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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
The Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-001070

BRIAN K. SPEARS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE

Under Strickland, proving ineffective assistance of counsel requires showing deficiency and prejudice. The trial court admitted excited utterance testimony of a prior bad act that Victim told his sister, Petitioner shot him in a Walmart parking lot. In a statement to Officer Jackson, Victim's sister allegedly stated a different man, not Victim, was the declarant. Did the PCR court properly find counsel was not ineffective for cross examining the sister on the inconsistency but not questioning Officer Jackson?

STATEMENT OF THE CASE

Petitioner Brian Spears was indicted by a Horry County Grand Jury in August of 2007 for murder and three counts of assault and battery with the intent to kill. He proceeded to a jury trial on May 10-13, 2010, before the Honorable Larry B. Hyman, Jr., circuit court judge. Petitioner was convicted as charged and sentenced to thirty years' imprisonment for murder to be served concurrent with twenty years' imprisonment for each count of ABWIK. Petitioner's initial direct appeal was remanded for an on-the-record 403 analysis on April 17, 2013. The trial court conducted its analysis and affirmed the conviction on February 7, 2017. The Court of Appeals affirmed the conviction on June 26, 2019. Petitioner filed an application for post-conviction relief on September 26, 2019. His PCR hearing was held on September 6, 2022, with the Honorable Kristi F. Curtis presiding. Petitioner's application was dismissed with prejudice. This appeal follows.

STATEMENT OF FACTS

Petitioner lived in Lumberton, NC and is a member of the gang 41-Curve.[1] (App. 225). Prior to this incident, another member of 41-Curve, Eric Floyd (or G-Black) was killed, and Aaron Hammond (hereafter "Victim") was imprisoned for accessory after the fact of murder. (App. 225-6). Victim was a member of the "East Side Bloods." (App. 225). A few months after Victim was released from prison, he was shot at a Walmart parking lot, but only grazed. (App. 224). Danyell Hammond (Victim's sister) testified that Victim identified Petitioner as the shooter. (App. 224).

On May 26, 2007, Petitioner visited Myrtle Beach with some fellow 41-Curve members. (App. 296, 360). Petitioner was wearing a red t-shirt along with a black and red Yankees hat, while a fellow gang member was wearing a red O.J. Simpson jersey. (App. 288-89, 299). Red was the color of the East Side Bloods; members typically wear the colors of a rival gang when intending to "go do something." (App. 281).

After their arrival, a member of Petitioner's group stated they observed Victim walking down Ocean Boulevard with other East Side members. (App. 506). An East Side member left the group and approached Petitioner's group to compliment them on their clothing. (App. 301). The member's right arm was in a sling, so he attempted to shake a 41-Curve member's hand with his left hand, which was considered disrespectful. (App. 301). In response, the 41-Curve member slapped the East Side member's hand and cursed him out. (App. 301).

Immediately thereafter, a high-ranking member of 41-Curve became angry and began talking to Petitioner. (App. 302). Petitioner said to a fellow member that he thought someone from 41-Curve would kill someone in their group, unless they killed someone first. (App. 447-

[1] Petitioner was also referred to as "Bos." (App. 225).

48). Then, the group of 41-Curve "went after them." (App. 449). As they approached the other group, a member from 41-Curve pulled out a knife. (App. 451). A shooting abruptly occurred, resulting in Victim's death and injury to three others. (App. 451).

Officers spoke with Petitioner in North Carolina on June 4, 2007, where Petitioner denied being in Myrtle Beach on the date in question, instead claiming he was in North Carolina all weekend. (App. 355, 358-61). Following the first interview, Petitioner was charged with one count of murder and three counts of ABWIK. (App. 363-64).

On June 7, 2007, Petitioner was interviewed again. (App. 363-64). Petitioner told law enforcement that he was in Myrtle Beach on the date in question, but insisted that after the altercation began, he walked away. (App. 363-64, 367-68).

An eyewitness testified at trial that the shooter was a black male, about five-foot-seven, and was wearing a red shirt, a red bandana over his face, a red hat, and another red bandana on his wrist. (App. 203-04, 209, 211). She told the jury that she heard "five or six" shots. (App. 207, 210).

Petitioner's co-defendants, Nathaniel Douglas and Jeffrey Bethea, also testified at trial. (App. 287-350, 437-99). Nathaniel Douglas said that after the initial dispute with an East Side member he walked off while Petitioner remained with the rest of the group and heard gunshots approximately ten minutes after he left the group. (App. 302, 304-05). Douglas also confirmed that Petitioner was carrying a handgun the night in question. (App. 302-04). Meanwhile, Bethea confirmed that Douglas left the group and explained that he and Petitioner approached East Side and attacked them. (App. 449). Bethea told the jury that Petitioner pulled out a handgun and began shooting. (App. 450-51).

The State also introduced rap lyrics written by Petitioner which indicated he killed

Victim to avenge Eric Floyd's (G-Black) death. (App. 293-95, 406-07, 415). The lyrics included "murder was the game, revenge for [G]-[B]lack" and "but get a shirt made with Aaron on it that say n...'s dead ass." (App. 524, 639). Petitioner's former cellmate testified that Petitioner told him he received a phone call that Victim was in Myrtle Beach, which prompted Petitioner and his friends to come to Myrtle Beach to "go take care of him." (App. 505-07).

Petitioner testified in his own defense. (App. 565-611). Specifically, Petitioner claimed he had walked off following the dispute between the groups, heard gunshots and ran off. (App. 575-76). He said he did not shoot anyone. (App. 566). On cross-examination, Petitioner said he brought a gun to Myrtle Beach, but gave it to a friend because he did not need it. (App. 589, 600).

