

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Edgar W. Dickson, Trial Judge
Michael G. Nettles, PCR Judge

Appellate Case No. 2023-001622

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Aug 19 2024

S.C. SUPREME COURT

DOUGLAS YOUNG,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Petitioner's Question

Whether the PCR court abused its discretion in denying Petitioner's motion for a continuance where PCR counsel admitted he had never spoken with Petitioner about his case and the PCR judge improperly reasoned that allowing Petitioner to testify and "tell us what he thinks the [PCR] issues are" was acceptable where Petitioner was only allowed "one bite at the apple" in PCR?

Respondent's Counterstatement of Question

Did the PCR court abuse its discretion in denying Petitioner's request for a continuance when (a) Petitioner's only stated reason for a continuance was he was uncomfortable with appointed PCR counsel because counsel did not find any issues, (b) PCR counsel was in fact prepared for the hearing, and (c) providing additional time to subpoena witnesses (which was not requested) would not change the outcome based on the PCR court's finding that Petitioner did not establish deficiency?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a thirty-five-year sentence. In February 2018, the Charleston County Grand Jury indicted Petitioner for murder (2018-GS-10-558) and possession of a weapon during the commission of a violent crime (2018-GS-10-559). On December 2-4, 2019, Petitioner proceeded to a jury trial before the Honorable Edgar W. Dickson. Nicholas D'Angelo and Benjamin Lewis, Esquires, represented Applicant, and Assistant Solicitors David Osborne and Shanon Elliott represented the State. The jury convicted Petitioner as indicted, and Judge Dickson sentenced Petitioner to concurrent terms of thirty-five years for murder and five years for the weapon charge.

Petitioner filed a direct appeal, and Appellate Defender Adam Sinclair Ruffin submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed Applicant's appeal pursuant to Anders. The remittitur was sent March 11, 2022.

On January 6, 2023, Petitioner filed an application for post-conviction relief (PCR). On August 22, 2023, an evidentiary hearing convened before the Honorable Michael G. Nettles. Applicant was present and represented by Christopher L. Murphy, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, Applicant testified on his behalf. Respondent called as witnesses Assistant Public Defender Nicolas G. D'Angelo (trial counsel) and former Appellate Defender Adam S. Ruffin (appellate counsel). On September 13, 2023, Judge Nettles issued an order of dismissal denying and dismissing Petitioner's claims.

Summary of Trial Testimony

At trial, Zoe Whittaker testified she heard a gunshot outside her apartment as she was getting ready for work. She looked outside and saw a man holding a gun. As Whittaker ran to her

room to call 911, she heard more gunshots. She looked outside again and saw the same man holding a gun; the man left the scene in a maroon vehicle. (Tr. 74-76 76). During Whittaker's testimony, the State entered her 911 call into evidence over objection.

Shortly after the shooting, law enforcement located the maroon vehicle; Kathy Brisbane was driving the vehicle. At trial, Brisbane testified she was familiar with Petitioner's family and had dated his uncle, Gerald Young. Brisbane testified she was driving to work on the morning of the shooting when she saw Petitioner pointing a gun at another man. She stated she began blowing her horn to distract Petitioner from shooting, but Applicant shot the man three times. Brisbane clarified the other man had his hands up and did not have a gun. After Petitioner shot the man, Brisbane yelled at him and asked what he was doing. Brisbane testified Petitioner recognized her and asked her to drive him around the corner. She stated Petitioner told her, "You didn't see nothing." Although Brisbane did not know Petitioner's first name, she knew he was a Young. She later identified him from a photo lineup. (Tr. 158-86).

Nova Grilli, an expert in latent print examination, testified a fingerprint recovered from the GMC's passenger exterior door matched Petitioner's left palm. (Tr. 155). Sarah Zapata, an expert in DNA analysis, testified DNA swabbed from a beer can that was located at the scene of the shooting matched Applicant's DNA. (Tr. 105-06, 221-22). Law enforcement recovered four .9 Luger shell casings from the scene, and an expert in firearms identification testified they were all fired by the same weapon. (Tr. 97, 101, 103, 213-14). The expert further stated a bullet fragment recovered from the autopsy was consistent with being fired by a .9 caliber bullet. (Tr. 213).

