

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable Luke N. Brown, Trial Judge
Honorable R. Markley Dennis, Post-Conviction Relief Judge

Lower Court Case No. 2005-CP-10-3313
Appellate Case No. 2012-213419

WESLEY MAX MYERS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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OCT - 4 2013

S.C. Supreme Court

REPLY TO RETURN TO STATE'S PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ADDITIONAL SUSTAINING GROUNDS

- I. Trial counsel's failure to obtain a forensic pathologist violated Applicant's right to the effective assistance of counsel.
- II. Trial counsel's failure to obtain a psychologist to evaluate applicant and testify as to why Respondent would be more likely than other individuals to falsely confess to a crime he did not commit violated applicant's right to effective assistance of counsel.
- III. Trial counsel's failure to thoroughly examine and impeach a key witness violated applicant's right to effective assistance of counsel.

ARGUMENT I

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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 (1984); Butler, 286 S.C. 441, 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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

- A. The record supports counsel provided effective assistance of counsel by choosing not to obtain a forensic pathologists to rebut the State's expert witness when counsel adequately challenged the witness' testimony on cross-examination and the Respondent failed carrying his burden of proving prejudice resulted.**

The Respondent alleges counsel was ineffective for failing to obtain a forensic pathologist to rebut the State's expert witness as the basis for the denial of the Petitioner's

Petition for Writ of Certiorari. While the lower court did not rule on this issue, the record supports the Petitioner's position that the Applicant failed to carry his burden of proving counsel's performance was deficient and resulted in prejudice. Counsel was not ineffective for failing to obtain a forensic pathologist to rebut the State's expert witness.

At trial, the State called Dr. Clay Nichols, a forensic pathologist. Dr. Nichols testified he performed the autopsy on the victim (App. 2246:4) and the examination of the victim's head revealed multiple lacerations. (App. 2248:7-9). Dr. Nichols testified that Officer Hallman brought a broken piece of a glass carafe to the autopsy which he matched to the victim's wounds. (App. 2252:8-14). Dr. Nichols matched the broken ends of the carafe to lacerations on the left side of the victim's head. (App. 2252:17-25). He testified further that it was not unreasonable to assume the carafe was used to cause blunt trauma to the victim's right forehead and then used to cause the laceration on the other side of the victim's head. (App. 2253:4-23).

Dr. Nichols also testified that the blunt trauma on the tip of the victim's finger was a defensive wound. (App. 2257:7-24). Nichols testified further that he performed a toxicology test on the victim. He testified that since the victim's blood was not available he used her liver tissue. (App. 2262:17-25). He then testified the alcohol level in the victim's liver was .63 mg which is less than the legal limit for driving and no illegal drugs were found. (App. 2263:1-14). Lastly, Dr. Nichols testified the victim's cause of death was blunt force trauma to the head. (App. 2263:15-24).

At the evidentiary hearing, the Respondent presented the testimony of Dr. Jonathan Arden, also a forensic pathologist. Dr. Arden testified he reviewed the autopsy reports and photos, portions of police reports, and the transcript of Dr. Nichols' testimony. (App. 3227:7-16). Dr. Arden testified he disagrees with Dr. Nichols' testimony that matched the wound on the

victim's head to a specific weapon. He testified that the principle of "matching" is medically flawed and not reliable. (App. 3228:6-3229:16).

Dr. Arden testified he also disagreed with Dr. Nichols' testimony about the liver alcohol level of the victim. He testified the alcohol level is measured by liver alcohol concentration and liver alcohol concentration is generally lower than blood alcohol. He testified that liver alcohol should not be compare to blood alcohol and the blood used to test for carbon monoxide could have been used to test the victim's blood alcohol. (App. 3232:5-23). Lastly, Dr. Arden testified fingernail scrapings of the victim should have been taken and Dr. Nichols should have conducted an examination of the victim for sexual assault. (App. 3238:3-24).

The Petitioner submits trial counsel articulated a valid strategic reason for choosing not to retain an independent pathologist to review the victim's autopsy report. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Counsel testified at the evidentiary hearing that he interviewed Dr. Nichols, was familiar with his work from other cases, and felt he could get Dr. Nichols to say what he needed to prove his points to the jury without obtaining an expert. The Petitioner submits after fully investigating Dr. Nichols' testimony, counsel made a reasonable strategic decision not to employ an independent forensic pathologist.

