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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2025-000654

HOLLY JO THOMPSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR REHEARING

On August 20, 2025, this Court reversed the opinion of the Court of Appeals, which had affirmed the PCR court's denial of Petitioner's PCR application. *Thompson v. State*, 2025-MO-039 (S.C. Sup. Ct. filed Aug. 20, 2025). This Court determined that trial counsel did not articulate a valid trial strategy for failing to seek immunity under the Protection of Persons and Property Act, and therefore, the PCR court's determination that trial counsel was not deficient based on an articulated trial strategy was not supported by the evidence. *Id.* at *3.

Regarding the Court of Appeals' conclusion that trial counsel was not deficient because the question of whether a social guest could use force against an attacking homeowner in the homeowner's home had not been decided, this Court determined that trial counsel's failure to request an immunity hearing was not based on any ambiguity in the law because trial counsel

testified during the PCR hearing that he knew about the act, that immunity was something he could have explored, and he could not remember any specific reason why he chose not to pursue immunity. *Id.* This Court determined that the Act is not ambiguous and that the plain language of section 16-11-440(C) provides that a social guest, who is not engaged in any unlawful activity that was the proximate cause of the homicide, has no duty to retreat and can use force against an attacking homeowner in the homeowner's home because a social guest has a right to be in the attacking homeowner's home, "at least until the invitation is revoked." *Id.* This Court held that because trial counsel did not request a determination of immunity under the Act, which resulted in the factual question of immunity never being decided by the trial court, trial counsel was deficient. *Id.* at *3-4.

This Court also remanded this matter to the PCR court to consider in the first instance whether Petitioner was prejudiced by trial counsel's failure to request an immunity hearing based on the existing record. *Id.* at *4.

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the State requests that this Court rehear this matter because the PCR court's determination that trial counsel was not deficient is supported by evidence in the record. In the alternative, should this Court uphold its decision that the PCR court's deficiency determination was not supported by evidence in the record, then deficiency should be remanded for further consideration by the PCR court in the first instance.

I. The PCR court's deficiency determination was supported by evidence in the record.

The State acknowledges that pursuing pretrial immunity would not preclude pursuing self-defense at trial, and trial counsel testified at the PCR hearing that a pretrial immunity hearing would not have precluded Petitioner from pursuing self-defense at trial. (App. 816). However, probative evidence supports the PCR court's finding that counsel was not deficient because counsel

conducted a pro/con analysis when deciding not to pursue pretrial immunity. Specifically, when asked why they did not pursue pretrial immunity, trial counsel testified, "Sitting here today, I don't specifically remember anything regarding her case other than kind of typical pros and cons you do in any case. But, no, I don't remember anything specific in this case in terms of why we didn't do that." (App. 823). Based on this testimony, counsel *did* conduct a pro/con analysis when determining whether to request an immunity hearing. Because counsel conducted a pro/con analysis when determining whether to request an immunity hearing, Petitioner failed to meet her burden in overcoming the strong presumption that trial counsel rendered adequate assistance. *See Taylor v. State*, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case."); *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) ("The defendant is required to overcome the presumption that counsel was effective in order to receive relief.").

II. In the alternative, should this Court determine that the PCR court's deficiency determination was not supported by evidence in the record, then deficiency should be remanded to the PCR court for further consideration on the present record.

Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Strickland v. Washington*, 466 U.S. 668, 688 (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 trial counsel's performance must be highly deferential. *Id.* at 689. Generally, where trial counsel articulates a valid trial strategic reason for an action or inaction, trial counsel's performance should not be found to be deficient. *See generally 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).

However, a strategic or tactical decision does not have to be articulated by counsel on the record before a PCR court may acknowledge it, nor does counsel have to personally identify his or her thinking. It is enough that the record reflects strategic design, such that a PCR court may fairly infer from the record what the strategy was, even if trial counsel cannot or will not subsequently articulate it. *See Wood v. Allen*, 558 U.S. 290, 300-03 (2010) (determining that a PCR court reasonably inferred from evidence in the record that trial counsel's failure to pursue or present evidence of defendant's mental deficiencies was a strategic decision); *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1244-45 (11th Cir. 2011) (holding that where trial counsel's memory is lacking, courts will presume that trial counsel did what he should have done and that trial counsel exercised reasonable professional judgment because it is a PCR applicant's burden to persuade courts otherwise); *Koon v. Rushton*, 364 F. App'x 22, 29 (4th Cir. 2010) (upholding PCR court finding that applicant failed to carry his burden where trial counsel had an articulable strategy behind his method of impeaching a witness); *Geralds v. State*, 111 So.3d 778, 794 (Fl. 2010) (finding trial strategy from the record where trial counsel was deceased, and therefore not able to testify).

Here, the PCR court determined that trial counsel articulated a valid trial strategy of focusing on a self-defense argument at trial despite not being able to recall why he did not pursue immunity before trial. (App. 857). The PCR court also specifically determined that trial counsel's testimony was credible regarding Petitioner's version of events best supporting a self-defense theory at trial. (App. 858). However, the PCR court did not specifically rule whether the evidence in the record, such as the physical evidence presented at trial which could also have been presented at an immunity hearing, showed a strategic decision for not pursuing immunity.

This Court determined that the PCR court's determination was not supported by evidence in the record and trial counsel did not articulate a valid trial strategy because he could not recall why he did not pursue immunity. *Thompson*, 2025-MO-039 at *3. When there is no factual support for a PCR court's conclusion (which the State contends is not the case here), then the decision should be reversed. *Earley v. State*, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2010).

As this Court determined trial counsel did not articulate a valid trial strategy *because he could not remember*, this Court should remand the deficiency determination to the PCR court for further consideration as to whether a reasonable trial strategy may be inferred from the present record. *See Wood*, 558 U.S. at 300-03 (determining that a PCR court reasonably inferred from evidence in the record that trial counsel's failure to pursue or present evidence of defendant's mental deficiencies was a strategic decision).

To hold otherwise would suggest that where trial counsel cannot recall their strategy for failing to pursue some potential legal argument or where trial counsel is otherwise unavailable to present testimony at a PCR hearing, then a PCR court can, and potentially should, determine that trial counsel's performance was deficient without looking to the record to determine whether trial counsel's performance was reasonable under prevailing professional norms. *See Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (holding that courts measure an attorney's performance by reasonableness under prevailing professional norms); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding that the proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases).

Trial counsel's performance is accorded high deference and should not be second guessed by PCR courts or on appeal merely because trial counsel could not remember or was otherwise unavailable. *See Strickland*, 466 U.S. at 691 ("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 689 (holding that judicial scrutiny of trial counsel's performance must be highly deferential).

CONCLUSION


Based on the foregoing and the Return to the Petition for Writ of Certiorari, the State requests that this Court rehear the case, determine that trial counsel was not deficient for deciding not to pursue immunity, and affirm the PCR court's order. Alternatively, if this Court maintains its holding that the PCR court's deficiency determination was not supported by evidence in the record, the State requests that this Court remand the deficiency determination to the PCR court for further consideration on the present record.

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