RECEIVED
Jan 11 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable H. Steven DeBerry, IV

Appellate Case No. 2023-000747

MARQUIS MCDONALD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3747

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

P.O. Box 1688
Georgetown, SC 29442

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 5

ARGUMENT 6

I. The PCR court properly found that Petitioner' counsel was not ineffective for failing to hire an expert. 6

II. The PCR court properly found that Petitioner's counsel was not ineffective for failing to object to jury instructions. 11

CONCLUSION 14

TABLE OF AUTHORITIES

South Carolina Cases:

Buckson v. State, 423 S.C. 313, 815 S.E.2d 436 (2018) 7

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) 6, 7, 13

Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011) 7

Gilmore v. State, 314 S.C. 453, 457 S.E.2d 454 (1994) 11

Legare v. State, 333 S.C. 281, 509 S.E.2d 475 (1998) 7

Mayo v. State, 347 S.C. 422, 556 S.E.2d 380 (2001) 13

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 5

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 11, 12, 13

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) 12, 13

State v. Clifton, 302 S.C. 431, 396 S.E.2d 831 (Ct. App. 1990) 11

Teamer v. State, 416 S.C. 171, 786 S.E.2d 109 (2016) 11

Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016) 13

Other Cases:

Bower v. Quarterman, 497 F.3d 459 (5th Cir. 2007) 7

Dunn v. Reeves, 141 S. Ct. 2405 (2021) 7

Ford v. Hall, 546 F.3d 1326 (11th Cir. 2008) 8

Gudinas v. State, 816 So.2d 1095 (Fla. 2002) 8

Harrington v. Richter, 562 U.S. 86 (2011) 7

Honeycutt v. Mahoney, 698 F.2d 213 (4th Cir. 1983) 12

Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) 12

Miller v. State, 764 S.E.2d 135 (GA 2014) 8

Samatar v. Clarridge, 225 F. App'x. 366 (6th Cir. 2007) 7

Strickland v. Washington, 466 U.S. 668 (1984) 6, 10, 13

Taylor v. State, 352 N.W.2d 683 (Iowa 1984) 8

Yarborough v. Gentry, 540 U.S. 1 (2003) 6

Other

Anderson, S.C. Requests to Charge - Criminal 13

STATEMENT OF ISSUES

I. The PCR court properly found that Petitioner's counsel was not ineffective for failing to hire an expert.

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

STATEMENT OF THE CASE

Petitioner Marquis McDonald was indicted by a Horry County Grand Jury in 2013 for armed robbery and murder. He proceeded to a jury trial on October 6-9, 2019, before the Honorable R. Markley Dennis Jr., circuit court judge, presiding. Petitioner was convicted as charged and sentenced to thirty years' incarceration for armed robbery and forty-five years' incarceration for murder. Petitioner appealed the conviction on admittance of expert testimony and admittance of prior convictions. The South Carolina Court of Appeals affirmed the conviction on July 12, 2017. Petitioner filed an application for post-conviction relief on August 11, 2020. His PCR hearing was held on November 29, 2022, before the Honorable H. Steven DeBerry IV, circuit court judge, presiding. Petitioner's application was dismissed with prejudice. This appeal follows.

STATEMENT OF FACTS

On the night of February 26, 2013, Marquis McDonald (Petitioner) planned to purchase marijuana from Anthony Liddell (Victim) at the residential housing complex, located at Coastal Carolina University. (App. 473-4; 588). Petitioner was accompanied by Stephon McLain.[1] (App. 590). On the day of the murder Petitioner called Victim and McLain several times. (App. 434-39). Petitioner had previously purchased marijuana from Victim at this location. (App. 588).

Petitioner testified that he pulled up to the housing complex with McLain in the passenger seat of the car. (App. 589). Petitioner testified Victim then got into the vehicle to sell the marijuana. (App. 590). He claimed McLain was dissatisfied with the transaction and pulled out a gun; the two men struggled over it and it resulted in Victim being shot. (App. 590-94).

A student who witnessed the event testified that it looked like Petitioner was in a fight against a car and was "very aggressive." (App. 154-57). She heard a total of three shots and heard the car speed away. (App. 153; 158-61). She saw Victim get out of the car and stumble towards her for help before falling to the ground. (App. 161). She instructed people on a nearby balcony to call 911. (App. 175).

