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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Charleston County
Honorable R. Kirk Griffin, Circuit Court Judge
Appellate Case No. 2024-000687

MICHAEL T. BARNES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Michael Barnes was indicted by a Charleston County Grand Jury in April of 2006 for murder and attempted armed robbery. He proceeded to a jury trial on November 1-3, 2006, before the Honorable R. Markley Dennis, Jr., circuit court judge. Petitioner was convicted as charged. Petitioner was sentenced to thirty years' incarceration for murder and fifteen years' imprisonment for armed robbery to be served consecutively. Petitioner's appeal was dismissed pursuant to Anders. Petitioner filed an application for post-conviction relief on January 7, 2011. Circuit Judge Kristi Harrington issued a conditional order of dismissal on March 31, 2011, conditioned upon Petitioner responding within twenty days with a reason as to why the application should not be dismissed. Petitioner responded asserting a variety of reasons including a prison lockdown. Judge Harrington dismissed the application with prejudice. Subsequently, Petitioner filled a petition for writ of certiorari with the Court of Appeals, which was denied. Petitioner then filed a common law petition for writ of certiorari in August of 2020 requesting to file a successive PCR application based on the actions of the Charleston County Clerk's office. This Court granted Petitioner's writ and held the application was timely. This Court found the Charleston County Clerk's office failed to execute its ministerial function and directed Petitioner to file a PCR application within thirty days, which Petitioner did. Petitioner's PCR hearing was held on April 19, 2023, before the Honorable R. Kirk Griffin. Petitioner's application was dismissed with prejudice on April 17, 2024. Petitioner filed a notice of appeal on April 27, 2024. This Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

At trial, Nelson testified he lived with Summers and knew Petitioner because of his relationship with a girl in their neighborhood. (App'x 105). Nelson, Summers, and Petitioner stated they had either sold drugs before or were selling drugs on the day of the incident. (App'x 107; 153; 310). Nelson testified that after washing dishes he walked to Dobson Street where his friends would gather. (App'x 106). Nelson stated on the day of the shooting, two men drove up, asked for cocaine, and showed him a "wad of money." (App'x 106-10). Nelson testified he found Summers, whom he thought could get some cocaine, and told him the man wanted to purchase cocaine. (App'x 109-12). He stated Petitioner was walking with Summers when Petitioner handed them guns. (App'x 109-13). Nelson testified Petitioner also had a gun, which he had previously described as a .380 Army edition. (App'x 234). When asked why Petitioner gave them guns, Nelson replied, "We were going to rob them." (App'x 109-16).

Nelson testified they approached the men in the vehicle and Petitioner "pulled out his gun and he and the dude started tussling." (App'x 117). He stated the passenger broke loose and drove away. (App'x 117). As the passenger rode off, Nelson heard two gunshots. (App'x 118). He testified he did not fire his weapon or see who fired the shots. (App'x 118).

Summers testified that on the day of the incident he was outside selling crack cocaine when Nelson called and said "some dude in the trailer park got a lot of money." (App'x 154). He stated they went to Petitioner and told him about what was happening and that they were "gonna rob 'em." (App'x 155-6). Summers testified Petitioner gave them guns: Summers had a .22 automatic, Nelson had a revolver, and Petitioner had a .38. (App'x 156-57). Summers stated Petitioner approached the truck, the passenger got out; and they pulled their guns. (App'x 159). He stated the passenger tried to run but Petitioner "popped him on the head with the gun."

(App'x 159). The passenger ran off and the driver tried to leave in the truck; as the driver was pulling away, Summers stated he "almost hit me and I shot at the door." (App'x 160). Summers testified that after he fired Petitioner also fired. (App'x 161).

