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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Dillon County

The Honorable J. Derham Cole, PCR Judge

Appellate Case No. 2023-000914

TYREEK HAYES.....Respondent,

v.

STATE OF SOUTH CAROLINA.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENTS OF ISSUE ON CERTIORARI

I. Did the Post-Conviction Relief judge err by granting relief after finding counsel was constitutionally ineffective for failing to object to an erroneous general intent jury charge in an attempted murder case, when, although counsel was, in fact, deficient for failing to object, the Respondent did not and could not meet his burden of establishing the requisite prejudice in light of the overwhelming evidence that the victims' assailant specifically intended to kill them when he repeatedly and brutally stabbed both of them?

STATEMENT OF THE CASE

Respondent, Tyreek Hayes, is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dillon County Clerk of Court. During its December 2016 term, the Dillon County Grand Jury indicted Respondent for two counts of attempted murder (2016-GS-17-0875 and -0879), one count of kidnapping (2016-GS-17-0877), and one count of possession of a weapon during the commission of a violent crime (2016-GS-17-0878).[1] Respondent was represented by Matthew Swilley, Esquire. Megan Burchstead and Joel Kozak, Esquires, of the South Carolina Attorney General's Office prosecuted the case. On July 23-26, 2019, Respondent proceeded to trial before the Honorable Roger E. Henderson, circuit court judge, and a jury. Respondent was found guilty of two counts of attempted murder, one count of kidnapping, and one count of possession of a weapon during the commission of a violent crime. Judge Henderson sentenced him to consecutive terms of imprisonment of thirty years for each count of attempted murder, fifteen for kidnapping, and five for possession of a weapon.

Respondent filed a timely notice of appeal on August 5, 2019, and the appeal was perfected by Susan B. Hackett, Esquire, through filing a brief raising the following issue:

> The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified [Respondent] as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the State's case.

Briefing concluded on January 4, 2021. The South Carolina Court of Appeals affirmed the conviction by unpublished opinion. *State v. Hayes*, 2021-UP-378 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur issued on November 29, 2021.

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[1] Respondent was also charged with first degree criminal sexual conduct, which he was found not guilty of at trial. (App. 619).

After issuance of the Remittitur, Respondent filed a timely application for Post Conviction Relief, and in response, the State filed a return requesting additional information and an evidentiary hearing. On July 26, 2022, an evidentiary hearing was held in the Dillon County Court of Common Pleas, with the Honorable J. Derham Cole, Circuit Court judge presiding. At the conclusion of the hearing, Judge Cole took the matter under advisement and later instructed counsel to prepare a mutually acceptable order granting relief as to a sole issue. Counsel prepared and submitted the order, and on April 3, 2023, entered the order granting Respondent relief in part, and denying relief as to all other issues raised in his Application and at the hearing. The State then timely filed a motion to alter or amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, which was denied by way of an order filed on June 2, 2023.

Thereafter the State filed a timely Notice of Appeal on June 8, 2023.

STATEMENT OF FACTS

C.S. (Victim 1) met "Reedy Boss", or "Reedy All Boss", on Facebook and began communicating with him in or about 2016. (App. 107). "Reedy Boss" was later identified as Respondent. On the evening of September 30th and into the morning of October 1, 2016, C.S. went to a local club called Strikers with some friends and left her kids at her mother's house where her sister, A.C. (Victim 2) also lived. (App. 106-109). After going to Strikers, C.S. and a friend went to T Lees, another club. (App. 111-12). While at T Lees, C.S. saw Respondent in the parking lot. (App. 113).

At approximately 4:00am (an hour after arriving), C.S. and her friend were leaving T Lees, and Respondent asked for a ride home because he lived in the apartment complex next door to where C.S. lived. (App. 113). When they all got out of the car, Respondent asked if he could come into C.S.'s apartment, and she agreed. (App. 115). C.S. turned on the television, sat Respondent on her sectional couch, and went to wash off the smoke from the bar and change her clothes. (App. 116). When she came out of the shower, she sat in a recliner while Respondent stayed on her sectional couch watching TV. He asked her to come over and sit with him, which she did, and he started trying to kiss her. C.S. said no, that she had to work doing hair in the morning, and asked Respondent to leave, but he would not. (App. 116).

Instead, Respondent grabbed C.S. by her waist, held her so that her feet were off the floor, and dragged her into her bedroom. (App. 117). She fought Respondent and tried to scream and bang on the wall to get the attention of her neighbor, but Respondent began choking her. (App. 117). Once they were in the bedroom, C.S. begged him to stop to the extent she was able while Respondent was choking her, but he refused and continued to force sexual advances on her. When it became clear that he intended to have intercourse with her, C.S. begged Respondent to at least

wear a condom, because she didn't know what STDs he might have, which he did. (App. 118). Respondent forced her onto the floor, got a condom from where C.S. kept them, and then vaginally raped her. (App. 118-119). C.S. passed out after Respondent began penetrating her with his penis and woke up once it was light out the following morning. (App. 119).