EMS arrived at the scene and found the Victim on the ground with two students. (App. 132). An Officer testified that he found a cell phone and a bullet casing in the area where student told him the incident occurred. (App. 232). SLED arrived on the scene and collected the phone and bullet casing. (App. 246; 250). The cell phone and cigarettes belonged to Petitioner. (App. 595). Petitioner thereafter turned himself in. (App. 380).

During an interview, Petitioner stated he set up the marijuana deal with Victim. (App. 473). Petitioner indicated that he had no idea who McLain was before that night. (App. 396).

---

[1] McLain is also referred to as "Black" in the record. (App. 109; 499)

Petitioner stated McLain was in the passenger seat and Victim was in the back seat when McLain pulled out a gun. (App. 473-4). Petitioner claimed that the other two struggled over the gun and it fired. (App. 479). Petitioner claimed after the shooting he punched McLain so hard he fell out of the vehicle and Petitioner drove off. (App. 474).

SLED Agent Truss testified that all of the evidence recovered from the scene came from the driver's side of the car. (App. 391). Petitioner testified at trial that he was at the scene of the murder. (App. 589). Petitioner verified the phone found at the scene as his. (App. 598). He also stated that he had lied to investigators about being with and punching McLain. (App. 587). Petitioner again claimed McLain and Victim struggled over control of the gun and that it fired. (App. 594-5).

The Court instructed the jury that malice could be inferred from the use of a deadly weapon. (App. 667). The Court also instructed the jury as to hand of one hand of all, stating that guilt can be shown by actual or constructive presence at the crime as the result of a prior arrangement. (App. 670). Petitioner was convicted of both armed robbery and murder.

At the PCR hearing Dr. Turvey testified as an expert witness. (App. 5). He stated that it was unlikely Petitioner was the shooter, and that the most probable explanation was that the person in the passenger seat fired the shots. (App. 29-30). Counsel testified that his defense was the placement of the parties in the car. (App. 34-35). Counsel stated he now wishes he would have hired an expert but thought that the trajectory was obvious. (App. 39). Petitioner testified that he thought an expert would have been helpful at trial. (App. 59). He also stated he did not think the evidence presented at trial showed he was the shooter. (App. 64). The PCR court found counsel was not ineffective for failing to call an expert witness or for failing to object to jury instructions.

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.

ARGUMENT

I. The PCR court properly found that Petitioner's counsel was not ineffective for failing to hire an expert.

The PCR court properly denied relief because counsel was not outside the zone of reasonable professional norms in not calling an expert witness to testify at trial and Petitioner suffered no prejudice. Accordingly, this Petition for Writ of Certiorari should be denied.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland v. Washington, 466 U.S. 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." 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).

"Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021). Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective. Legare v. State, 333 S.C. at 281, 509 S.E.2d at 475 (1998); Bower v. Quarterman, 497 F.3d 459, 472 (5th Cir. 2007) (Counsel is not constitutionally required to seek out a contradictory expert so long as the decision not to call an expert is informed and based on a strategic decision.). "In many criminal cases trial counsel's decision not to seek expert testimony is unquestionably tactical because such an expert might uncover evidence that further inculpates the defendant." Samatar v. Clarridge, 225 F. App'x. 366, 372 (6th Cir. 2007). The analysis for failure to call a witness is focused on the strategic considerations of counsel in balancing the potential benefits of calling a witness against the risks. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

In Edwards v. State, our Supreme Court found counsel to not be ineffective for failing to call a codefendant, because the testimony would have been cumulative and could have opened the door for a potentially unfavorable cross examination. Edwards v. State, 392 S.C. 449, 710

S.E.2d 60 (2011). Several other jurisdictions have held counsel is not ineffective for failing to present cumulative evidence. See Miller v. State, 764 S.E.2d 135, 140 (GA 2014) ("Counsel is not ineffective for failing to call an expert witness whose testimony would have been cumulative of other evidence presented in the trial"); Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) ("even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence"); Taylor v. State, 352 N.W.2d 683, 687 (Iowa 1984) ("withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffective assistance of counsel"); Ford v. Hall, 546 F.3d 1326, 1328 (11th Cir. 2008) ("Counsel is not required to call additional witnesses to present redundant or cumulative evidence").

