STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-11-0591
Appellate Case No. 2012-212165

Jeremy Richard Phillips, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel's performance did not violate Petitioner's 6th Amendment right to effective assistance of counsel for failing conduct a pre-trial investigation and present witnesses in Petitioner's defense?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Petitioner was indicted at the March 2007 term of the Cherokee County Grand Jury for murder (2007-GS-11-0301) and arson – 1st degree (2007-GS-11-0302). Petitioner was represented by Wade S. Weatherford III, Esquire. On December 7, 2007, the Petitioner underwent trial and was found guilty as indicted. Petitioner was sentenced by the Honorable J. Derham Cole to confinement for life (07-301) with a concurrent term of thirty years (07-0302).

A timely notice of appeal was filed and perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phillips, Op. No. 2010-UP-363 (S.C. Ct. App. filed July 14, 2010). The Remittitur was returned on July 30, 2010.

Petitioner then filed an Application for Post-Conviction Relief on August 4, 2010. The Respondent made its Return on February 16, 2011. An evidentiary hearing into the matter was convened on February 3, 2012, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Samuel R. Bass II, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Following the hearing, The Honorable Frank R. Addy, Jr. denied the application by written Order dated May 17, 2012. A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court properly held that Counsel's performance did not violate Petitioner's 6th Amendment right to effective assistance of counsel for failing conduct a pre-trial investigation and present witnesses in Petitioner's defense.

In September 2006, Petitioner was charged with murder and arson – 1st degree following the death of Juan Roman and the fire that consumed his home. At trial, although there was little physical evidence to link Petitioner to the crimes, Petitioner's former girlfriend, Nakia Gossett and various neighbors testified against Petitioner. Gossett's testimony placed Petitioner at the scene and provided details about the crime and subsequent clean up attempts. Following the State's case and testimony by the Petitioner during the defense case, Petitioner was convicted and given a sentence of life and a concurrent thirty years. Petitioner argues that Counsel was ineffective for failing to call various witnesses to support his claims that his co-defendant Jesse Willis was the sole person responsible and for failing to properly investigate and prepare for trial.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner 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.

Failure to Call Witnesses

Petitioner testified at the PCR hearing that there were several inmates who would have testified on his behalf had Counsel called upon them and presented each of those inmates. (App. Vol. II. p. 651). Petitioner testified that Counsel was aware of the first two witnesses and had even indicated in a letter to the Solicitor directly prior to the trial that he had numerous witnesses that were incarcerated that he needed location information for. (App. Vol. II. p. 659). Each of those inmates provided testimony that placed the blame entirely on Jesse Willis.

Joseph Smith testified that he wrote a note regarding a conversation he had with Jesse Willis after being asked by Petitioner, but was never contacted by Counsel. (App. Vol. II. p. 627-

8; 632). Smith said that Jesse told him that he fought Juan, beat him up, poured gas on him, and set him on fire all by himself. (App. Vol. II. p. 627). Smith acknowledged that he was facing a charge of accessory after the fact to murder, but had originally been charged with murder. (App. Vol. II. p. 629). Carmie Joe Hull testified that he had written a note as well that stated he overheard Jesse tell his mother in the Cherokee County Detention Center visiting room that he killed a man and was going to get away with it (App. Vol. II. p. 635). Hull acknowledged that he was currently in prison for charges of armed robbery, carjacking, assault and battery with intent to kill, and failure to stop for a blue light and had previously been convicted of twenty-seven counts of fraudulent checks and burglary. (App. Vol. II. p. 643-4).

One final witness, Donald Adams, testified that he wrote a note stating that Jesse beat a man to death and poured gasoline on him and blew him up (App. Vol. II. p. 696). The statement was written on January 22, 2008, more than a month past the Petitioner's conviction date. (App. Vol. II. p. 696). Petitioner acknowledged that Counsel did not have this information at the time of trial. (App. Vol. II. p. 657). However, Adams testified that he did not remember writing the statement, but did admit that he signed the statement. (App. Vol. II. p. 697). Adams acknowledged that he had recently been arrested on charges of petty larceny and burglary – 2nd degree. (App. Vol. II. p. 695). Adams, over his protestations, acknowledged that he had previously been convicted of breach of trust with fraud, four counts of property crimes – 3rd or subsequent, three counts of burglary – 2nd degree, receiving stolen goods, malicious injury to personal property, and giving false information. (App. Vol. II. p. 703-4).