Petitioner testified in his defense and claimed he never intended to rob anyone, never pulled a gun, and never shot at anyone. (App'x 303; 310). He stated Nelson and Summers approached him and told him the men in the truck wanted to purchase cocaine, and Petitioner planned to sell them cocaine. (App'x 305-07). He testified after he gave the passenger cocaine, the passenger did not give him money; Petitioner tried to snatch the drugs back and they began fighting. (App'x 306). Petitioner stated he turned and saw Nelson and Summers with their guns out. (App'x 308). He testified the passenger gave him the drugs and ran off; Petitioner ran when someone said they were going to call the police. (App'x 310).

Dr. Caplin testified that Victim died as a result of a gunshot wound to the head. (App'x 244). Caplin explained Victim suffered from an entry and exit wound. (App'x 247-8). Summers testified Petitioner had a .38. (App'x 156-7). Petitioner testified that he had a nine-millimeter with him on the day of the incident. (App'x 311). Agent Paavel testified the cartridge recovered from Victim's car was more consistent with a .380 than a 9-millimeter. (App'x 293; 295). Mr. Sommerfeldt, a ballistics specialist, testified that the projectile fragment taken from the hood of the vehicle was between a .380 and a nine-millimeter. (App'x 205). Summers testified that he had a .22 caliber gun. (App'x 167).

During the courts jury charge the court gave an instruction on hand of one hand of all. (App'x 339). The court instructed that "when a person does an act in the presence of and with the assistance of another, the act is done by both." (App'x 339). The court also instructed "where

two or more acting with a common plan or intent are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty." (App'x. 339).

At the PCR hearing Petitioner testified that Counsel was ineffective for failing to object to the solicitor's closing statement claiming Petitioner shot the fatal bullet, that Counsel should have requested a cautionary instruction regarding the statement, that Counsel was ineffective in calling Paavel, and that Counsel should have impeached Nelson regarding his agreement. (App'x 526-7). Counsel testified she met with Petitioner nine times in preparation for his trial. (App'x 539). She stated that his defense was that he did not fire the weapon and did not know a robbery was going to occur. (App'x 540-1). Counsel stated she was concerned that Petitioner could still be found guilty of armed robbery and murder even if the jury did not think he fired the weapon. (App'x 540-1). Counsel stated she did not recall any issues with the State's closing. (App'x 544). Counsel testified that Paavel was under subpoena from the State and her strategy was to call him as a witness and ask the jury in closing argument why the State did not call Paavel. (App'x 545). Counsel stated that she wanted the jury to understand Nelson's case was still in family court and that the solicitor's request would be important. (App'x 545). Petitioner's PCR was dismissed with prejudice.

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 finding 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.

ARGUMENT

I. The State's closing argument logically stemmed from evidence produced at trial and accordingly did not require an objection or cautionary instruction.

The PCR court properly found that Counsel was not ineffective for failing to object to the Solicitor's argument. The Solicitor argued that the evidence showed Petitioner fired the fatal bullet. (App'x 357). The argument logically stemmed from the evidence presented at trial and thus gave no legal basis for an objection. Even if Counsel objected to the argument, any objection is not reasonably likely to produce a different result. Moreover, because the argument was logically supported by the evidence presented at trial, no cautionary instruction was necessary.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 686 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence"). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually

"countless" ways. Strickland, 466 U.S. at 688-89. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. Id. 466 U.S. at 686. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 141 U.S. 2405, 2410 (2021).

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697). In examining whether an applicant has proven prejudice, courts should consider the specific impact Counsel's error had on the outcome. Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). To prove counsel was ineffective when a guilty plea is challenged, an applicant "must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered." Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007).

A closing argument should be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 468 S.E.2d 620 (1996). So long as the attorney stays within the record and its reasonable inferences, the attorney may "legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict

which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (quoting State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (quoting 23A C.J.S. Criminal Law §1107, closing arguments)). Also, the attorney "may argue with reference to any matter which the jurors may properly consider in arriving at their verdict and may point out as well the matters which they should not consider." Id.