In the case sub judice, counsel was not deficient because the testimony offered would have been repetitive. The PCR court properly found that counsel was not ineffective because the expert testimony would have been duplicative considering the evidence presented at trial. (App. 828). The expert would have stated that it was unlikely Petitioner was the shooter because the shooting would have been at a close range and thus most likely from the passenger seat. (App. 29-30). Counsel stated that he thought the trajectory was obvious. (App. 39). He even stated "anyone with a number two pencil could have told you where the bullets were coming from." (App. 39-40). Counsel explained in his closing argument "we know the bullet came from inside the car ... we know where the bullet hit, that it hit in the back of the door." (App. 628). Counsel further attacked the State's theory of the case by explaining possible complications Petitioner would have shooting from over the car door. (App. 628). Counsel even stated, "if I'm seated in the driver's side of the car, it is impossible for me to have shot him." (App. 629).

Counsel reasonably thought an expert was not needed, because testimony would have been repetitive to that already produced, especially with respect to the testimony of Petitioner. Calling an expert witness would risk the admission of unfavorable testimony; coupled with the low benefit of duplicative evidence and an inability to disprove Petitioner's involvement relating to hand of one hand of all. Counsel implemented a valid trial strategy for not hiring an expert.

Even if counsel deviated from the standards of professional norms, any deficiency did not result in prejudice. The standards of prejudice 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.

Here, the evidence to be offered by the expert is not reasonably probable to produce a different outcome. The State produced evidence that Petitioner set up the marijuana deal the day before the incident. (App. 431-4; 588). Petitioner put himself at the scene of the shooting. (App. 588-9). A SLED agent testified that all the evidence recovered from the scene, including the cell phone and bullet casing, came from the driver's side of the car where Petitioner was seated. (App. 391). Expert testimony is not reasonably probable to change the outcome, because the State produced sufficient evidence and because the jury was not required to establish Petitioner's role as the shooter to secure a conviction. The expert testimony only dealt with the likelihood of Petitioner being the actual shooter, not with his criminal liability under the hand of one hand of all.

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.

Petitioner also claims counsel was ineffective for failing to introduce evidence relating to a report that shell casings found in this case matched casings used in another murder case where McLain was charged. Petitioner must prove that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. at 688. Here, the report simply shows the same weapon was used in both murders. It does not show Petitioner did not fire the weapon or that he was not a participant under the hand of one hand of all theory. Because the evidence provides low relevance or value to the defense, counsel was not deficient and Petitioner suffered no prejudice.

Petitioner has failed to meet his burden in establishing counsel was ineffective for failing to hire an expert or introduce evidence found in the casing report. Accordingly, this Petition for Writ of Certiorari should be denied.

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

Counsel was not deficient for failing to object to jury instructions, because the instructions when given were valid under Belcher and counsel is not required to anticipate changes in the law.

Counsel's performance must fall "below an objective standard of reasonableness ... under prevailing professional norms." Strickland, 466 U.S. at 688. 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 (1994).

The South Carolina Supreme Court reiterated this 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 Teamer

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.

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). Belcher found the instruction to only be invalid when evidence was presented that would reduce, mitigate, excuse, or justify the homicide. Id.

The case sub judice was tried from October 6-9, 2014, before State v. Burdette was decided and while Belcher was still applicable. Thus, at the time of the jury instructions in question the case law supported the jury charge given. Nothing in the record supports reduction,

mitigation, excuses, or justifies the homicide. Under the hand of one hand of all theory, the person who joins in the illegal act is as guilty as the principal. § 2-69 Hand of One-Hand of All, Anderson, S.C. Requests to Charge - Criminal, § 2-69. Thus, the charge complied with Belcher and counsel's performance was not deficient.

Petitioner cites Counsel's statements concerning his lack of knowledge surrounding Burdette and Belcher. Nonetheless Counsel's conduct is judged upon an objective standard of reasonableness, and, at the time of the jury instructions, Counsel was objectively reasonable in not challenging the jury instruction as there was no viable legal basis to do so. See Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) ("One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection."); cf. Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a post-conviction relief judge's grant of relief based on defense counsel's failure to raise an objection to be without factual support where "there was no sustainable objection" defense counsel could have made). 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. Accordingly, the PCR court properly found counsel was not deficient.

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's malice was not found from an inference, but by Petitioner's actions. The State's theory was Petitioner robbed and killed Victim. The State showed a drug deal was set up, that there was an aggressive struggle between the men, that someone was shot multiple times, and that a car drove off and left Victim to die. (App. 588; 153-61). The State produced sufficient evidence to show Petitioner acted with malice independent of the inference stemming from the use of a deadly weapon. 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.

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

P.O. Box 1688
Georgetown, SC 29442

BY: _____
ANDREW D. POWELL
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3747

ATTORNEYS FOR RESPONDENT

January 11, 2024