When she woke up, C.S.'s clothing was missing and she was on the bed, it was daylight and Respondent was standing in the room watching her. (App. 119-20). Respondent indicated he wanted to have sex again, but C.S. refused. He then asked her to perform oral sex. After initially refusing and being choked a second time, C.S. agreed, believing Respondent would continue to choke her if she did not comply. (App. 121). She passed out again while performing oral sex on Respondent. (App. 120). Ultimately, Respondent began choking C.S. again, and during this time she begged him to stop, telling him she had children and she pleaded for her life. While C.S. was pleading with Respondent, he stated "no you're gonna tell [on him]" and continued to strangle her. (App. 121). She passed out again from the choking and when she woke the third time, her legs were weak and she could barely walk. (App. 121-22). Respondent helped her up and walked her to the bathroom, all the time holding on to her arm to prevent her from running away and eventually they both sat down on the bed. (App. 122).

At that point, C.S.'s sister A.C. arrived at C.S.'s apartment with her son and nephew. C.S. pulled away from Respondent and ran out into the hallway, when C.S. saw that it was her sister, she immediately told A.C. that Respondent raped her. (App. 123). A.C. then confronted Respondent and told him to leave, but instead he and A.C. engaged in a physical altercation. C.S. believed Respondent was punching A.C. but did not know he was actually stabbing her with a knife. (App. 123-24). C.S. jumped on Respondent's back and A.C. was able to get free, escape into the bedroom with the children and lock the door. (App. 123-25). C.S. then tried to run toward

the front door, but Respondent grabbed her from behind and tried to cut her neck with the knife. (App. 123-24). C.S. was able to get her hands up to fend off the knife and sustained numerous deep lacerations to her hands. Respondent then dragged C.S. into the kitchen where he repeatedly stabbed her. (App. 123-25). While Respondent was stabbing C.S., A.C. snuck out of the room with the children and ran for the front door. (App. 125). When Respondent heard the front door open, he stopped stabbing C.S. and went to try and stop A.C., but she got away. (App. 126). While Respondent was attempting to stop A.C. from leaving, C.S. was able to escape out the sliding door in the back. (App. 126). C.S. had to break through the screen to get out and away from Respondent. She then ran to her neighbor's house without clothes on and with multiple stab wounds where the neighbor called 911. (App. 127-28).

After law enforcement was contacted, an ambulance arrived and took both C.S. and A.C. to the hospital. (App. 128). After being treated and receiving stiches and staples, C.S. was shown a photo lineup. She immediately identified Respondent in the lineup and gave law enforcement the only name she knew him by, "Reedy All Boss". (App.129, 303).[2] At trial, C.S. again identified Respondent as the person who raped, choked, and stabbed her and her sister with a knife, and held her against her will. (App. 137-138).

A.C. testified that when she brought C.S.'s son back the morning of the attack, she walked in on what she thought was C.S. and someone having sex. (App. 196-97). After she backed out of the bedroom, she explained that C.S. came out and said the man in the bedroom was trying to kill her. (App. 197). A.C. confronted Respondent and a physical altercation ensued. (App. 197-99).[3]

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[2] A.C. also identified Respondent from a lineup, and stated she knew him from around the neighborhood. She also identified him when she testified at trial.

[3] There is a discrepancy in the witness' testimony regarding A.C. locking herself and the children in the bedroom or running out the front door after C.S. jumped on Respondent's back to stop him assaulting A.C. (App. 199, 210).

During the altercation, A.C. thought Respondent was hitting her, but instead he was stabbing her with a knife. (App. 197-98). She managed to escape with the children when C.S. jumped on Respondent's back and went next door requesting the neighbor to call 911. (App. 199-200). The neighbor let A.C. and the two children into her apartment after she called 911, and approximately one to two minutes later C.S. came around from behind the building to the neighbor's apartment. (App. 200-203). C.S. had no clothes on, and both C.S. and A.C. were bleeding from the knife wounds inflicted by Respondent. (App. 203).

Medical testimony from the surgeon who treated C.S.[4], photographs[5], testimony of investigating officer Lorie Tyler,[6] and Emergency Department Nurse Bridget Bryant[7] document C.S. suffered multiple cuts and stab wounds to her face, neck, torso and arms, which were described as "defensive wounds" and a "deep" laceration/stab wound to her leg. (App. 261-63). She also suffered bruising and swelling to her face and neck and petechial hemorrhaging in her eyes consistent with being choked. (App. 261). Meanwhile, A.C. suffered lacerations to her neck and arms, and a stab wound to one arm which was described as "through and through" by investigating officers indicating she had been stabbed with sufficient force for the knife to enter one side of her arm, pass through the tissue, and punch out the other side. (App. 260).

Respondent testified on his own behalf at trial, and his *sole* defense was that he did not commit the crimes, but rather, an unknown male entered the apartment and stabbed both victims.[8] He claimed that he was having consensual sex with C.S., and that the unknown male entered the

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[4] Dr. Mamdouh Mijalli, trauma surgeon at McLeod Dillon ER. (App. 296-306).
[5] State's Exhibits 6 through 78. (App. 247).
[6] App. 241-277.
[7] Nurse Bryant treated Victim 1 along with Dr. Mijalli at the McLeod Dillon ER. (App. 277-295).
[8] App. 489-520.

apartment, saw him having sex with C.S., and began assaulting C.S. and later A.C. He indicated that he ran from the scene once the unknown male began assaulting the victims with the knife.

