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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Ferrell Cothran, Circuit Court Judge
Appellate Case No. 2023-000624

SYLVESTER D. SCOTT,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENT OF THE ISSUE ON APPEAL

The post-conviction relief court properly found that trial counsel was not ineffective.

STATEMENT OF THE CASE

Petitioner was indicted during the August 2015 term of the Charleston County Grand Jury for armed robbery and possession of a weapon during commission of a violent crime. The State called the case to trial on March 11, 2019, before the Honorable Roger M. Young and jury. Petitioner was represented by John J. Kozelski, Esq. and Susannah R. Knox, Esq. During the course of the trial, Petitioner elected to forgo the right to trial and enter guilty pleas pursuant to Alford v. North Carolina¹ to armed robbery and the weapons charge pursuant to negotiations with the State for a determinate twenty-year term of imprisonment and the dismissal of unrelated, pending charges.

On June 18, 2019, Petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. Respondent filed a Return dated October 17, 2019. A PCR hearing in this case was convened on April 18, 2022, at Charleston County Courthouse before Judge Ferrell Cothran, Jr., circuit court judge. Petitioner was present and represented by James Falk, Esq. and Assistant Attorney General Samantha Weidauer, Esq. appeared on behalf of the State.

On March 31, 2023, Judge Cothran issued an Order of Dismissal therein denying Petitioner's application. Petitioner timely appealed the Order of Dismissal and filed a petition.

¹ Alford v. North Carolina, 400 U.S. 25 (1970).

STATEMENT OF FACTS

Trial Facts

The PCR Court referenced Assistant Solicitor Thomas R. Waring's opening statement in presenting the facts of the case. Petitioner was arrested in Charleston for armed robbery and possession of a weapon during the commission of a violent crime. (App. 135). Around 3:30 p.m., on March 4, 2015, Petitioner walked into a bank and pointed a gun at Jasmin Jenkins, the bank teller, and demanded money. (App. 137). A few days later, Petitioner was arrested with \$635 in cash and two cell phones on his person. (App. 140). Cell phone mapping revealed the location of the one of the phones was near the bank at the time of the robbery. (App. 140).

At trial, Harriet Cordero, Petitioner's only witness, testified as an alibi witness on his behalf. (App. 514). Cordero testified that she knew Petitioner as "Scotty" from the neighborhood and that he lived a few blocks from her home. (App. 514-515). She further testified that she left her home on her moped around 2:25 p.m. and rode for about 30 to 40 minutes before the moped ran hot and began emitting smoke from the tailpipe. (App. 516). At that time, Cordero got off the moped and began pushing it near Petitioner's home. (App. 517). Cordero testified that Petitioner was smoking a cigarette in the back and saw her pushing the moped and came to help. (App. 517). She stated that Petitioner was with her and they talked for about 30 to 40 minutes. (App. 518).

On cross examination, the State asked Cordero how she knew that March 4th was the day Petitioner allegedly helped her. (App. 521). Cordero claimed she remembered that day because her moped ran hot, but when asked how she remembered the specific date, she testified the investigator with the public defender's office told her. (App. 522).

Following Cordero's testimony, Petitioner decided to plead in the middle of trial. Petitioner ultimately plead to armed robbery and possession of a weapon during the commission of a violent crime.

Evidentiary Hearing Facts

At the start of the evidentiary hearing, Petitioner informed the PCR Court he was proceeding forward on a sole allegation that his counsel was ineffective for failing to properly prepare the alibi witness to testify. Petitioner testified on direct examination that the trial strategy of Counsel was to present an alibi witness (Cordero) to refute the State's circumstantial evidence against Petitioner. (App. 561). Petitioner testified there were plea negotiations with the State, which purportedly offered him a ten-year plea because they allegedly had no witnesses and he claimed to have an "air-tight alibi witness". (App. 561). Petitioner claimed he was in North Charleston when the crime occurred, talking to a friend, and testified Cordero's moped stalled in front of his driveway and he helped her. (App. 562). Petitioner testified he helped Cordero with her moped in his yard and then gave Cordero a ride home. (App 562). Petitioner testified that Cordero was in her seventies at the time and people in the neighborhood generally looked out for her. (App. 562).

Petitioner testified he did not plead guilty because he was "actually" guilty, but he plead guilty "because that was the advice of [his] attorney." (App. 568). Petitioner stated Counsel's advice changed during trial, and Counsel had been optimistic about his case until Cordero testified. (App. 569). Petitioner testified everyone was shocked by Cordero's mental condition on the stand. (App. 567-568). On cross-examination, Petitioner testified he plead guilty after three days of trial and recalled the two armed robbery charges and two possession of a weapon charges against Petitioner as a result of his plea. (App. 568). Petitioner testified he understood that if he was granted

his PCR, he could be retried on all of his charges and would face a possibility of life without parole. (App. 568-569).