The Petitioner also submits the Respondent has failed to show how counsel's performance affected the outcome of his trial. No prejudice resulted from counsel's performance since counsel was still able to adequately cross-examine Dr. Nichols and challenge his testimony at trial without an independent forensic pathologist. Counsel's failure to procure expert witnesses

does not render their representation deficient when counsel vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991).

Much of the testimony elicited by trial counsel on cross-examination of Dr. Nichols was similar to the testimony given by the Respondent's witness, Dr. Arden, at the evidentiary hearing. At trial, counsel cross-examined Dr. Nichols on the following:

- Dr. Nichols' failure to complete a rape protocol on the victim (App. 2265:1-21)
- A malfunctioning freezer which resulted in the loss of the victim's pubic swabs (App. 2266:2-13)
- Dr. Nichols' failure to take fingernail scrapings at the time of autopsy (App.2268:11-20)
- The lack of glass in any of the victim's wounds (App. 2269:11-14, 2273:15-18)
- The fact that Officer Hallman brought the glass carafe to the autopsy, but failed to bring the meat cleaver found at the scene (App. 2270:1-13)
- Dr. Nichols' uncertainty about the number of carafe pieces he compared to the victims' wounds (App. 2271:1:-16)
- Dr. Nichols' failure to test any samples of the wine carafe to determine breakage qualities of the glass, how it breaks, where it breaks, and how the thickness might affect the breakage of the glass (App. 2273:19-2274:1, 2275:4-10)
- Dr. Nichols' lack of knowledge about whether the carafe was even used in the assault (App. 2276:7-14)
- The fact that another blunt instrument could have caused the victim's injuries (App. 2277:8-10)
- The possibility that the injury to the victim's finger was not a defensive wound (App. 2277:11-15)
- The method of testing the victim's liver alcohol and the fact that he was aware the victim drank 18 beers over a 5 hour time frame (App. 2277:22-2278:5)

On cross-examination of Dr. Nichols, counsel challenged his testimony with regard to the matching of the glass carafe to the wound, the victim's liver alcohol level, and the autopsy procedures. The Respondent has failed to carry his burden of proving counsel was ineffective for not obtaining a forensic pathologist to refute the testimony of Dr. Nichols at trial. The record is clear that counsel was able to adequately challenge Dr. Nichols' testimony with thorough cross-examination. The Petitioner submits this allegation is without merit and should not be considered an additional sustaining ground for the lower court's granting of post-conviction relief.

B. The record supports counsel provided effective assistance of counsel by choosing not to obtain a psychologist to evaluate the Respondent and testify about why the Respondent is more likely to give a false confession when counsel presented the testimony of a false confession expert at trial and the Respondent failed to prove prejudice resulted.

The Respondent alleges counsel was ineffective for failing to obtain psychologist to examine the Respondent and testify as to why he is more likely than other individuals to falsely confess to a crime he did not commit as the basis for the denial of the Petitioner's Petition for Writ of Certiorari. While the lower court did not rule on this issue, the record supports the Petitioner's position that counsel was not ineffective for failing to obtain a psychologist to examine the Respondent and testify at trial about the Respondent's inclination towards false confessions, when a psychologist was obtained by counsel and provided testimony at trial about false confessions.

At the evidentiary hearing, the Respondent presented the testimony of Dr. Susan Knight, a forensic psychologist. Dr. Knight testified she conducted a psychological evaluation of the Respondent to determine if he had any psychological characteristics that would make the Respondent more vulnerable during police interrogation. (App. 3249:22-3250:1). She testified

she reviewed the Respondent's prior psychological reports, a transcript of the officers' testimony, a video of the interrogation, and Dr. Kassin's testimony and report. (App. 3250:3-11).

Dr. Knight testified after interviewing the Respondent and his family members she found the Respondent had psychological vulnerabilities that may pre-dispose him to making unreliable statements in police interrogation. (App. 3266:2-8). These psychological vulnerabilities included high levels of interrogative suggestibility, high levels of compliance, high levels of anxiety, low self-esteem, and inherent distrust of law enforcement personnel. (App. 3251:8-13). She concluded that Respondent has a higher level of interrogative suggestibility than the general population, but could not give an opinion about whether the Respondent's confession was true or false. (App. 3256:16-18, 3267:15-17).