After the State rested, Applicant testified in his defense and claimed he shot the victim in self-defense. (Tr. 308-15). Applicant also called Gerald Young, who testified he had seen the victim earlier that evening with "what appeared to be a lump of a gun in his pants." (Tr. 297-99).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court did not abuse its discretion in denying Petitioner’s request for a continuance when (a) Petitioner’s only stated reason for a continuance was he was uncomfortable with appointed PCR counsel because counsel did not find any issues, (b) PCR counsel was in fact prepared for the hearing, and (c) providing additional time to subpoena witnesses (which was not requested) would not change the outcome based on the PCR court’s finding that Petitioner did not establish deficiency.

Petitioner argues the PCR court abused its discretion in denying his motion for a continuance. Specifically, he avers PCR counsel was unprepared and had never spoken to him prior to the PCR hearing. He further contends—for the first time on appeal—that if PCR counsel had better prepared, PCR counsel could have subpoenaed three witnesses to his PCR hearing. However, based on Petitioner’s stated reason for a continuance request—that he was uncomfortable with PCR counsel because counsel did not find any issues—the PCR court did not abuse its discretion in denying the continuance. Further, a review of the transcript shows PCR counsel *did in fact* speak to Petitioner prior to the PCR hearing and was prepared to go forward. Finally, providing Petitioner additional time to subpoena witnesses (which was never actually requested at the PCR hearing) would not have changed the outcome based on the PCR court’s finding that Petitioner did not establish deficiency. Thus, the PCR court did not abuse its discretion in denying Petitioner’s motion for a continuance.

a. Based on Petitioner’s stated reason for a continuance—that he was uncomfortable with PCR counsel because counsel did not find any issues—the PCR court did not abuse its discretion in denying the motion for a continuance.

“The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant.” Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992). “Reversals for the denial of a continuance are about as rare as the proverbial hens’ teeth.” State v. Colden, 372

S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). A trial court does not abuse its discretion in denying a motion for a continuance based on a criminal defendant's desire to retain different counsel when the defendant is represented by counsel at all stages of the proceeding. Bozeman, 307 S.C. at 175, 414 S.E.2d at 146; State v. Bennett, 259 S.C. 50, 53-54, 190 S.E.2d 497, 498 (1972).

“While there is no constitutional obligation to appoint counsel in a PCR matter, in South Carolina, if a PCR application presents questions of law or fact requiring a hearing, and the applicant is indigent, state law provides that counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained.” Richardson v. State, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494–95 (2008). “However, a PCR applicant is not entitled to appointed counsel of choice.” Id. at 106, 659 S.E.2d at 495. “While an applicant may have the right to reject or discharge court-appointed counsel and proceed pro se or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed.” Id. “A mere disagreement between an applicant and his counsel as to how to proceed with the PCR application, including the allegations to be raised, is not sufficient cause, in itself, to require the PCR judge to replace or to offer to replace court appointed counsel with another attorney.” Id. “Counsel should not be relieved, and the process delayed, because an applicant is dissatisfied with counsel's legitimate refusal to pursue allegations that are meritless and/or not proper in PCR.” Id.

Here, Petitioner's basis for requesting a continuance pretrial was he did not like PCR counsel. Specifically, Petitioner stated: “If I don't feel comfortable with him right now, because if he can't find an issue, I want to try to get another lawyer, really.” (App. 483). Although Petitioner desired different counsel, Petitioner is not entitled to appointed counsel of his choice. See id. (“[A]

PCR applicant is not entitled to appointed counsel of choice.”). Further, Petitioner did not relay he had consulted with a private attorney that he intended to retain; rather, he merely expressed his discomfort with appointed counsel because counsel did not find any issues. Under Richardson, the PCR court’s denial of a continuance on this basis was not an abuse of discretion. See id. (“Counsel should not be relieved, and the process delayed, because an applicant is dissatisfied with counsel's legitimate refusal to pursue allegations that are meritless and/or not proper in PCR.”).

b. A review of the PCR transcript shows PCR counsel was in fact prepared and did speak to Petitioner prior to the PCR hearing.