Petitioner testified he informed Counsel that Cordero could be an alibi witness. (App. 570). Petitioner testified he ultimately decided to plead guilty, based on advice of his attorney, even though he told the plea court it was his decision alone to plead guilty. (App. 569). After the testimony of Cordero, Petitioner testified that the discussions with Counsel centered around Petitioner taking a plea. (App. 568-569). Petitioner testified he was not told the State intended to call Investigator Verdell to combat his alibi. (App. 569). Petitioner testified he was aware he had the right to testify at trial and to remain silent, and he could have testified to the fact he had an alibi at trial. (App. 569). Petitioner stated he chose not to testify at trial because he had a prior record and Counsel advised him it was not a good idea. (App. 570).

Petitioner testified he did not recall the plea court asking if he believed “there was a good possibility [Petitioner] would be convicted based on the evidence presented by the State”. (App. 570). Petitioner testified he was “numb about the situation”, and so he does not remember everything that took place at the guilty plea hearing. (App. 570). Petitioner testified he liked and respected Counsel, and Counsel made a mistake in this instance of Petitioner’s case. (App. 571). As to the colloquy with plea court, Petitioner testified he was in shock when questions were being asked of him, and he could not remember exactly what the judge asked him. (App. 571). Petitioner testified he was satisfied with Counsel’s services prior to the State cross-examining Cordero. (App. 571). However, Petitioner testified he does not believe Counsel adequately investigated Cordero prior to trial. (App. 571).

Petitioner’s Counsel, Mr. Kozelski testified next. He stated he informed jury they would be hearing from an alibi witness in his opening statement of Petitioner’s case. (App. 572). Counsel

testified he checked with investigator Verdell Young prior to trial to see if Cordero was still a good witness, and the investigator told him, “[Cordero] remembers it like it was yesterday”. (App. 572). Counsel testified because of this assurance he mentioned Cordero as an alibi witness and used the same language the investigator used to describe Cordero’s memory, which he ultimately regrets. (App. 573). Counsel testified Cordero was in her seventies when he originally spoke with her and testified. Cordero refused to speak with the Solicitor prosecuting the case before testifying. (App. 573). Counsel testified his trial strategy was to argue Petitioner did not commit this crime, using Cordero as an alibi witness to prove he was not there at the time of the bank robbery. (App. 573).

Counsel testified he never spoke with Cordero directly, but he did get a statement from her through his investigator. (App. 573-574). Petitioner informed Counsel about Cordero, the investigator contacted Cordero, got a statement from her and Counsel sent the statement to the solicitor prosecuting Petitioner’s case. (App. 575). Counsel testified that the cross-examination of Cordero was a problem because the State made it appear as if Counsel had put Cordero up to fabricating the statement. (App. 576). PCR Counsel referenced page 521, line 18, of the trial transcript as the problematic part of Cordero’s cross-examination. (App. 576):

Q. I understand that, but I guess what I’m asking you is, two months after the incident, how did you know that that happened on March the 4th?

A. Because I was told.

Q. Because you were told?

A. Yes.

Q. You were told by the investigator?

A. Yes.

(App. 522). Counsel testified it is normal on cross-examination of witnesses for a witness to be asked how they remember an event that happened years earlier. (App. 576). At the evidentiary hearing Counsel testified he believed Cordero testified that she remembered the day in question because her moped was running hot that day. (App. 576). When the solicitor cross-examined Cordero, she could not tell the solicitor exactly why she remembered that day. (App. 576). When the solicitor pressed her, she said the investigator told her. (App. 577). Petitioner testified the solicitor made it seem as if the investigator wrote down Cordero's statement:

Q. But she told you that?

A. No. She didn't tell me my moped ran hot.

Q. And she told you that happened on March the 4th, correct?

A. She told me when — I don't know the exact date, but it was written down, though.

Q. It's written down?

A. Yes.

Q. By the investigator?

A. Yeah. I signed it.

(App. 522). Counsel testified the cross-examination changed his opinion on the outcome of the case, because it made it look like their alibi was lying. (App. 578). Counsel testified he did not work with Cordero much, because he had given the task of dealing with Cordero to his second chair, Susannah Knox. (App. 578). Susannah Knox testified that she spoke with Cordero within the week prior to trial to go through her story again and made sure she remembered the same details she had previously given. (App. 589-590). Knox further testified that prior to cross examination, she had no reason to believe that Cordero would give an unfavorable testimony. (App. 592).

Counsel testified he was the one who advised Petitioner to plea because their defense relied on Cordero, and that defense had fallen apart at trial. (App. 578-579). Counsel testified he believed up to that moment they were winning the trial. (App. 579). Counsel testified he had no reason to believe Cordero would give unfavorable testimony at the trial. (App. 584).