The Petitioner submits in this case there was no failure by counsel. Counsel obtained Dr. Saul Kassin, a social psychologist, to testify for the defense at trial about false confessions. At trial Dr. Kassin testified about the following:

- Social psychology as the basis for the study of confessions which included the study of conformity, compliance, obedience to authority, and influence (App. 2331:18-2332:17)
- The fact that people confess to crimes they do not commit (App. 2336:8-10)
- The three types of false confessions (App. 2338:9-2339:11)
- How the psychology of memory can cause a person to make them think they were involved in a crime (App. 2345:7-24)
- The Reid School Technique used by police on the Respondent (App. 2349:21-2351:21)
- Problems with the Reid School Technique (App. 2352:17-2355:7)
- Things to look for when evaluating the reliability of a particular confession (App. 2357:14-2359:23)
- Interrogation techniques used on the Respondent that caused concern (App. 2363:11-2367:3)

-How anxiety affects a person's decision to confess or not (App. 2420:9-15)

-How demeanor and posture during interrogation can be signs of innocence (App. 2376:14-2380:10)

Counsel adequately presented an expert witness at trial to challenge the validity of the Respondent's confession before the jury. This Court should also rely on counsel's testimony that after hiring Dr. Kassin, Dr. Kassin never suggested the defense needed to employ a psychiatrist for any other testing. (App. 3348:3-15). The Petitioner submits it was reasonable for counsel to rely on Dr. Kassin, a national expert on false confessions, to inform him of additional experts that needed to be employed for the Respondent's defense.

The Petitioner also submits that counsel should not be found ineffective for simply choosing to focus on a different aspect of false confessions than that presented by the Respondent at the evidentiary hearing. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689.

The Respondent has failed to carry his burden of proving counsel's performance was deficient and resulted in prejudice to the Respondent. The record reflects counsel adequately challenged the Respondent's confession to police with Dr. Kassin's testimony on false confessions. The Petitioner submits this allegation is without merit and should not be considered an additional sustaining ground for the lower court's granting of post-conviction relief.

- C. The record supports counsel provided effective assistance of counsel by not impeaching the State's witness at trial when counsel adequately challenged the credibility of the witness' testimony on cross examination and presented the testimony of a defense witness to highlight a weakness in the testimony of the State's witness.**

The Respondent alleges counsel was ineffective for failing to impeach the State's witness at trial with her prior convictions in support of the lower court's granting of post-conviction relief. While this issue was not ruled on by the lower court, the record supports the Petitioner's position that counsel adequately impeached the State's witness, Laurie Villalobos, at trial on cross-examination and by calling Carl Chaplin to further challenge her testimony.

When called by the State at trial, Laurie Villalobos testified that on the night of the murder, she went to talk to the victim about collecting money from a check the victim has cashed for her. (App. 2212:7-13). She testified she took a cab to the Mills Inn between 1:30 am and 2:30 am. (App. 2216:2-14). She testified she knocked on the locked door of the bar and was let in by the Respondent. (App. 2217:3-7). She testified the victim was in the bar drinking and was clearly distraught. (App. 2217:8-22). Villalobos testified further the victim gave her the money and she left. (App. 2219:7-19). She testified she then walked down the street to her boyfriend, Carl Chaplin's house. (App. 2220:1-10). Lastly, she testified she never spoke to police and ran into a friend at the bar the day previous who mentioned the trial. (App. 2222:6-2223:15).

The Petitioner submits counsel adequately impeached and challenged the credibility of Villalobos at trial. Defense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses. Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986). Impeachment by prior conviction is not the only way to challenge the credibility of a witness' testimony. The fact that other methods for impeachment existed does not mean that Petitioner received ineffective assistance of counsel. Yaitsky v. U.S., 2008 WL 3845446, at *16-17 (D.S.C.

August 18, 2008) (holding trial counsel did not fail to investigate methods of impeachment; trial counsel merely chose which methods they believed to be most effective for trial; Petitioner's suggestions of better ways to impeach the Government witnesses do not prove that trial counsel's actual methods were below an objective standard of reasonableness).

Here, counsel challenged Villalobos' credibility by eliciting favorable testimony on cross-examination and calling her former boyfriend as defense witness. This Court should find persuasive counsel's testimony that his goal was to impeach Villalobos with the substance of her testimony, specifically, the basis of which was her delay in coming forward and her propensity to drink in the excess. (App. 3346:1-14). Counsel testified when he learned Villalobos would testify at trial he did everything he could to find any information he could to undermine her credibility about the core part of her testimony. (App. 3353:1-16).