Much of Petitioner’s argument is premised on the assumption that PCR counsel did not meet with Petitioner prior to the hearing or prepare for the hearing. However, PCR counsel testified he did, in fact, speak with Petitioner prior to the PCR hearing: “I spoke with Mr. Young a few months ago, and his jail cell was flooded. I had to resend him the transcript to go over issues.” (App. 479). PCR counsel further relayed he had reviewed the trial transcript and taken notes, and PCR counsel’s questioning of Petitioner about the trial itself showed counsel understood the trial transcript. (App. 480, 487-88). Ultimately, PCR counsel relayed he did not find any issues to raise. (App. 479). The fact that PCR counsel did not find any issues does not mean PCR counsel was unprepared; rather, it suggests there were, in fact, no compelling issues to raise.

Notwithstanding this, counsel questioned Petitioner on the various issues raised in his PCR application, and these issues were fully fleshed out to the PCR court. (App. 484-503). Counsel likewise elicited testimony regarding the witnesses Petitioner wanted to call at trial—including testimony about what those witnesses would have purportedly testified to. (App. 486-91). Ultimately, PCR counsel was prepared and elicited testimony from Petitioner to flesh out the various grounds Petitioner raised in his application. Thus, PCR counsel’s alleged lack of

preparation does not set forth a viable basis for finding the PCR court abused its discretion in denying Petitioner's request for a continuance.

c. The PCR court properly found counsel was not deficient for failing to call additional witnesses at trial, making a continuance for Petitioner to procure these witnesses to prove prejudice unnecessary.

In a PCR action, an applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove counsel's performance was deficient, and the deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Deficiency is measured by an attorney's "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and an applicant must overcome this presumption to receive relief. Butler, 286 S.C. at 442, 334 S.E.2d at 814; Cherry, 300 S.C. at 118, 386 S.E.2d at 625. To show prejudice, an applicant must show by "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.

Throughout his Petition, Petitioner avers he could have subpoenaed three witnesses for the PCR hearing if the PCR court had granted his continuance request. Although Petitioner offered testimony about these witnesses at the PCR hearing, at no point during the hearing did he request a continuance for the basis of procuring these additional witnesses. Thus, Petitioner's argument that he was prejudiced by the denial of a continuance because he could not procure these witnesses is not preserved. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to

and ruled upon by the trial judge to be preserved for appellate review.”).

On the merits, continuing the case to allow Petitioner to attempt to procure additional witnesses to establish prejudice would have been futile when the PCR court further found counsel was not deficient in its investigation of these witnesses. Petitioner does not challenge this finding by the PCR court, making it law of the case.¹ See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”).

Further, probative evidence supports the PCR court’s finding that counsel was not deficient. At the PCR hearing, trial counsel testified Petitioner had several witnesses he wanted counsel to talk to, but counsel was only able to get in touch with Applicant’s uncle—whom he called as a witness at trial. (App. 511-12). The PCR court found counsel’s foregoing testimony credible, and this Court should defer to that finding. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 (“Where matters of credibility are involved, this Court gives great deference to a judge’s findings, because this Court lacks the opportunity to directly observe the witnesses.”). Petitioner in fact corroborated this when he testified, “[M]y two cousins wasn’t been able to come.” (App. 489). Based on the foregoing, the PCR court properly found counsel’s investigation into these witnesses was reasonable under prevailing professional norms and not deficient.

Regarding the officer, trial counsel stated Petitioner initially claimed he was not the shooter and did not agree with a self-defense strategy until about seven days before trial. Thus, as counsel explained, the officer (who could have feasibly presented evidence of the victim’s reputation for violence) did not become a relevant witness until their strategy changed to self-defense. Counsel

¹ Petitioner likewise does not challenge any of the PCR court’s findings related to his claims of ineffective assistance of counsel, making them law of the case.

testified that at that point he was unable to legally subpoena the officer in time for trial, and the officer was not willing to testify without being subpoenaed. (App. 514-15). The PCR court found counsel's foregoing testimony credible, and this Court should defer to that finding. See id. Based on the foregoing, the PCR court properly found Petitioner did not prove deficiency based upon counsel's investigation of these witnesses.

Critically, because Petitioner did not prove deficiency, Petitioner cannot show counsel was ineffective. See Strickland, 466 U.S. at 668 (providing a PCR applicant must prove deficiency to establish ineffective assistance of counsel). Thus, providing Petitioner additional time to subpoena and call these witnesses in an effort to establish prejudice would be futile. Based on the foregoing, the PCR court did not abuse its discretion in denying Petitioner's motion to continue the hearing.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 19th day of August, 2024.