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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Kristi F. Curtis, Circuit Court Judge

TERRANCE SEABROOK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000930

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel deficient for failing to cross-examine a witness, who was given immunity by the State in exchange for his testimony, about a prior conviction for manufacturing/passing counterfeit currency and in finding that Petitioner failed to prove prejudice because the State, rather than Petitioner, notified the PCR judge of the prior conviction?

STATEMENT

On December 16, 2010, the Beaufort County Grand Jury indicted Petitioner, Terrance Seabrook, for armed robbery and kidnapping, indictments #2010-GS-07-02320, 02321. (App. pp. 502-505). On February 3, 2012, the State filed a notice of intent to seek a life imprisonment sentence pursuant to S.C. Code Ann. § 17-25-45(A). (App. p. 277, lines 16-21). On March 19, 2012, Petitioner proceeded to jury trial before the Honorable Carmen T. Mullen. Larry W. Weidner represented Petitioner. James M. Bannon prosecuted the case. The jury acquitted Petitioner of kidnapping, but found him guilty of armed robbery. Judge Mullen sentenced Petitioner to life without parole pursuant to S.C. Code Ann. § 17-25-45. (App. p. 506). On April 5, 2012, a hearing was held before Judge Mullen on Petitioner's post-trial motion for a new trial. (App. pp. 281 – 290). Judge Mullen denied the motion.

On May 4, 2012, Petitioner timely filed a notice of intent to appeal. Upon receipt of the appointment to represent Petitioner, the Office of Appellate Defense (OAD) requested the trial transcript. OAD received an incomplete transcript. Specifically, OAD only received the transcript of the third day of trial, March 21, 2012, which contained closing arguments, jury instructions, the verdict, and sentencing.

On May 2, 2014, Petitioner filed a motion with the Court of Appeals requesting his case be remanded to the circuit court to reconstruct the record. By order filed June 11, 2014, the Court of Appeals granted Petitioner's motion and remanded the case.

On April 15, 2015, a hearing was held in Beaufort County before Judge Mullen to reconstruct the missing portions of Petitioner's trial, which included all of the proceedings that took place on the afternoon of March 19, 2012, specifically all the pretrial motions and a Jackson

v. Denno[1] hearing.[2] (App. pp. 291-492). Assistant Solicitor Lynorr Musser represented the state, and Appellate Defender Lara M. Caudy represented Petitioner. At the conclusion of the hearing, Judge Mullen ruled the record had been sufficiently reconstructed to allow for meaningful appellate review. (App. p. 488 line 25 – 489, 490, lines 1- 18). On April 23, 2015, Petitioner filed a Notice of Intent to Appeal from Judge Mullen's oral ruling.

By order filed August 21, 2015, this Court granted Petitioner's motion to hold the appeal of his conviction and sentence in abeyance pending resolution of his appeal from the order reconstructing the record. Petitioner filed an initial brief of Petitioner and designation of matter on December 14, 2015 challenging the trial court's finding that the record of Petitioner's trial had been sufficiently reconstructed to allow for meaningful appellate review. The State filed an initial brief of respondent and designation of matter on March 15, 2016. By opinion filed April 19, 2017, this Court affirmed the trial court's finding. State v. Seabrook, Op. No. 2017-UP-164 (S.C. Ct. App. filed April 19, 2017).

On August 31, 2017, a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), was filed on behalf of Petitioner. On January 31, 2018, the Court of Appeals dismissed the appeal. State v. Seabrook, Op. No. 2018-UP-040 (S.C.Ct.App. filed January 31, 2018).

On February 15, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 507-513). The State filed a return and partial motion to dismiss on July 13, 2020. On July 21, 2022, an evidentiary hearing was held before the Honorable Kristi F. Curtis. James Falk

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[1] 378 U.S. 368 (1964).

