

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2023-001806

HEATHER MARIE LAWSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES PRESENTED

- I. Whether Counsel provided constitutionally deficient assistance for failing to call the coroner as a witness, where the coroner's initial determination for cause of Minor 1's death was accident, and evidence existed in the record of multiple accidental strikes to Minor 1's head prior to the date of her death, yet where accident was not charged to the jury.

RESPONDENT'S STATEMENT OF ISSUES PRESENTED

- I. The PCR court correctly found that Counsel was not constitutionally ineffective for failing to call the coroner as a witness, where Counsel articulated a valid reason for not doing so, and Petitioner failed to meet her burden establishing prejudice by failing to call the coroner as a witness during the PCR evidentiary hearing.

STATEMENT OF THE CASE

Heather M. Lawson (“Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on June 27, 2016, following an investigation into the death over her seven-month-old child. During its July 2017 term, the Lexington County Grand Jury indicted Petitioner for homicide by child abuse (2017-GS-32-2364).

On August 7, 2017, Petitioner proceeded to a jury trial before the Honorable R. Knox McMahon. Robert Theo Williams, Esquire (Counsel) represented Applicant. Deputy Solicitor Suzanne Mayes and Assistant Solicitor Robert McNair of the Eleventh Circuit Solicitor’s Office prosecuted the case. Applicant was found guilty as indicted. On August 10, 2017, Judge McMahon sentenced Applicant to life imprisonment.

Applicant filed a timely notice of appeal. Appellate Defender Robert M. Pachak perfected Applicant’s appeal by filing an *Anders*¹ brief with the Court of Appeals on the following issues:

Whether the trial court erred in denying trial counsel’s motion for a directed verdict when the State failed to prove sufficient circumstantial evidence beyond a reasonable doubt that [Applicant] committed the crime of homicide by child abuse?

On April 29, 2020, the Court affirmed Applicant’s conviction and sentence. *State v. Lawson*, 2020-UP-120 (S.C. Ct. App. filed April 29, 2020). The case was remitted back to the circuit court on June 10, 2020.

On September 14, 2020, Petitioner filed an application for post-conviction relief. Respondent made its return on or about March 1, 2021. An evidentiary hearing was convened on April 7, 2023, at the Lexington County Courthouse. Petitioner was present at the hearing and was

¹ *Anders v. California*, 386 U.S. 738 (1967).

represented by Ashley A. McMahan, Esquire. Respondent was represented by Assistant Attorney General T. Cruise Mitchell, of the South Carolina Attorney General's Office. In an order filed November 13, 2023, the Honorable Kristi F. Curtis denied Petitioner's application for post-conviction relief. This appeal follows.

STATEMENT OF THE FACTS

On June 26, 2016, two 911 calls were made at 5:18 p.m., one by Emily Graves and the other by Petitioner, requesting assistance at Weaver Drive in Lexington County. (App pp.165–166). Petitioner explained to the 911 operator that her infant daughter (Minor 1) was dead. (App. p.172). First responders from the Lexington Fire Department and Lexington County EMS arrived at the scene where they found Minor 1 lying next to a pack 'n play inside the residence. (App. p.184). Minor 1 was not breathing, had no pulse, and rigor mortis had set in. (App p.185). Petitioner, the father of Minor 1, and two other children were present at the scene. (App. p. 187–188; p.221). First responder from Lexington County Fire Department noted there was bruising to Minor 1's forehead. (App. p.190). EMS began patient care on Minor 1, including CPR. (App. pp.203–204). Minor 1 arrived at Lexington County Medical Center at 5:25 p.m. (App. p.205). Minor 1 exhibited no signs of life throughout that time. (App. p.205). First responder from EMS also described bruising to Minor 1's forehead. (App. p.210).

Petitioner was questioned by Detective Adam Creech ("Creech") at the Lexington County Medical Center. Petitioner made a statement initially blaming Minors 2 and 3 for the death of Minor 1. (App. pp.332–336; p.342). The coroner, Margaret Fisher ("Coroner") then arrived at the hospital while Petitioner was being questioned by Creech. (App. p.336). In her initial statement, Petitioner told Creech that Minor 1 appeared fine that day with no significant bruises present. (App. p.337, l.23–338, ll.1–12). Based on Minor 1's significant bruising and the improbability

those bruises could have been caused by Minor 2 and Minor 3, Petitioner became a suspect in this case. (App. pp.340–341).

Petitioner was then transported to the Lexington County Sherriff's Department where, following Mirandization, she freely and voluntarily made a statement to Creech and Sergeant Traci Barr ("Barr"). (App. p.123; 341). Petitioner then presented a new version of events in which Minor 1 suffered several accidental bumps to the head beginning on Thursday, June 24, 2016. (App. pp.353, 1.5–359, 1.25). Included in those accidents, was a purported fall that occurred at Petitioner's place of work, where Minor 1 fell out of a cigarette box and hit her head on the concrete. (App. p.367). After being asked why she did not tell law enforcement about these alleged incidents at the hospital, Petitioner responded "you had no reason to believe me because I lied." (App. p.367, ll. 9–20). After the conclusion of the interview, Petitioner was arrested. (App. p.369, ll.13–18).

