

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Honorable Debra R. McCaslin, Circuit Judge
Appellate Case No. 2023-000811

DAVID JAMES WELCH,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S ISSUE PRESENTED

The PCR court properly denied post-conviction relief upon correctly finding that Trial Counsel was not ineffective for failing to object to witness testimony.

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).

STATEMENT OF THE CASE

The Horry County Grand Jury indicted Petitioner, David James Welch, for kidnapping, armed robbery, first degree criminal sexual conduct, and possession of a weapon during the commission of a violent crime. On April 17, 2017, Petitioner proceeded to a jury trial before the Honorable Steven H. John. Petitioner was convicted of the kidnapping and criminal sexual conduct and the jury acquitted Petitioner on the armed robbery and weapon charges. Judge John sentenced Petitioner to concurrent twenty-four year terms of imprisonment for convictions.

Petitioner filed a timely notice of appeal. Katherine H. Hudgins, Esquire perfected the appeal, filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Welch, Op. No. 2018-UP-451 (S.C. Ct. App. Dec. 12, 2018). The remittitur was issued on December 28, 2018.

Petitioner subsequently filed a PCR application in Horry County on February 21, 2019. The application was amended, and an evidentiary hearing was held on January 5, 2023. Christopher Geel, Esquire represented Petitioner. On April 28, 2023, Judge McCaslin signed an order of dismissal denying PCR.

Petitioner filed a Petition for Writ of Certiorari on January 26, 2024. This return follows.

RELEVANT FACTS

On January 8, 2015, Victim Jerrica Nelson got off work and was on her way home when her phone lit up with messages from Petitioner on Facebook. (App. 76-81). Nelson did not answer Petitioner's messages because she was driving, but then her phone rang when Petitioner called. (App. 78; App. 85-86).

Nelson became acquainted with Petitioner over the internet after Facebook suggested him as a friend but never met him in person. (App. 79-80). Nelson initiated the first conversation on January 6, 2015. (App. 116-17). Petitioner continuously suggested they hang out and cuddle, to which Nelson replied: "I know what guys mean when they say that." (App. 118). Petitioner requested sex with Nelson, but Nelson neither agreed nor refused. (App. 83-84; App. 126-27). Petitioner wanted to meet Nelson in person, but Nelson delayed until she received a voicemail from Petitioner amid a flurry of eight phone calls. (App. 86-87). In the voicemail, Petitioner claimed he was waiting for Nelson, and that he had been waiting for her all day after they made plans. (App. 87). Nelson messaged Petitioner back asserting she had never made plans with him, but ultimately relented and agreed to meet him at the Burger King "[i]n front of Coastal Grand Mall by Sticky Fingers." (App. 86-89). Nelson called Petitioner while waiting at the Burger King to "see if he was actually gonna show up." (App. 86-87).

After waiting for ten to fifteen minutes, Petitioner appeared wearing khaki-colored jeans, a dark colored sweatshirt, and a "small like beanie type" hat. (App. 89-90). Petitioner knocked on the window of Nelson's Hyundai Tucson and she let him into the SUV, where Petitioner asked Nelson how her day was. (App. 90). Nelson resisted Petitioner's efforts to pursue intimate relations. (App. 90-91). Petitioner finally relented and asked her to take him home. (App. 91). Nelson drove him to the Town Square Apartments and pulled into the parking lot. (App. 92-96).

After Petitioner pointed out an open window, he told Nelson to turn off her headlights, pulled out a gun; and asked Nelson to have sex with him. (App. 96). Petitioner “rubbed the gun on my hand” before pocketing it again, then began to unbutton Nelson’s pants over her objections, stating that he would shoot her. (App. 96). Finding Nelson’s pants a challenge to remove, Petitioner ordered Nelson into the back seat, where he raped her. (App. 96). Nelson told Petitioner she was not on birth control in the hopes of dissuading him, but he responded by putting on a condom. (App. 96-97). After Petitioner finished with Nelson, he grabbed her purse. (App. 97). Nelson refused to let go until he threatened to shoot her, at which point she released the purse, and Petitioner ran out of the SUV to a nearby gas station. (App. 97). Nelson shouted after him to return the purse, but Petitioner paid her no attention. (App. 97). Deprived of her purse and iPhone, Nelson knocked on doors at the apartment complex to borrow a phone to no avail, then drove to a Belk to call her mother and the police. (App. 97-99; App. 102-03). Nelson did not see her purse, its contents, or Petitioner again until trial. (App. 99-101). Nelson denied ever agreeing to have sex with Petitioner, and asserted she was afraid for her life. (App. 114).