On direct examination of Ms. Cordero, she testified she knew Petitioner, described the day in question, and testified Petitioner helped her with her moped during the time of the incident. (App. 585). It was not until cross-examination Cordero's testimony faltered and showed her diminished capacity, which Counsel testified happens at times on cross-examination. (App. 585). Prior to plea, Counsel testified he advised Petitioner to cut his losses, that the cross-examination had put them in a bad position, but Petitioner did not want to plea. (App. 586). Counsel testified that it was ultimately Petitioner's decision to plea, but he had urged him to plea because of the risk of a life sentence. (App. 586). Counsel testified he spoke with Petitioner briefly about bringing Investigator Verdell Young to testify but did not believe it would make a difference. (App. 587). Upon the conclusion of all testimony, the PCR Court determined that Petitioner failed to meet his burden of proof to satisfy the claim of ineffective assistance of counsel.

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 findings 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 post-conviction relief court properly found that trial counsel was not ineffective.

Petitioner contends that the PCR court erred in finding trial counsel ineffective for failing to prepare an alibi witness to testify prior to trial. Specifically, Petitioner contends that because the alibi witness's testimony at trial was so unfavorable to Petitioner, Petitioner was immediately coerced into pleading guilty. Petitioner's argument is without merit because trial counsel's performance was not deficient and even if it had been, Petitioner failed to show that he was prejudiced by this deficiency.

The Sixth and Fourteenth Amendments to the United States Constitution guarantees Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 688 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the Petitioner did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. §17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

“A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency.” Stalk v. State, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (citing Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985) (adopting seminal ineffective assistance of counsel standard from Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), and applying to cases resolved via guilty

plea)). In order to satisfy the prejudice requirement, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” Hill v. Lockhart, at 59, 106 S.Ct. at 370. At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006).

Ineffectiveness claims based on counsel’s failure to investigate or prepare for trial require the Petitioner to present evidence of what counsel could have discovered or other defenses that could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when allegation is supported only by mere speculation as to the result). Relief will be denied where Petitioner does not present evidence at PCR hearing showing how additional preparation would have had any possible effect on the result at trial. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). Counsel has a duty to conduct reasonable investigation, and at a minimum, interview potential witnesses, considering favorability of witness’s testimony, and make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 772 S.C. 318, 642 S.E.2d 590 (2007); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). “So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so his performance will not be deficient.” Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011).

“It must be shown that the failure resulted in counsel’s ignorance of valuable evidence which would have substantially benefited the accused,” Id.

Here, the PCR Court properly found that counsel was not deficient in not preparing the alibi witness for trial. He acted reasonably as required by Strickland. Counsel’s investigator took a statement from Cordero shortly after Petitioner was arrested. (App. 583). Second chair for Petitioner testified that she met with Cordero within the week of trial and there was no indication that she would testify unfavorably. (App. 589-590). Counsel also spoke with the investigator prior to trial to make sure that Cordero was still a good witness, and the investigator told him “she remembers it like yesterday.” (App. 572). Unlike in State v. Walker, where counsel was found to be deficient because he had an alibi witness to interview, but never did, in this case Cordero had a statement taken from her shortly after the arrest of Petitioner and was spoken to and prepped prior to trial. State v. Walker, 407 S.C. 400, 756 S.E2d 144 (2014). In Moorehead v. State, Petitioner claimed that counsel was ineffective for failing to interview exculpatory witnesses or the two witnesses. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The court held that counsel was not deficient because there was nothing in the record to indicate that interviewing the victims would have led to any different result. Id. In this case, Counsel did interview the witness and prepare her for trial; however similar to Moorehead, there is nothing in the record to indicate that any further prep would have changed the result.² There was no indication that she would testify unfavorably or be tripped up by the State’s cross examination.

Even if Counsel had been deficient in his performance, the PCR court properly found that Petitioner did not meet his burden of proving that but for Counsel’s deficiency he would not have

² There is no evidence any more preparation of Cordero would have changed the result. Cordero did not testify at the PCR hearing.

plead guilty and insisted on going to trial. Due to the alibi witness's age being over 70 years old, and her answer being so unfavorable to the Petitioner's case, Counsel feared the credibility of Petitioner's only witness was in jeopardy with the jury. Counsel's choice to advise Petitioner to enter a plea after the alibi witness testified on cross examination was a strategic maneuver to avoid a potential life sentence, not an ad hoc misstep. Petitioner has provided no evidence to support his claim that the alibi witness's cross examination should have been reasonably anticipated by Counsel. Petitioner has failed to provide support for his claim that Counsel's assistance was ineffective.

CONCLUSION

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

Respectfully submitted,

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