

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

2010-CP-40-8149
Appellate Case No. 2012-213469

JIMMY D. PORTEE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

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ISSUES PRESENTED

Probative evidence supports the PCR Court's finding that Counsel was not ineffective for failing to object to hearsay testimony of Michael Murphy where, Trial Counsel testified it was part of his ultimate trial strategy to undermine the credibility of the State for failing to present Michael Murphy during trial.

STATEMENT OF THE CASE

Petitioner was true bill indicted at the January 2007 term of the Richland County Grand Jury for Armed Robbery and two counts of Assault and Battery of a High and Aggravated Nature, as well as at the February 2007 term for Failure to Stop for a Blue Light (2007-CP-40-10684 through -10686; -11829). James "Jay" Cooper, Esquire, and Casey Secor, Esquire, of the Richland County Public Defender's Office represented Applicant on the charges. On September 2, 2008, Applicant proceeded to jury trial before the Honorable Thomas G. Cooper, Jr. After a three day trial, Applicant was found guilty of the charges as indicted, and was sentenced to life imprisonment without parole for Armed Robbery, ten years imprisonment for each Assault and Battery of a High and Aggravated Nature, and three years imprisonment for the Failure to Stop charge. All sentences were to run concurrently.

A Notice of Appeal was filed and an appeal perfected. Applicant was represented by Wanda Carter, Esquire, of the South Carolina Office of Appellate Defense on appeal. After briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion filed October 12, 2010. State v. Portee, Unpub. Op. No. 2010-UP-435 (S.C. App. filed October 12, 2010). The Remittitur was issued on October 28, 2010.

Petitioner subsequently filed an application for post-conviction relief on November 19, 2010. An evidentiary hearing into the matter was convened on September 10, 2012, at Richland County Courthouse. By Order dated October 29, 2012 and filed November 19, 2012, the Honorable J. Ernest Kinard, Jr., denied and dismissed Petitioner's post-conviction relief application with prejudice.

Subsequently, Petitioner filed a Petition for Writ of Certiorari on July 17, 2013. The State's Return Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application 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 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 Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner 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 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.

ARGUMENT

Probative evidence supports the PCR Court's finding that Counsel was not ineffective for failing to object to hearsay testimony of Michael Murphy where, Trial Counsel testified it was part of his ultimate trial strategy to undermine the credibility of the State for failing to present Michael Murphy during trial.

Petitioner argues the post-conviction relief (PCR) court erred in finding that Counsel was not ineffective for failing to object to hearsay testimony of Michael Murphy (Murphy). However, this argument is without merit, as the record provides ample evidence to support the PCR court's finding that Counsel was not ineffective.

During direct examination Tracy Anderson (Anderson) testified Murphy entered the store immediately following the robbery. (App. p. 233 ln. 1-4). Anderson further testified, Murphy "ran around to the back to see the robber, and that's when he identified the car and that's when he said the robber pulled out a pistol on him." (App. p. 233 ln. 4-7). At the post-conviction relief hearing, Trial Counsel, James Cooper (Counsel Cooper) testified it was his understanding that Murphy was on the run from the police because he was wanted for a felony. (App. p. 726 ln. 19-21). Counsel Cooper explained that it was part of his trial strategy to argue that the State failed to produce Murphy, a key witness. Specifically Counsel Cooper testified "Mr. Secor and I were very well aware of him as a witness, but we decided to go ahead and let them talk about him just to punch a hole in their case and to make it obvious that they have got this main witness that they can't even get into court." (App. p. 727 ln. 1-6). Counsel Cooper testified in his opinion it looked bad for the State to focus on the testimony of a supposed credible witness, yet they were unable to produce him for trial. (App. p. 728 ln. 2-9). Counsel Cooper summarized "the idea was that if they have got this reverend (Murphy) that saw so much out there, then why not bring him to court. The idea was...if you had this extremely credible guy, a minister or

reverend, and he is supposedly such an important witness you can't even call him to the stand.” (App. p. 729 ln 7-13).

Trial Counsel, Casey Secor (Counsel Secor), corroborated Counsel Cooper's testimony regarding their trial strategy. Specifically, Counsel Secor testified he and Counsel Cooper had lengthy discussions about Murphy and they ultimately decided to “intentionally allow” his testimony to come in as part of their trial strategy. (App. p. 745 ln. 5—p.746 ln. 6). Counsel Secor explained they “thought Michael Murphy was a fraud. And the information that we had about him indicated that he was fraud.” (App. p. 745 ln. 4-6).

During closing arguments, Counsel Cooper argued,

“Who is Michael Murphy...Tracy Anderson up here talking about Michael Murphy fellow that saw something, saw a robber, apparently got a pretty good look at him, apparently ran through the store talking to them, saw him get in the car... Who is this guy? Where is he? You talk about proving evidence. That sounds pretty important. Where is this guy who was this fellow in the store? I can tell you one place where he wasn't. He wasn't on that witness stand. He wasn't in this courtroom talking to y'all. And why didn't he testify?”

(App. p. 585 ln. 1-17). “Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective.” See Underwood v. State, 309 S.C. 560, 563, 425 S.E.2d 20, 22 (1992). In the instant case, both Counsel Cooper and Secor articulated a valid trial strategy for allowing Murphy's testimony to come in during direct examination. It is apparent that Counsel's strategy was effective in inserting some doubt in the jurors evidenced by that fact that they sent out a note during deliberations asking “Where is Michael Murphy?” (App. p. 609 ln. 11-18; App. p. 618 ln. 25—p. 626 ln. 2). Therefore, Petitioner cannot show Counsels were deficient in making a strategic decision not to object to Murphy's statements during trial.