Nelson initially did not tell her mother or the police about the sexual assault “[b]ecause [she] didn’t want to think it happened.” (App. 102-03; App. 128-29). Instead, Nelson only reported that she was robbed at gunpoint at the Burger King, prompting officers to respond. (App. 107-09; App. 129-30). Nelson also reported she did not recognize her attacker, explaining at trial that she “wasn’t thinking about it clearly.” (App. 110-111). Nelson admitted that the story she told to 911 dispatch was a lie, and that she left things out because she “didn’t want to think it had actually happened.” (App. 130). Nelson agreed that law enforcement’s questioning of her was “rough.” (App. 112). Officer Sououd went so far as to warn Nelson that she could be charged with filing a

false police report if she lied to police, which prompted Nelson to disclose the sexual assault. (App. 133-34; App. 142).

Officer Michael Dame, of the Myrtle Beach Police Department, assisted in Petitioner's arrest. (App. 204-06). Multiple law enforcement officers positioned at the front and rear of the house around midnight between January 8 and 9, 2015, with Dame situated "to the back of the house to the right." (App. 206-07; App. 211). An officer knocked on the front door; "the back door flew open and the subject exited very quickly out of the back of the house." (App. 207). While other officers pursued through yards and over fences, Dame took a wider route down the street and "saw the same subject that left the house going underneath a vehicle, cowering underneath a vehicle." (App. 207-08). Petitioner was apprehended. (App. 208).

Detective Jeremiah Beam, of the Myrtle Beach Police Department, responded to the Belk's at Coastal Grand Mall on January 8, 2015. (App. 232-35). Det. Beam acknowledged he was tough on Nelson to vet her complaint, and affirmed that Nelson never denied being sexually assaulted or being robbed at gunpoint. (App. 240-41). Det. Beam interviewed Petitioner on January 9, 2015, after his arrest. (App. 242-45). Petitioner was Mirandized and initialed the form utilized by the detective. (App. 243-45). Petitioner asked for a lawyer after a couple of brief statements. (App. 252-54).

Vanessa Lynn Thompson, a resident of Myrtle Beach, decided with her sister one day in February 2015 to go check out a foreclosed, abandoned house that her sister had previously lived in. (App. 183-86; App. 190-91). While exploring the utility room, Thompson found a purse and "stuff scattered like it had been thrown out of the purse." (App. 186-87). Thompson's sister found more identification cards on the air conditioning unit. (App. 187). Thompson found a name tag for where the purse's owner worked and called the company to try and alert the owner that she had

found her pocketbook. (App. 187). Law enforcement returned the phone call, and Officer Brittany Southerland responded to the scene. (App. 188; App. 190-93; App. 237). At trial, Detective Beam noted that the house where the purse was found was along the direction of Petitioner's flight from the scene after assaulting Nelson. (App. 239).

In Petitioner's defense, Counsel called expert witness Jessica Stowe, a forensic serologist with the South Carolina Law Enforcement Division. (App. 284-85). Stowe screened the sexual assault kit submitted to SLED and found neither pubic hair, spermatozoa, nor seminal components. (App. 286-296; Defendant's Trial Exhibit #16). Buccal swabs were taken from Nelson, but no analysis was performed on them. (App. 294).

PCR Hearing

At the PCR hearing, Petitioner proceeded forward on numerous allegations raised in his original and amended application including the allegation of ineffective assistance of counsel for failure to object to the prosecutor's closing statement on the grounds that his argument extended past the scope of the evidence presented at trial and that the prosecutor impermissibly offered his own opinion regarding the evidence offered.

Petitioner Testimony

Petitioner testified that he only had one meeting with Counsel before trial. (App. 433). Petitioner stated he discussed the evidence against him and the elements of the charges with Counsel. (App. 434). Petitioner testified that he had some issues with Detective Beam's testimony because he felt like he vouched, bolstered, and corroborated evidence. (App. 441). PCR counsel for Petitioner referred to the following portion of questioning from trial between the solicitor and Detective Beam:

Q: Now, I'm sure this is gonna come up; I brought it up a little bit with Jerrica as well. You were pretty tough on her that night weren't you?

A: I was. I try to be thorough and make sure I asked the right questions, make sure that I go over the story. I typically do that in all interviews to make sure they were not just, you know doing it halfway. I wanted to make sure I was thorough.

Q: In your job, could you even be able to ballpark how many complaints of sexual assault you get?

A: We get a lot. Unfortunately, We're a tourist town, Spring Break, college, it's a lot.

Q: And are you trained to vet these complaints?

A: We have to vet them just like any other case. So, yes, sir, we do our very best to try to vet it to make sure it appears to be credible and that it's true.