Dr. Susan Luberoff ("Luberoff"), an expert in forensic pediatrics to include diagnosis and treatment of child abuse, was asked to consult in the investigation of this case. (App. p.579). Luberoff examined Minor 1's body and opined that "the bruises on this child's head represent a significant amount of trauma, a significant amount of force applied to that skin to cause a large area of crushing and torn blood vessels." (App. p. 585, ll.16–19). Luberoff also analyzed surveillance footage from Carolina Convenience store, Petitioner's employer, showing Minor 1's fall out of the cigarette box. As the footage was being published to the jury, Luberoff explained the fall out of the cigarette box was a very low velocity fall that was broken "by hitting the cushion of the chair before [Minor 1] hit the floor." (App. pp. 594, ll.1–6). Luberoff further opined there was no evidence of any injury to Minor 1 following the fall. (App. 594, ll. 18 – 595, 1.5).

Dr. Janice Ross, an expert in forensice pathology, conducted the autopsy of Minor 1. Dr. Ross concluded that Minor 1 died of blunt force injury of the head with the manner of death being

homicide. (App. 482, ll.9–19).

Petitioner testified in her own defense at trial. Petitioner explained she was working at the convenience store on June 25, 2016, when she heard Minor 1 fall out of the box Petitioner had placed her in while she worked. Petitioner noted Minor 1 was fine after the fall. (App. p.661). Petitioner testified that Richard Tuckus (“Richard”), Minor 1’s father, had keys to her trailer, and it was not unusual for him to come over without her knowledge. (App. pp.663–664). Petitioner testified she had problems obtaining assistance from Richard regarding the care of Minor 1. (App. p.668). On the day of Minor 1’s death, Petitioner testified she dozed off and, after waking up, she went to check on Minor 1. Petitioner testified she pulled Minor 1’s blanket back and noticed Minor 1’s “eyes were barely open and the bruising was really bad on her forehead.” (App. p. 680, ll. 11–16). Petitioner explained she did not see those bruises prior to checking on Minor 1. (App. p.682). Petitioner testified she did not know how Minor 1 suffered those injuries. (App. p.683).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

- I. **The PCR court correctly found that Counsel was not constitutionally ineffective for failing to call the coroner as a witness, where Counsel articulated a valid reason for not doing so, and Petitioner failed to meet her burden establishing prejudice by failing to call the coroner as a witness during the PCR evidentiary hearing.**

Petitioner alleges the PCR court erred in finding trial counsel was not ineffective for failing to call the coroner as a witness. The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, counsel's deficient performance must have prejudiced 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. “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.” *Strickland*, 466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC.

This Court should deny the petition for writ of certiorari because the PCR court correctly found Counsel was not deficient for failing to call the coroner as a witness. Petitioner has failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [her] case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*). “[W]hen Counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010). At the evidentiary hearing, Counsel explained he did not call Coroner as a witness because Counsel believed “when the coroner got up there she was going to fall in line with the other experts who testified.” (App. p.830). Counsel further explained Coroner “could easily explain why she originally called it accidental.” (App. p.830). Although Coroner initially ruled the death was an accident, Counsel explained he believed Coroner would disavow that finding and testify the cause of death was a homicide. This is a valid reason for not calling Coroner.

Petitioner contends this was an unreasonable strategy because Counsel could have elicited testimony from Coroner that she initially assessed the cause of death to be an accident. However, even if that is true, it is unknown what the entirety of Coroner’s testimony would have been at trial since Coroner was not called as a witness at the evidentiary hearing. If Counsel was correct and

Coroner would have modified her earlier finding of accident and testified that she now believed the cause of death was a homicide, the defense is then left with its own witness corroborating the testimony of both the State's experts. This is not beneficial testimony for the defense. Instead, Counsel reasonably cross-examined Detective Creech regarding the presence of Coroner during Petitioner's statements and argued in closing that the State did not call Coroner as a witness. (App. pp. 397–398; p. 409; p.723). This was clearly a strategy to intimate to the jury there is a potential witness who the State, for whatever reason, did not want to have testify. This is a reasonable strategic alternative to calling Coroner as a witness at trial. Because it is unknown how beneficial or damaging the testimony from Coroner would have been, Petitioner has failed to demonstrate it was unreasonable for Counsel not to call the coroner as a witness at trial.

Petitioner cites to *Lounds v. State*, 380 S.C. 454, 670 S.C. 646 (2008) in support of her argument that Counsel was deficient for failing to call the coroner as a witness. The Court in *Lounds* found Counsel ineffective for failing to properly investigate the case which would have led to the discovery of witnesses who could have corroborated the defendant's version of events. *Lounds*, 380 S.C. at 463. The defense theory in *Lounds* was that the defendant and victim knew each other through drug dealing, yet the only evidence of this was from Lound's own testimony at trial. The court ruled that "if witnesses other than [Lounds] were willing to testify to this fact, certainly that would have added significantly to the credibility of [Lound's] case." *Id.* at 462.