This Court has reversed a conviction where a solicitor improperly referred to Defendant's statement that was not introduced into evidence. State v. Huggins, 325 S.C. 103, 105, 481 S.E.2d 114, 115 (1997). Conversely, this Court found trial counsel was not deficient for failing to challenge the State's opening statement. Smalls v. State, 422 S.C. 174, 186, 810 S.E.2d 836, 842 (2018). In Smalls the solicitor stated that police saw defendant leaving the scene of the robbery. Id. This Court noted that in "certain circumstances, it may be reasonable for trial counsel to simply ignore the misstatement." Id. The Court also noted it was not clear that the closing argument was not supported by the record because a witness' testimony "appear[ed] to support the assistant solicitor's statement." Id.

Petitioner contends the following portion of the State's closing argument was improper:

> "I don't know what kind of guns they had, I don't know if they all had nine millimeters, for all I know they all had .380 's. He thought he was getting out of it by saying he had a nine. I don't know what he had. But all we know is that he had the only gun that would fire an automatic, based on the statements and testimony of each (Summers and Nelson). That was the gun, that was the projectile, the bullet that went through [Victim's] head. Those are the reasons that we think that you can be comfortable that Michael Barnes being the shooter."

(App'x 363-4).

Here, Counsel was not deficient for failing to object. At the PCR hearing, Counsel stated she did not recall any issues with the State's closing. (App'x 544). This assessment correct under the prevailing standards of professional norms and not deficient. The evidence presented at trial logically supported the State's closing argument. Summers testified Petitioner fired his weapon. (App'x 161). Sommerfeldt testified that the projectile fragment taken from the hood of the vehicle was within the range of a .380 to nine-millimeter and evidence in the record supported the idea that Petitioner shot either a nine-millimeter or .38. (App'x 156-7; 161; 170-1; 311; 205). Paavel testified that the projectile was most consistent with bullets he would expect to see in a .380 automatic caliber ammunition. (App'x 293). Further, Detective Spears testified that Petitioner described the gun as an automatic gun. (App'x 235). While there was some conflicting testimony about whether Petitioner was carrying a .38 or nine-millimeter weapon, the record logically supports the solicitor's statements. The solicitor's version of events is plausible considering the testimony regarding Petitioner's weapon, the ballistics found in the vehicle, and testimony that the projectile could have been fired from multiple weapons.

Accordingly, a cautionary instruction was not necessary because the statement was logically supported by the evidence produced relating to ballistics. Accordingly, Counsel was not deficient because there was no error to minimize. Cautionary or curative instructions, 26A Standard Pennsylvania Practice 2d § 132:670 ("adequate cautionary instructions may minimize the impact of an error so as to render it harmless"); Lawhorne v. Douglas, 371 Ga. App. 849, 903 S.E.2d 316 (Ga. Ct. App. 2024) ("[d]etermination as to whether harmful factors are present in case so as to warrant cautionary instruction to jury necessarily rests in discretion of trial judge").

Even if Counsel rendered deficient performance, Petitioner was not prejudiced[1]. Petitioner has failed to establish a different outcome is reasonably probable. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("in a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application"); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding applicant failed to establish prejudice from counsel's failure to investigate criminal background of victims and witnesses where applicant failed to show at PCR hearing that victims and witnesses had criminal records). Petitioner failed to establish he suffered any prejudice for Counsel's failure to object.

Here, it is not reasonably likely the trial court would have sustained any objection here where the argument was a reasonable inference from the facts presented. Further, even had the objection been sustained a different outcome is not reasonably probable because it was not necessary to establish Petitioner as the shooter. As noted by Counsel in the PCR hearing, Petitioner could still have been convicted if the jury did not believe he was the shooter. Directly after the solicitor made the comments in question he noted "what I want to talk to you about next is why you don't even have to go through that analysis. That is because [of] the hand of one hand of all." (App'x 364). The court also instructed the jury on the hand of one hand of all doctrine.