The Petitioner submits counsel adequately impeached Villalobos and challenged the substance of Villalobos' testimony on cross-examination. Counsel elicited testimony from Villalobos about the number of drinks she had the night of the murder (App. 225:1-11) and her inability to recall certain details of the night of the murder (App. 2230:5-6). He also elicited testimony from Villalobos about her failure to disclose seeing the victim and the Respondent together at the bar the night of the murder until shortly before trial. (App. 2232:20-2233:1). Counsel was even able to elicit testimony from Villalobos that she did not tell her boyfriend at the time, Carl Chaplin, about what she saw at the bar when she arrived at his house immediately after leaving the Mill Inn and that she failed to disclose what she knew because she thought no one would believe her. (App. 2232:20-2233:1, 2230:17-25). On cross-examination, counsel not only impeached the witness with her failure to disclose what she knew until shortly before trial, but he also got the witness to admit her lack of credibility to the jury.

The Petitioner submits counsel also impeached Villalobos by calling Carl Chaplin to testify at trial. The defense called Carl Chaplin in his case. Chaplin testified he knew Villalobos and that they previously dated. (App. 2286:18-2287:1). He testified Villalobos never mentioned anything to him about the Mill Inn the evening of March 12, 1997 or any time since. (App. 2286:25-2287:1, 2287:11-23). He testified she never mentioned seeing the victim and the Respondent in the bar together. (App. 2288:3-9). The presentation of Chaplin's testimony was an adequate attempt by counsel to undermine Villalobos' testimony at trial.

The Petitioner submits the Respondent also failed to carry his burden of proving prejudice resulted from counsel's performance in this regard. On direct examination, the State elicited testimony from Villalobos that she had previously been convicted of possession of a stolen automobile. (App. 2210:9-14). Considering the jury was made aware of at least one of Villalobos' prior convictions, it is unlikely impeachment by counsel on her other alleged convictions would have made an impact on the outcome of the trial. The jury was made aware of her prior conviction and had that to consider when assessing the credibility of her testimony at trial.

The Petitioner submits counsel adequately impeached and challenged the testimony of Villalobos and the Respondent has failed to show how counsel's performance affected the outcome of his trial. This Court should not find counsel deficient simply because the Respondent suggested an alternate method of impeachment of the State witness. The Petitioner submits this allegation is without merit and should not be considered an additional sustaining ground for the lower court's granting of post-conviction relief.

ARGUMENT II

The Petitioner also asserts the Respondent improperly states on page 5 of his Return that the lower court found “violations of Myers’ constitutional right to be present as well as the right to effective assistance of trial and appellate counsel”. The Petitioner submits the lower court did not find ineffective assistance of appellate counsel. The record reflects the lower court held: the Respondent was denied the right to be present at all critical stages of trial (App. 3403) and the Respondent’s trial counsel was ineffective for failing to advise him of the right to be present (App. 3404 FN 7). The only reference to appellate counsel in the Court’s order was in Footnote 6 where the Court notes appellate counsel was unaware of possible issues that could have been raised on appeal because the transcript did not include off the record conferences. (App. 3403). The lower court made no findings as to whether or not appellate counsel provided effective assistance of counsel and this court should disregard the Respondent’s assertion.

CONCLUSION

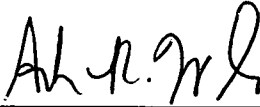
The Petitioner submits the additional sustaining grounds raised by the Respondent in his Return are not sufficient to justify the granting of post-conviction relief and the denial of the Petitioner for Writ of Certiorari. For all the foregoing reasons, the State submits that this Court should grant the State’s Petition.

[Signature on the following page.]

Respectfully submitted,

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October 4, 2013

STATE OF SOUTH CAROLINA
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Appeal From Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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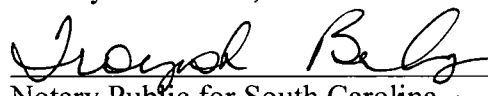
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply to the Return to Petition for Writ of Certiorari has been served upon opposing counsel, John H. Blume, this 4th day of October, 2013.



Anne R. Henley
Legal Assistant

SWORN to before me this
4th day of October, 2013.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 8/22/2022



ALAN WILSON
ATTORNEY GENERAL

October 4, 2013

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

RE: Wesley Max Myers v. State of South Carolina
2005-CP-10-3113
Appellate Case No. 2012-213419

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S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Reply to the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Reply to the Return to Petition for Writ of Certiorari today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: John H. Blume, Esquire