At the PCR hearing, Petitioner alleged defense counsel was ineffective for failing to call Officer Jackson. (App. 904-05). Petitioner alleged that Victim's sisters stated to Officer Jackson that someone other than Victim declared Petitioner was the shooter in the Walmart shooting. App. 904-05). Nonetheless, Officer Jackson was not called to testify at the PCR hearing. Counsel testified that Officer Jackson "probably would not have been particularly helpful." (App. 940). Counsel also testified that she thought there was some difficulty with impeaching a witness with extrinsic evidence under Rule 613. (App. 944).

The PCR court issued an order of dismissal. The court found Counsel was not ineffective for failing to call Officer Jackson. (App. 966-08). The court found that any statement was likely hearsay, counsel credibly testified that she did not think Jackson would be helpful, and that Petitioner failed to meet his burden in establishing prejudice. (App. 967-08).

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

Under Strickland, proving ineffective assistance of counsel requires showing deficiency and prejudice. The trial court admitted excited utterance testimony of a prior bad act that Victim told his sister, Petitioner shot him in a Walmart parking lot. In a statement to Officer Jackson, Victim's sister allegedly stated a different man, not Victim, was the declarant. Did the PCR court properly find counsel was not ineffective for cross examining the sister on the inconsistency but not questioning Officer Jackson?

Counsel was not ineffective for failing to question Officer Jackson because Petitioner failed to introduce evidence that established prejudice to petitioner, Counsel cross examined Victim's sisters, and Counsel testified she did not think Jackson would be helpful. Even if Counsel was deficient, her failure to examine Jackson did not prejudice Petitioner, because a different outcome is not reasonably probable. Accordingly, this Petition for Writ of Certiorari should be denied.

Pursuant to the first prong of the Strickland analysis, Petitioner must show counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 686 (1984); 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." 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. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. Id. 466 U.S. at 686. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 141 U.S. 2405, 2410 (2021).

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). A court need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR. Dalton v. State, 376 S.C. 130, 143, 654 S.E.2d 870, 877 (Ct. App. 2007). In Bannister v. State, this Court found Petitioner failed to meet his burden in establishing prejudice. Bannister v. State, 333 S.C. 298, 300, 509 S.E.2d 807, 808 (1998). Bannister was convicted of burglary and alleged a potential witness could have corroborated his testimony that he did not break into an apartment with the intent to commit a crime. Id. 333 S.C. 301, 509 S.E.2d 808. The Bannister Court noted that this testimony would have been "crucial" to the defense. Id. 333 S.C. 303, 509 S.E.2d 810. Nonetheless, applicant did not meet his burden in establishing prejudice by failing to call the witness at the PCR hearing or introducing the testimony in some other manner. Id.

South Carolina courts have repeatedly held that in order to establish prejudice for failure to call a witness, an applicant must produce testimony of a favorable witness. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (finding no prejudice where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding no prejudice where applicant did not offer witnesses at PCR hearing but merely alleged witnesses would have provided him with alibi defense); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding no prejudice from counsel's failure to investigate criminal backgrounds of witnesses where applicant failed to substantiate at PCR hearing that witnesses had criminal records); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial). Petitioner did not do so, and, thus he failed to establish prejudice.

However, even if Petitioner established Officer Jackson's prospective testimony was not speculative, Counsel was not ineffective. First, Victim's sister testified that she was in the house when Victim came inside and told her he had been shot at Walmart. (App. 225). The Court found the evidence was reliable enough to satisfy the clear and convincing standard for the admission of a prior bad act. (App. 269). The Court properly found this standard was established by considering the testimony in conjunction with the video.[2] Also, the State presented testimony from Bethea that Petitioner pulled out a handgun and began shooting, testimony from Douglas that Petitioner was carrying a handgun, and Petitioner's incriminating rap lyrics that referred to Victim by name. Given the circumstances, Counsel was not ineffective because a different outcome is not reasonably probable.

Next, Counsel was not ineffective because she implemented a valid trial strategy. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) ("[w]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel"); The point is not whether counsel erred but whether counsel's errors were so deficient as to provide ineffective assistance. State v. Anderson, Op. No. CR-23-0008-PR (Az. Sup. Ct. filed May 2, 2024).

Counsel asked Victim's sister on cross examination if she remembered telling Officer Jackson that Lemark told Victim that petitioner was the shooter. (App. 235). Also, Counsel made comprehensive arguments against the admission of evidence relating to the prior shooting. She argued that the State did not meet its burden in establishing Petitioner committed the act by clear and convincing evidence and that Victim's sister's testimony identifying Petitioner was not within a hearsay exception. (App. 241-2, 259). Lastly, in the PCR hearing Counsel stated that she did not think Officer Jackson would have been particularly helpful to the defense and that she was worried about opening the door to allowing the State to cross examine Officer Jackson. (App. 940). Here, Counsel's conduct was within the range of competence. See Dunn v. Reeves, 594 U.S. 731, 739 (2021) ("even if there is reason to think that counsel's conduct 'was far from

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[2] The Court noted Victim's sister stated Victim came to the house near midnight on the day of the shooting and that the video was timestamped at 12:04. (App. 255-6).

exemplary,' a court still may not grant relief [unless] counsel took an approach that no competent lawyer would have taken"). Here, Counsel was not deficient because she implemented a valid trial strategy in an attempt to exclude the prior bad act. 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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