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter *de novo* and is not required to give deference to the post-conviction relief judge's rulings. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In a PCR action, the Applicant (offender) bears the burden of proving the allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Under the Constitution, criminal defendants are afforded the right to effective assistance of counsel, but effective assistance does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an Applicant asserts ineffective assistance of counsel as a ground for relief, he must show "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*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense 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 petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee 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); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). 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, but no less important, 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. Most importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011); *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.

1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory.").

The standards do not establish mechanical rules and 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 because 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.

I. The Post-Conviction Relief court erred in determining counsel was constitutionally ineffective because Respondent did not and could not establish prejudice in light of the overwhelming evidence establishing whoever stabbed the victims did so with the specific intent to kill them.

In its order, the PCR court granted Respondent post-conviction relief on a sole issue—trial counsel was constitutionally ineffective for failing to object to the trial court's instruction to the jury that attempted murder required only general intent. In doing so, the PCR court further concluded that trial counsel was deficient for failing to object to this erroneous instruction but failed to make any findings of fact which would support a finding of prejudice. The Petitioner concedes both the impropriety of the jury instruction, and the deficiency on the part of Respondent's PCR counsel. *See State v. King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017); 412 S.C. 403, 417, 772 S.E.2d 189, 196 (Ct. App. 2015). However, Petitioner disputes the findings related to the second prong of the *Strickland* analysis.

In making its finding of prejudice, the PCR court stated as follows:

> ...This was also prejudicial to [Respondent]. The Court found fit to charge the jury on the lesser-included offenses of assault and battery of a high and aggravated nature and first-degree assault and battery. The jury charge in this case negated the

> requirement of any proof of an essential element of the charge against [Respondent]. Given the facts of the case, this error cannot be seen as harmless. Thus, this Court grants post-conviction relief and [Respondent's] convictions for attempted murder are reversed and remanded to the Court of General Sessions for a new trial. [emphasis added]
>
> (Order Granting Relief in Part, Denying in Part p. 11-12).

The PCR court applied the "harmless error" standard. That was error, as it was the incorrect standard for determining prejudice under *Strickland*, and in finding counsel's deficiency was not harmless, the PCR court ignored the copious and overwhelming evidence in the record establishing Respondent's express malice and intent to kill the victims, which meant there was not and could not be a reasonable likelihood of a different outcome at trial but for counsel's deficiency, when the proper *Strickland* analysis is applied.

A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S. at 112 (emphasis added); *see Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In *State v. Middleton*, the Supreme Court reiterated that errors with respect to jury instructions related to attempted murder are subject to a harmless error analysis:

> When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Thus, whether or not the error was harmless is a fact-intensive inquiry.
>
> *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (internal citations and

quotations omitted).

In *Middleton*, the defendant walked up to a vehicle where the two victims were sitting and discharged at least five bullets directly through the windshield into the passenger compartment. The Court found as follows "in the instant case, the evidence adduced at trial demonstrates that, notwithstanding the [improper jury charge], the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts...In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill [the victims]." The evidence presented in this matter presents a similarly obvious picture.

When the proper standard is applied in Respondent's case, it is clear that he did not meet the high burden placed upon him because he cannot establish the requisite prejudice necessary for a PCR court to grant relief, and the PCR court erred as a matter of law. This is true because the evidence in the record only supports the conclusion that the victims' assailant specifically intended to kill them with malice aforethought in committing this crime. Based on the evidence presented at trial, Respondent attacked both victims with a knife after sexually assaulting C.S. twice and choking her into unconsciousness, C.S. immediately told Victim 2 what he did when she arrived, and Respondent stated he believed C.S. would tell on him if he let her go before stabbing her. These statements, in combination with the number, location and severity of the injuries both victims sustained clearly established the Respondent (or whoever inflicted the injuries) intended to kill both victims to escape the consequences for his assault on C.S. Further, the act of repeatedly and brutally stabbing and slicing the throats of both victims could not logically support any other conclusion but that the assailant intended to kill them. *Cf. Middleton,* 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

The Respondent's entire defense, which the jury clearly did not believe, was that some unknown male walked in on him having consensual sex with C.S. and went berserk. At no point did he deny there was intent to kill, or that he was defending himself or that there was some other mitigating factor in this situation. He simply tried to claim it was someone else who harmed the victims, even though they both knew him, and immediately identified him by name and by his photograph, shortly after the incident. Accordingly, any error from the trial court's erroneous jury instruction cannot be considered prejudicial in the context of the *Strickland* standard, and the PCR court should not have granted relief.

There is no conceivable way the result of Respondent's trial would have been different but for counsel's failure to object to this jury instruction in light of the evidence presented. This Court should grant the Petition for a Writ of Certiorari, and reverse the PCR court's decision granting relief to Respondent.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this court should grant the Writ of Certiorari and overturn the PCR Court's findings that Petitioner's counsel was ineffective.

Respectfully submitted,

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