[2] There is conflicting information in the record regarding whether a Jackson v. Denno hearing was heard by Judge Young on February 27, 2012, or on some other date, and Judge Mullen subsequently adopted Judge Young's prior ruling or whether the Jackson v. Denno hearing was first heard by Judge Mullen on March 19, 2012. Either way, the parties attempted to reconstruct the Jackson v. Denno hearing at the April 15, 2015 hearing.

represented Petitioner. Lauren Mims represented the State. In a written order signed May 17, 2023, and filed May 28, 2024, Judge Curtis denied relief and dismissed the application. A timely notice of intent to appeal was filed on June 5, 2024. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel deficient for failing to cross-examine a witness, who was given immunity by the State in exchange for his testimony, about a prior conviction for manufacturing/passing counterfeit currency and in finding that Petitioner failed to prove prejudice because the State, rather than Petitioner, notified the PCR judge of the prior conviction.

The jury found Petitioner guilty of robbing an Exxon Station located on Sea Island Parkway on St. Helena Island. Shatike J. Shabazz was initially also charged with the robbery of the Exxon Station. (App. p. 119, lines 19-22). The State, however, dismissed the charges against Shabazz and granted him immunity. (App. p. 119, line 23 – p. 120 , lines 1-2).

Shabazz's testimony at trial placed Petitioner at the Exxon at the time of the robbery. Shabazz testified that he and Petitioner went to the Exxon Station on the evening of October 4, 2010, to meet a "guy named Sub" about a telephone. Shabazz drove a blue Ford Explorer that was registered to a Shawn Boyd to the store and he claimed that Petitioner rode in the front passenger seat. (App. p. 101, line 16 – p. 102, 103, 104, lines 1-13). Shabazz testified that while the two were waiting for Sub, who never showed, he went into the store and purchased a couple of items then returned to the car. Shabazz eventually got tired of waiting for Sub and left the store in Boyd's Explorer. However, he claimed that before he left, Petitioner got out of the car and decided to remain at the store, presumably to continue to wait for Sub. (App. p. 104, line 14 – pp. 105 – 107, lines 1-5). According to Shabazz, he never saw Petitioner again that evening.

Shabazz testified that he watched the recording of the armed robbery from the surveillance cameras numerous times and that, in his opinion, Petitioner was not the armed robber. He explained, "The person's really not built like Terrance [Petitioner]. The person had broader . . . shoulders. Terrance [Petitioner] is real skinny. Terrance['s] shoulders don't sit that high." (App. p. 117, line 17 – p. 118, lines 1-3). While Shabazz again stated Petitioner was the individual who got

out of the front passenger seat of the Ford Explorer he was driving that evening, he maintained that the man who robbed the store "[d]oesn't look like Terrance [Petitioner]." (App. p. 119, lines 9-12).

Trial counsel cross-examined Shabazz about the State granting him immunity from prosecution in exchange for his testimony. (App. p. 118, line 8 – p. 119, lines 1-1-3; p. 126, lines 9 – 25). Trial counsel, however, did not question Shabazz about his prior criminal record.

During the PCR hearing PCR counsel raised an additional ground that trial counsel was deficient for failing to cross-examine Shabazz about his prior criminal record in order to impeach his credibility pursuant to Rule 609, SCRE. (App. pp. 564-569). Trial counsel admitted that he had the NCIC rap sheet for Shabazz. (App. p. 566, lines 19-25). When asked if Shabazz was on probation at the time of trial counsel answered, "I have no recollection of it. I don't know." (App. p. 567, lines 1-4). Trial counsel indicated that any cross examination about a prior conviction would have taken the steam out of Shabazz's admission on cross-examination that immunity hinged on his testimony that he left Petitioner at the Exxon on the date of the robbery. (App. p. 567, line 5 – p. 568, 569, lines 1-22).

At the time of the PCR hearing PCR counsel did not have a copy of Shabazz's prior record and at the conclusion of the hearing sought a copy of the NCIC from the State. (App. p. 587, line 21 – p. 588, p. 589, lines 1-19). The PCR judge allowed the record to remain open so that the State could run the NCIC to determine Shabazz's criminal record. (App. p. 589, lines 3-19). Petitioner testified at the PCR hearing that Shabazz had a prior record for counterfeiting. (App. p. 583, line 6 – p. 584, lines 1-19). In footnote #8 of the order of dismissal the PCR judge wrote, "Respondent relayed via email that Shabazz had a prior federal conviction for manufacturing/passing counterfeit currency; he was arrested Augst 23, 2000, pled guilty September 19, 2001, was sentenced to sixty months' jail time, and was placed on supervised release on April 7, 2005. This Court finds, based

on counsel's cross-examination of Shabazz, that it is not reasonably likely the outcome would have been different had counsel further elicited information about this prior conviction." (App. p. 602).