(App. 240; App. 442-443). Petitioner testified that he believed this line of questioning was improper vouching and would have brought it to trial counsel's attention if he had knowledge of vouching at the time. (App. 444). PCR Counsel continues through the line of questioning:

Q: and did you—did you sometimes threaten them – by threatening them, telling them that they could be facing a felony if they are filing a false police report?

A: Sometimes. I personally try not to. Not often, especially for sexual assault. I'm not a big fan of that, but sometimes there is a time and place where you have to let them know if it's a false report, that there are consequences.

(App. 240; App. 445). Petitioner again testified that he felt that was vouching. PCR Counsel then read more questioning.

Q: Even when questioned hard by you a trained detective, did she deny her story?

A: She never denied it. The story didn't really change.

(App. 240-241; App. 445-446). Petitioner then testified that he felt like the this was vouching because there was evidence in the case that the victim gave three different stories to three different officers. Another line of questioning was addressed by PCR counsel:

Q: What name was the Defendant using on Facebook?

A: His Facebook user name was David Royal.

Q: Okay. But we know that that's the Defendant sitting in the courtroom?

A: Correct

Q: This picture we've seen, 17, State's 17, Did you pull that up on Facebook?

A: I did; yes, sir.

Q: And under what name did you pull it up?

A: It was under David Royal.

Q: Okay. And then the victim told you this was the person who had assaulted her and stolen her stuff?

A: That is correct.

Q: Did she ever change that story?

A: No, Sir.

Q: She stuck to that to this day?

A: She did.

(App. 247; App. 448). Petitioner testified that again he had the same concerns about this line of questioning because Detective Beam was saying the story didn't change when it did. (App. 449).

PCR counsel then begins to question Petitioner about the line of questioning on cross examination.

Q: okay and my question to you is this, please tell the jury whether or not her story changed, whether or not she omitted things when she first called 911?

A: Yeah. Initially, she did not tell about the sexual assault.

Q: Okay. Let me ask you a question, are omissions lies in your book?

A: Omissions, it depends on the context, situational based.

Q: I've known you for a long time; you're a good detective?

A: uh-huh (affirmative response)

Q: And you're very seasoned. So, if you go and you talk to anyone, a victim or you talk to someone who did something wrong, and they leave something out and it's pertinent to the case, would you consider it to be a lie, yes or no?

A: I think it depends on the intent and also she's a victim of sexual assault. So, I mean she's a trauma victim. So, there's explanations for her state of mind.

Q: Okay. And so, the explanation for her state of mind here in your opinion was what?

A: She's been a victim of sexual assault and that, you know, we were speaking and continued to ask questions and gather details.

(App. 257; App. 449-450). Petitioner testified that he expressed concerns about this testimony because the detective was on the stand testifying before a jury saying that she was a victim of sexual assault and goes on to say that she's a trauma victim and this was a form of vouching. (App. 450-451).

PCR Counsel asked Petitioner if there was anything else he would like to add. Petitioner then referred to an issue of vouching stating "When questioning Detective Beam about what the victim told him, the Solicitor asked Detective Beam if the defendant used the gun and if the defendant forced the victim to have sex at gunpoint, in which Detective Beam gave an affirmative response to both questions with no objection made by the defense." (App. 264-265; App. 458). Petitioner further stated that he felt like the Solicitor's leading questions elicited an affirmative response that corroborated the victim's testimony. (App. 458-459).

Counsel Testimony

Trial counsel affirmed that he knew what bolstering was. (App. 492). Counsel testified that his strategy was prepared two weeks before trial, but he was worried about the credibility of the victim and the detective assigned this case. (App. 492-493).

Trial counsel testified that many of the objections Applicant now asserts should have been objected to were allowed in intentionally. Trial counsel stated "I knew what Beam was going to

testify to. We knew what he was going to say. We wanted to attach his wagon, so to speak, to the actual alleged victim. We wanted to discredit Beam and the investigation, so a lot of this stuff I allowed in intentionally, because I knew I would cross examine him about it.” (App. 495). He further testified “that was the strategy. It worked, to a certain extent, because we got the jury to not believe that he was guilty of possession of a weapon or guilty of armed robbery. So that is why the strategy was employed.” (App. 495). Counsel also noted that he didn’t object to some questions by prosecution because he was going to ask the witness the same types of questions. (App. 495). Counsel testified that he didn’t make objections of “bolstering or vouching” because he didn’t find them to have a valid legal basis and recognized that there were statements made that were false but not “bolstering”. (App. 496-505).

ARGUMENT

The PCR court properly denied post-conviction relief upon correctly finding that Trial Counsel was not ineffective for failing to object to witness testimony.