This case is clearly distinguishable from *Lounds*. First, the petitioner in *Lounds* presented testimony from two witnesses his counsel allegedly failed to investigate at the PCR hearing, unlike Petitioner in this case. Second, the defense theory at Petitioner's trial was that somebody else did it. Petitioner's testimony on direct examination advanced the theory a third party killed Minor 1 while Petitioner was asleep. (App. pp.653—684). Unlike in *Lounds*, Coroner's purported

testimony that she initially ruled the cause of death an accident would not have corroborated Petitioner's testimony nor her defense theory at trial. At Petitioner's PCR hearing, Petitioner testified to the following:

Q. And did Mr. Williams present a defense on your behalf during trial?

A. Huh-huh.

Q. What was your defense that you wanted out there?

A. I wanted it known, like, I was not the last adult in the room with her before she died. The fact that - - just everything. Like there was never a defense, even, strategy talked about or anything.

Q. Who was the last adult with her when she died?

A. Richard.

Q. And who is Richard?

A. Her father

Q. And where were you when - - so obviously you weren't home at that time?

A. I was home, but I was in the other room. Our front door was in the children's bedroom. And Richard was the last one in there when he left that day, before I found [Minor 1].

Q. So Richard had been in the room with her?

A. Right.

Q. And then he leaves and they you find [Minor 1]?

A. A few hours later, yes.

(App. p.803-804).

Even at the evidentiary hearing, Petitioner contended she wanted it known she was not the last adult in the room. (App. pp.803-804). Clearly, Petitioner wanted Counsel to present a defense that Richard was the last one in the room with Minor 1 before she died, insinuating that he may

have been the one who killed Minor 1. Petitioner has not met her burden showing that further discussions with Counsel would have altered the defense strategy at trial since, even at the PCR evidentiary hearing stage, she still insisted she was not the last adult in the room implying a third party committed the homicide.

Furthermore, although Petitioner now contends Counsel should have argued an accident defense, “there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984). “Even if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief, on a claim of ineffective assistance of counsel, if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.” *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021). Considering the substance of Petitioner’s testimony and the State’s evidence refuting an accident defense, Counsel arguing a third party may have committed the homicide was clearly not an approach no competent lawyer would have taken.

Luberoff testified that, in her expert opinion, Minor 1 suffered no apparent injury from the fall at the convenience store. (App. p.596, ll.11–14). Luberoff further testified to the following:

- Q. And that assault and resulting bruising there to the front of the forehead, the top of the head, the back of the head, do you an opinion as to whether or not those injuries were sustained simultaneously?
- A. Well, they weren’t simultaneous because they represent numerous strikes so it would have been one after another; so not all in the same moment, but they are all of approximately the same appearance as far as age and as far as amount of force and so on. And so in my opinion, these injuries all happened contemporaneous to one another, not some last night and some this afternoon or some two days ago. It was all in a concentrated time span.

(App. p.598–599).

Dr. Janice Ross testified the manner of Minor 1's death was homicide. Although Petitioner made statements to law enforcement indicating Minor 1 suffered multiple accidental bumps to the head in the days preceding Minor 1's death, the testimony of Dr. Susan Luberoff and Dr. Janice Ross thoroughly refuted an accident defense. Thus, Counsel was not deficient for failing to call the coroner to support a defense of accident.

Notwithstanding Counsel's lack of deficiency, Petitioner has failed to satisfy her burden of proving she was prejudiced for the same reason argued above—Petitioner failed to call the coroner as a witness at the PCR hearing and the State's evidence refuted an accident defense. Our courts have "repeatedly held 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." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Petitioner asserts that the coroner's testimony was not required at the hearing, because Counsel testified the coroner initially determined Minor's 1 death to be an accident and this fact is not in question. However, it is purely speculative as to what Coroner would have testified to had she been subjected to full direct and cross-examination at trial. It is just as likely, or perhaps more likely, the entirety of the testimony from Coroner would have been damaging to Petitioner's defense, not beneficial.

Furthermore, the Court of Appeals has ruled that a "coroner's testimony regarding cause of victim's death [that] was not based on coroner's perceptions or observations, as required by rule which governed lay opinion testimony... [is] inadmissible, where coroner's opinion was based on findings of pathologist and investigation of law enforcement." *State v. Westmoreland*, 421 S.C. 410, 807 S.E.2d 701. Because Coroner did not testify at Petitioner's post-conviction relief hearing, it is unknown what Coroner's opinion was based on. Depending on the substance of Coroner's

testimony, which does not exist, Coroner's testimony concerning the cause of Minor 1's death may not even have been admissible at trial pursuant to *Westmoreland*. All of this is pure speculation, which could have been cured had Petitioner called Coroner to testify at the PCR hearing—Petitioner did not. Furthermore, as noted above, the State's evidence in this case clearly refutes a defense of accident. Thus, Petitioner has failed to prove prejudice and, accordingly, certiorari should be denied.

[Conclusion and Signature Page to Follow]

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari, as the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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