In the order of dismissal the PCR judge quoted trial counsel's testimony from the PCR hearing about his strategy for cross-examining Shabazz centered around the grant of immunity. (App. pp. 600-601). The PCR judge then wrote:

> This Court finds credible counsel's foregoing testimony regarding his strategy for cross-examining Shabazz. This Court further finds counsel's strategy and cross-examination of Shabazz was reasonable under prevailing professional norms and not deficient. Counsel recalled receiving Shabazz's criminal history but did not remember what the record contained or if Shabazz was on probation. Counsel further testified that even if he was aware of Shabazz's past criminal convictions, he may not have used it if it caused his cross-examination to "lose steam." Ultimately counsel's strategy of impeaching Shabazz based on his receipt of immunity from the State was reasonable under prevailing professional norms and not deficient.

(App. p. 803). Counsel's valid cross-examination about immunity does not preclude a finding of deficiency for failing to additionally cross-examine Shabazz about his prior record to further impeach his credibility. The cross-examination about the prior conviction for manufacturing/passing counterfeit currency could have taken place prior to the cross-examination about immunity so as to not cause the cross to "lose steam." The purported strategy is not valid and the PCR judge erred.

Additionally the PCR judge wrote, "Finally, although this Court held the record open for additional evidence, Applicant never provided a record of Shabazz's federal conviction and subsequent release from incarceration. Thus Applicant failed to meet his burden of proving prejudice, and this claim is denied." (App. p. 602) (n. #8 omitted). The PCR judge asked the State, not Petitioner and not Petitioner's PCR counsel, to run the NCIC. Petitioner proved both that trial counsel was deficient in failing to cross-examine Shabazz about his conviction for manufacturing/passing counterfeit currency to impeach his credibility pursuant to Rule 609, SCRE,

and resulting prejudice as Shabazz's testimony was critical to placing Petitioner at the scene of the robbery.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Rule 609(a), SCRE, provides:

For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; . . .

Rule 609(b), SCRE, provides a time limit as follows:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Shabazz was placed on supervised release on April 7, 2005. Petitioner's trial was held in March of 2012. Shabazz's conviction for manufacturing/passing counterfeit currency was admissible pursuant to Rule 609, SCRE. Trial counsel was deficient in failing to cross-examine Shabazz about the prior conviction. Any purported strategy for not cross-examining Shabazz about the prior conviction was not sound. In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), the South Carolina Supreme Court wrote:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.,* Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. See Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

The purported strategy for failing to cross-examine Shabazz about his prior conviction so as not to diminish the cross examination about the grant of immunity is not a sound strategy when both the prior conviction and the grant of immunity go to Shabazz's credibility.

In United States v. McCoy, 410 F.3d 124, 135 (3d Cir. 2005), the Third Circuit Court of Appeals wrote:

> We agree with the Government that courts have been highly deferential to counsel's strategic decisions, see, *e.g.,* Strickland, 466 U.S. at 690, 104 S.Ct. 2052

(stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); United States v. Otero, 848 F.2d 835, 838 (7th Cir.1988), but merely labeling a decision as "strategic" will not remove it from an inquiry of reasonableness. See generally Davidson v. United States, 951 F.Supp. 555, 558 (W.D.Pa.1996); see also Gov't of the V.I. v. Weatherwax, 77 F.3d 1425, 1431–32 (3d Cir.1996).

In the present case it was not reasonable to fail to cross-examine Shabazz about his prior conviction when it could have enhanced rather than diminished the impeachment value of the valid cross-examination about the grant of immunity. In Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984), the Eighth Circuit Court of Appeals wrote, "We agree that the label 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." See also Quartararo v. Fogg, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). Trial counsel was deficient for failing to cross-examine Shabazz about his prior conviction. Petitioner was prejudiced by the deficient performance because Shabazz's testimony was critical to placing Petitioner at the scene of the robbery. The PCR judge erred in refusing to grant post-conviction relief.

CONCLUSION

Based on the above argument this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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ATTORNEY FOR PETITIONER

This 25th day of November, 2024.