Petitioner contends that the PCR court erred finding that trial counsel was not ineffective for failing to object to certain testimony of a witness. Specifically, Petitioner argues that the testimony was improper corroboration and bolstering because he believed the witness provided testimony going to the credibility of the victim. Further Petitioner argues that Trial Counsel himself elicited some of the offending testimony. Petitioner's PCR counsel directed the Court to the previously stated testimony in support of this allegation. The PCR Court found Petitioner's allegation was without merit as Petitioner did not meet his burden of proof concerning that allegation. In its ruling the court stated:

This Court concurs with Counsel and Prosecutor in their assertions that none of the portions highlighted constituted improper bolstering. Additionally, several of the highlighted portions included questions Counsel intended to ask himself, which this Court finds are not appropriate for Counsel to object to. Further this Court finds that none of the highlighted portions were so crucial as to undermine the results of the proceedings. Accordingly, because Applicant has not met either prong of the *Strickland* analysis, relief is denied on this ground.

(App. 542).

To prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689. “Judicial scrutiny of counsel’s performance must be highly deferential.” Id., at 689. To prove a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. “[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.” Id. at 689.

Trial counsel’s articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated; as Strickland explains: “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690-91.

The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690. “Under Strickland, counsel’s representation must be only objectively reasonable, not flawless or to the highest degree of skill.” Strickland, 466 U.S. at 688-89. Moreover, counsel’s tactical decisions at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must

similarly meet only objectively reasonable standards. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000); Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) (“[E]ven if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.”) (citation and internal quotation marks omitted).

Petitioner attempted to argue that Trial Counsel’s performance was deficient, as it fell below an objective standard of reasonableness. Specifically, that Detective Beam was permitted to testify in a manner that corroborated Nelson’s version of events and bolstered her credibility. Petitioner continuously went through the line of questioning and questioned Trial Counsel as to why he did not feel the need to object to any of the line of questioning. After the first portion of testimony referenced by Petitioner regarding Detective Beam’s training to vet sexual assault complaints, Trial Counsel stated:

I knew what Beam was going to testify to. We knew what he was going to say. We wanted to attach his wagon, so to speak, to the actual alleged victim. We wanted to discredit Beam and the investigation, so a lot of this stuff I allowed in intentionally, because I knew I would cross examine him about it.

So, again, that was the strategy. It worked, to a certain extent, because we got the jury to not believe that he was guilty of possession of a weapon or guilty of the armed robbery. So that is why the strategy was employed.

I was going to ask the questions anyway on cross examination, and then to question him – and I did—question jim harshly about whether or not he told the truth and whether or not he was being honest about this girl and her testimony. I impeached him, yes.

(App. 495-496). Trial Counsel further testified that he did not believe the testimony was bolstering as well. Trial Counsel continued this response in reference to every line of questioning with Detective Beam. (App. 496-505). Petitioner also referenced the line of questioning by Trial Counsel on cross examinations regarding whether omissions are lies and that she was a trauma

victim stating that Trial Counsel elicited the bolstering testimony from his questions. (App. 499-500). Trial Counsel responded by stating:

The only thing I'll say about that, and I remember this line from the trial, what I say about this is that this is the first time that the officer begins to deviate from what he originally said, which is what I wanted. He began to say, yes, she may have lied or omitted something, which is, again, what I wanted in the record. It was important for me to get him on the record saying these things because we wanted to show that he wasn't being honest and truthful. So, in this situation, I don't consider it bolstering, but I think he is still not telling the complete truth about what the alleged victim is saying.

(App. 500-501).

Trial counsel was not deficient where he elucidated a valid trial strategy for not objecting to the testimony and instead deciding to highlight the weaknesses of the State's argument to the jury through cross-examination. The PCR court found that one the portions of testimony was not improper bolstering and that trial counsel had a valid trial strategy in not objecting and therefore properly found that trial counsel was not deficient for failing to object to the testimony and Petitioner failed to meet his burden.

Beyond failing to meet his burden as to deficiency, Petitioner has also failed to prove that he was prejudiced by trial counsel's failure to object to portions of the witness's testimony. In fact, at the PCR hearing Trial Counsel pointed out that the trial strategy worked to a certain extent because Petitioner was acquitted of the weapons and armed robbery charges. (App. 495). In its ruling, the PCR court found that "none of the highlighted portions were so crucial as to undermine the results of the proceedings. (App. 542). Petitioner has the burden of proving counsel's alleged deficiency effected the outcome of the proceeding, and Petitioner has failed to meet his burden. The PCR court properly denied relief because the Petitioner failed to show prejudice.

CONCLUSION

For the foregoing reasons, this Court should deny this 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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