Additionally, the court properly instructed the jury that the "remarks of the attorneys are not evidence." (App'x 371). Accordingly, the jury was instructed to support its verdict with the evidence presented at trial rather than statements made in a closing argument. It is not reasonably likely that a different result would have occurred had Counsel objected or requested a cautionary instruction.

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[1] If Petitioner fails to satisfy either the performance or the prejudice prong of the test, then this Court need not consider the other. Jones v. State, 661 S.W.3d 806, 809 (Mo. Ct. App. 2023)

II. The PCR Court properly found Counsel was not ineffective for eliciting testimony from Agent Paavel, because it allowed Counsel to argue Petitioner did not shoot Victim.

Counsel was not ineffective for eliciting testimony from Paavel because the testimony aided Counsel in an effort to separate Petitioner from the murder weapon. Counsel argued during closing that the cartridge that killed Victim was a .380 millimeter while Summers testified Petitioner had a nine-millimeter gun. (App'x 170-1; 346-7). Counsel was able to elicit testimony that the cartridge recovered from Victim's car was more consistent with a .380 than a 9-millimeter. (App'x 293; 295). Paavel testified that a .38 bullet can be fired from some nine-millimeter pistols. (App'x 298).

"Courts generally entrust cross-examination techniques, like other matters of trial strategy to the professional discretion of counsel." Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). "The cross-examination of a witness is a delicate task; what works for one lawyer may not be successful for another." Id. The Eighth Circuit Court of Appeals observed "there are few, if any, cross-examinations that could not be improved upon." Id.

The Ninth Circuit noted great deference should be given to counsel's decisions at trial such as refraining from cross-examining a particular witness. Brown v. Uttecht, 530 F.3d 1031, 1036 (9th Cir. 2008) (quoting Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000)). In Uttecht, the Ninth Circuit affirmed the determination that counsel was not ineffective for declining to cross-examine an expert witness based on the awareness "that a cross-examination of [expert] 'might well have backfired.'" Uttecht, at 1036-37 (quoting Yarborough v. Gentry, 540 U.S. 1, 7 (2003)); see generally Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) (finding plea counsel was not ineffective for failing to interview the burglary victim because plea counsel

would need to be clairvoyant to expect any benefit would accrue to his client). While some of these cases consider the decision to not cross examine a witness, the decision to cross examine a witness should be given similar deference.

Here, Counsel was not deficient for eliciting testimony from Agent Paavel because it allowed for Counsel to argue the ballistic evidence did not clearly establish Petitioner was the shooter. Paavel testified that Victim was likely shot with a .380. (App'x 298). Counsel was then able to argue that Petitioner was not the shooter because he was carrying a nine-millimeter according to Petitioner and Nelson's statement to police. (App'x 234-5; 313). In fact, Nelson originally told police Petitioner had a nine-millimeter before changing his story to a .380, which allowed Counsel to attack his credibility. (App'x 235; 349-50). Counsel stated that Paavel was under subpoena from the State and her strategy was to call him as a witness and ask the jury in closing argument why the State did not call Paavel. (App'x 545). There was conflicting testimony as to whether Petitioner was carrying a .38 or nine-millimeter weapon. That testimony coupled with Paavel's opinion regarding ballistics gave Counsel a basis to argue reasonable doubt was present. See State v. Boyer, P.3d 569, 589 (Ut. Ct. App. 2020) ("[a]n ineffective assistance of counsel claim is not an invitation to flyspeck the record and, with the luxury of time and the benefit of hindsight, identify ways in which counsel might have been even more effective"). Counsel was dealt a difficult hand and implemented a valid trial strategy in an attempt to distinguish the ballistics found at the scene from Petitioner's weapon.

Further Petitioner was not prejudiced. Petitioner has failed to establish a different outcome is reasonably probable. See Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) ("in a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application"). The jury could have convicted Petitioner without discerning he was the shooter under the hand of

one hand of all doctrine. Accordingly, Petitioner has failed to establish he was prejudiced by Counsel's performance.

