficient performance must have prejudiced 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 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.” *Strickland*, 466 U.S. at 670. The applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC.

This Court should deny the petition for a writ of certiorari because the PCR court correctly found there was no prejudice from Counsel’s failure to move for suppression of the evidence on constitutional grounds, as such a motion would have been meritless and would not have changed the outcome of the trial. There are three reasons not to disturb the PCR court’s decision: first, as the PCR court found, the uncontradicted evidence before the trial court established that Petitioner voluntarily consented to the blood draw; second, Trooper Boland had a good-faith belief that Petitioner voluntarily consented to the blood draw; and third, the fact that Petitioner was under the influence of methamphetamine at the time of the crash was not in dispute.²

First, the Fourth Amendment requires a finding that consent be given voluntarily under the totality of the circumstances. *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999) (citing *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Durades*, 929 F.2d 1160 (7th Cir. 1991); *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993)); see also *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (holding consent as an exception to the warrant requirement

² Although the PCR court’s order did not discuss the second and third reasons given here, the State raises them now as additional grounds for denying the petition for a writ of certiorari. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); *I’On, L.L.C., v. Town of Mt. Pleasant*, 338 S.C. 406, 417–23, 526 S.E.2d 716, 721–25 (2000).

must be voluntarily given). In this case, Trooper Boland testified that when he visited Petitioner at the hospital, Petitioner was awake, was able to track Boland with his eyes as he walked around the room, was able to communicate and to answer questions by nodding or shaking his head, correctly answered questions about his identity and whether he was in a hospital, and clearly nodded his head up and down when Trooper Boland requested a voluntary blood sample. Furthermore, Petitioner did not shake his head, withdraw his arm, or otherwise indicate non-consent when the nurse began taking the blood sample. Trooper Boland testified that Petitioner was able to clearly nod and shake his head despite his neck brace. None of this evidence was contradicted at trial. Finally, Petitioner himself admitted that—although he could not remember the interaction with Trooper Boland—if he was conscious and able to consent at the time of Boland’s visit, he would have consented to the blood draw. The mere fact that Petitioner was recovering from a concussion, was medicated, and could not later recall the interaction, does not mean he was unable to give voluntary consent to Trooper Boland’s request. Therefore, the PCR court correctly found that the uncontradicted evidence before the trial court established that Petitioner’s consent to the blood draw was voluntary.

Second, the exclusionary rule is not a constitutional requirement, but a judicially-created remedy designed to deter Fourth Amendment violations. *State v. German*, 439 S.C. 449, 474, 887 S.E.2d 912, 925 (2023); *United States v. Leon*, 468 U.S. 897 (1984). Therefore, the rule does not apply when law enforcement acts with an objectively reasonable good-faith belief that their conduct is lawful. *Davis v. United States*, 564 U.S. 229, 238 (2011). “Where there is no misconduct and no deterrent purpose to be served, suppression of the evidence is an unduly harsh sanction.” *State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014); *see also Davis*, 564 U.S. at 237 (“Exclusion exacts a heavy toll on both the judicial system and society at large . . . For

exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”). Here, even if there had been evidence that Petitioner was impaired by his concussion and medication in his ability to give voluntary consent to a blood draw, Trooper Boland was not aware of any such impairment. Boland testified that Petitioner appeared to be awake and alert and to give responsive answers to questions. Boland even asked multiple nurses whether they knew of any medical reasons Petitioner’s ability to communicate might be impaired, and they told him they did not. Boland denied knowing anything about Petitioner’s concussion or medications. The evidence indicates that Trooper Boland’s perception that Petitioner was able to voluntarily consent to the blood draw was objectively reasonable and in good faith. Accordingly, suppression of the evidence would not be appropriate because it would not serve any deterrent purpose.

Finally, there could be no prejudice because Petitioner never denied being under the influence of methamphetamine at the time of the accident. The theory of the defense, rather, was that Petitioner was not the one driving the RV at the time it ran off the road into the tree. At trial, Petitioner admitted on the stand that he was under the influence of methamphetamine and was not in a condition to drive, but he claimed Skidmore was driving the RV at the time of the fatal accident. At the evidentiary hearing, Petitioner reiterated that his defense was that he was not the driver, although he was under the influence of methamphetamine. (App.p.450, lines 9–16). Since Petitioner’s methamphetamine use was not in dispute, there is no possibility that the result of his trial would have been different, even if the motion to suppress had been granted. Therefore, he could not have been prejudiced by Counsel’s performance.

Each of these reasons, independently, suffices to defeat Petitioner’s claim of ineffective assistance of Counsel as to the suppression issue. Because there was no evidence to rebut the evidence of consent, no indication of bad faith on the part of Trooper Boland, and no dispute as to

Petitioner's use of methamphetamine at the time of the accident, there could be no prejudice from Counsel's failure to more thoroughly argue the constitutional issue during the pre-trial motion to suppress. For the same reasons, Counsel was not ineffective for allegedly failing to preserve the issue for appellate review, as Petitioner could not have prevailed in challenging the trial court's denial of his suppression motion on appeal: there could have been no reversible error for the appellate court to correct because both the constitutional and statutory arguments for suppression were meritless and the issue of Petitioner's drug use was not even in dispute.

Because Petitioner has not established any error in the decision of the PCR court, the State asks this Court to deny the petition for a writ of certiorari.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

September 29, 2023