Counsel testified that he did not take any steps to authenticate Willis' confession or contact any of the potential witnesses from the Detention Center because he decided it would not be fruitful. (App. Vol. II. p. 712). Counsel testified that Willis had given approximately five

"jailhouse" statements to the State, including three claiming responsibility and two denying involvement, while the one sworn statement inculpated Petitioner. (App. Vol. II. p. 710). He chose not to call Jesse Willis as a witness because Jesse, represented by counsel, was still being charged with murder and arson and would most likely exercise his Fifth Amendment right against self-incrimination. Further, Counsel testified that he felt that Willis was unpredictable and even if he testified to Petitioner not being involved, the State had his previous sworn statement to impeach him with. (App. Vol. II. p. 730). Also, Counsel researched third-party guilt and determined that the evidence of Willis' various statements and other inmate statements would have been inadmissible under third-party guilt. (App. Vol. II. p. 721).

Trial counsel was not ineffective for failing to call these potential witnesses. This Court has stated that counsel must articulate a valid reason for employing a certain strategy to avoid a finding of Sixth Amendment ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). A Petitioner will be denied relief when a court finds trial counsel's strategy to be credible. A PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Id. This court has held that "a Petitioner's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

If there is any probative evidence in the record to support the PCR judge's decision, his ruling must be affirmed. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Id. Counsel did not believe these three

witnesses to be credible individuals. He would have had to undergo risks by having Willis assert his Fifth Amendment rights before he could admit any hearsay confessions from these witnesses. These witnesses, fellow inmates of Willis, were not credible with their histories of crime and their shaky testimony could have hindered Petitioner's case by having a jury look unfavorable upon them

Counsel also articulated a valid reason for not calling co-defendant Jesse Willis as a witness. Not only was Jesse charged with murder and arson and represented by counsel, but he was a younger man with a very low IQ. (App. Vol. II. p. 784). Counsel believed that it would be too dangerous for Petitioner's case to put Jesse on the stand. If Jesse chose to testify, he could have incriminated Petitioner in order to help his own case. Petitioner can merely speculate that Jesse's testimony would have been beneficial, so Petitioner is unable to prove that Counsel was deficient.

Furthermore, the PCR Court properly found that Counsel was not ineffective for failing to call these potential defense witnesses. (App. Vol. II. p. 785). The court found that Counsel articulated a valid reason for not calling the potential witnesses offering statements by Willis or co-defendant Jesse Willis. (App. Vol. II. p. 786). The Court found the testimony of Petitioner and each of the three additional witnesses to not be credible. (App. Vol. II. p. 786).

Respondent submits that there was clear evidence of probative value in the record to support the PCR judge's findings. Respondent submits that Petitioner has failed to meet his burden of proof as to this argument.

Failure to Prepare for Trial and Investigate

Counsel also testified that he was completely prepared for trial (App. Vol. II. p. 727). Counsel testified that his motion for continuance was based upon what he thought was

insufficient notice of trial, not preparation. (App. Vol. II. p. 727). Counsel went to the crime scene several times and had the Petitioner draw him diagrams of where he and the other people were the night of the fire. (App. Vol. II. p. 741). Counsel spoke with each of the witnesses who were not co-defendants as well as visited the jail numerous times to meet with Petitioner. (App. Vol. II. p. 741). He stated that he reviewed the witness statements a great deal to prepare for trial so he would be suitably prepared for cross-examination. (App. Vol. II. p. 741).

Petitioner argued that it was important for him to have seen the towel that had the victim's blood on it prior to trial. (App. Vol. II. p. 670). Petitioner did acknowledge that Counsel attempted to arrange for a time for Petitioner to see evidence, but it did not occur based on the notice for trial. (App. Vol. II. p. 674). Counsel testified that he reviewed photos of the crime scene with the Petitioner and discussed the items that the police removed from the home of the Petitioner (App. Vol. II. p. 785).

Trial counsel was adequately prepared for trial and was not ineffective for failing to investigate. This court has held that a criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. While the scope of a reasonable investigation depends upon a number of issues, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Id. at 332, 597.

The PCR Court also determined Counsel was not ineffective for failing to investigate the evidence in the case or failing to ensure the Petitioner had the opportunity to review the physical

evidence obtained from the scene prior to trial. (App. Vol. II. p. 785). The court found that even if Counsel had ensured the Petitioner had the opportunity to review the physical evidence, the outcome of the trial would not have changed (App. Vol. II. p. 785).

Respondent submits that there was clear evidence of probative value in the record to support the PCR judge's findings. Respondent submits that Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By: ______________________
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September 3, 2013

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JEREMY RICHARD PHILLIPS, Petitioner,

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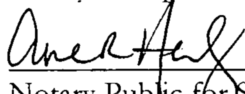
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Susan B. Hackett, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 3th day of September, 2013.

Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
3rd day of September, 2013.


________________________(L.S.)
Notary Public for South Carolina.
My Commission Expires: 7/18/2017

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September 3, 2013

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Via Hand Delivery
Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Jeremy Richard Phillips v. State of South Carolina
Circuit Court Case No: 2010-CP-11-0591
Appellate Case No.: 2012-212165

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: Susan B. Hackett, Esquire (w/enclosure)