III. The PCR Court properly found Counsel was not ineffective for failing to impeach Nelson for his proffer agreement with the State, because Counsel was able to effectively cross examine Nelson and uncover his motivations.

The PCR court properly found Counsel was not ineffective for failing to impeach Nelson, because the agreement did not result in a prosecutive decision. The agreement specifically provided the State did not make any prosecutive decisions or enter into any plea agreement or non-prosecutive agreement as a result of the proffer. Lastly, Counsel was able to effectively attack Nelson's credibility by cross examining Nelson about his motivations, the fact that he lied to police, that he was facing charges in family court. Accordingly, Petitioner failed to meet his burden in establishing Counsel was deficient for failing to impeach Nelson.

First, counsel's strategy, including the treatment of witnesses, are entitled to deference on review. Lopez v. Allen, 47 F.4th 1040, 1050–51 (9th Cir. 2022); See also Tucker v. State, 468 S.W.3d 468, 474 (Mo. App. E.D. 2015) ("The decision whether to impeach a witness is presumed to be a matter of trial strategy"). Courts have found that counsels' decision to not impeach a witness can be a reasonable trial strategy; the Montana Court of Appeals found "while trial counsel could have impeached Victim based on the two specific subjects, she made a strategic decision to impeach Victim on different grounds." Marshall v. State, 567 S.W.3d 283, 298 (Mo. Ct. App. 2019). Similarly, the Eleventh Circuit Court of Appeals noted "defense counsel's decision to impeach the witness by focusing on his motive for testifying was not unreasonable trial strategy" because the jury already knew the witness had prior convictions. Hunt v. Commissioner, Alabama Dept. of Corrections, 666 F.3d 708 (11th Cir. 2012). Similarly, the Fifth Circuit Court of Appeals found counsel was not deficient for failing to impeach a

witness when counsel had already conducted an effective cross examination. Skinner v. Quarterman, 576 F.3d 214 (5th Cir. 2009).

Counsel's cross examination began by asking Nelson "you came from the juvenile detention center, didn't you?" (App'x 131). She also asked him if he was charged with murder and attempted armed robbery, which he confirmed. (App'x 131-2). Counsel established that Nelson's current case was in family court and that he wanted the case to stay there because the punishment was more lenient. (App'x 132). Counsel was also able to establish that Nelson did not want to go to prison, especially adult prison, and that he was there to testify for the State. (App' 133). Counsel was also able to get Nelson to admit he previously lied to police. (App'x 133).

Here, Petitioner has failed to meet his burden in establishing deficiency because Nelson's agreement did not result in a prosecutive decision and Counsel was able to effectively attack Nelson's credibility by cross examining Nelson about statements made to police and the fact he was in DJJJ. Additionally, Counsel was able to outline the benefits associated with testifying on behalf of the State and Nelson's motivations in doing so, which attacks the same potential bias as would impeaching Nelson on the basis of his agreement. Counsel articulated that she wanted the jury to understand Nelson's case was still in family court and that the solicitor's request would be important. (App'x 545). Cf. Com. v. Duran, 435 Mass. 97, 755 N.E.2d 260, 267-68 (2001) ("We cannot say that defense counsel's failure to attempt to use every conceivable method to impeach Pena was manifestly unreasonable.").

Further, Petitioner has not shown prejudice. Petitioner has failed to establish a different outcome is reasonably probable. See Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) ("in a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application").

Counsel was able to effectively attack Nelson's credibility through alternative means and establish his motivations in testifying. Further, the agreement in question specifically provided the State did not make any prosecutive decisions as a result of the proffer. Thus, impeaching Nelson would have provided minimal benefit in light of Counsel's effective cross examination. Because the potential failure posed a minimal risk any deficiency in Counsel's failure to impeach is not reasonably likely to produce an alternative outcome.

Accordingly, this Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

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