Furthermore, Petitioner argues he was prejudiced by the admission of Murphy's statements because it "certainly increased the probability of conviction on the armed robbery charge." Petitioner was charged and ultimately found guilty under § 16-11-330(A) (2003). Under this section:

The State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using *a representation of a deadly weapon* or any object which a person present during the commission of the robbery reasonably *believed to be a deadly weapon*.

(emphasis added). The South Carolina Court of Appeals found there was "sufficient evidence under both prongs of § 16-11-330(A) (2003)." Assuming arguendo, Counsel could be found deficient for strategically choosing not to object to the Murphy's testimony; Petitioner cannot show any resulting prejudice. The South Carolina Court of Appeals found Petitioner was guilty of armed robbery under the second prong of § 16-11-330(A) (2003). Specifically the Court of Appeals relied on Anderson's testimony that Petitioner had a bulge in his right pocket of a yellow jacket. (App. p. 227 ln. 17-22). Additionally, Anderson testified Petitioner threatened to kill her. (App. p. 227 ln. 13-14; p. 255 ln. 15-16). Anderson further testified she believed Petitioner was armed as a result of his actions and threats. (App. p. 228 ln. 5-6; p. 264 ln. 15-18). Joan Hooks (Hooks) testified Petitioner had Anderson by her hair and she was "not sure what type of weapon he had." Furthermore, the State produced evidence through Investigator Kevin Isenhoward (Investigator Isenhoward) that Petitioner possessed a broken off hacksaw handle. (App. p. 484 ln. 9-11). Investigator Isenhoward testified, based on his experience, people who don't have access to actual firearms "will fashion other items to look like firearms." (App. p. 484 ln. 9-21).

The South Carolina Court of Appeals found that the State presented substantial circumstantial evidence that Petitioner alleged *he was armed with a deadly weapon while using a representation of a deadly weapon or object*. (App. p. 653) (emphasis added). Therefore, regardless of Murphy's statement, evidence presented at trial supported the trial judges denial of Petitioner's directed verdict motion under § 16-11-330(A)(2) (2003). Therefore, Petitioner cannot show any prejudice as a result of Counsel's strategic decision not to object to Murphy's statements during trial.

In addition, Petitioner was not prejudiced by any alleged deficient representation because the record provides overwhelming evidence of Petitioner's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). Anderson testified, the robber was wearing a yellow rain jacket and a knit mask with eyes cut out. (App. p. 224 ln. 11-15). Anderson testified, she noticed a bulge in the right pocket of the yellow jacket. (App. p. 227 ln. 20-22). Anderson later testified, the robber was wearing grey sweatpants and white shoes. (App. p. 232 ln. 13-16). Anderson testified, the robber was very light skinned, possibly Caucasian, tall, and slender. (App. p. 234 ln. 19—p. 235 ln. 1). Anderson further testified, she immediately identified Petitioner as the robber based on the his facial features, clothing, and shoes. (App. p. 241 ln. 20—p. 242 ln. 6). Anderson explained, she was able to recognize Petitioner's face because he entered the store earlier that morning, prior to the robbery. (App. p. 241 ln. 20-24). Anderson further identified Petitioner in the courtroom. (App. p. ln. 2-5).

Additionally, Hooks testified the robber was tall, wearing gray jogging pants, and had white/beige color shoes. (App. p. 270 ln. 9-22). Ellis testified, the robber was skinny, tall and light skinned tone. (App. p. 287 ln. 13-15; p. 288 ln. 4-7). Ellis further testified, the robber was

wearing a mask, yellow jacket, gray sweatpants and “old white tennis shoes.” (App. p. 287 ln. 8-23).

Investigator David Unger (Investigator Unger) testified he viewed a car matching the description of the vehicle used to flee the scene. (App. p. 317 ln.18—p. 318 ln. 7). Investigator Unger testified he proceeded to initiate a traffic stop, but Petitioner failed to stop and a chase ensued. (App. p. 319 ln. 9-12). The chase continued for several miles with speeds in excess of one hundred miles per hour. (App. p. 320 ln. 4-5). Petitioner eventually crashed into a fence and exited the vehicle. (App. p. 11-13). Petitioner fled the scene carrying a yellow jacket, a black mask, and a black sock. (App. p. 323 ln. 25-30). Investigator Unger testified he had to use force to bring Petitioner to the ground and place him in handcuffs. (App. p. 324 ln. 17-21). Investigator Unger testified, Petitioner was six-four and one hundred and sixty pounds. (App. p. 334 ln. 6-8).

Investigator Unger testified, “there was loose bills of different denominations” underneath Petitioner. (App. p. ln. 12-13). Investigator Unger testified Petitioner was wearing a white t-shirt and gray sweatpants. (App. p. 332 ln. 15-16). Investigator Unger further testified, “in plain view inside the car....there was rolled money, change money.” (App. p. 335 ln. 1-2). Harold Bouknight (Bouknight), an evidence technician, testified the yellow jacket contained “a blue cobalt utility knife.” (App. p. 440 ln. 14-16). Bouknight further testified, he recovered a black hacksaw handle from the floorboard of the car and a black mask. (App. p. 446 ln. 13-15; p. 448 ln. 2-4). Investigator Donald Robinson (Investigator Robinson) testified, Anderson immediately identified Petitioner as the robber. (App. p. 393 ln. 19-20). Therefore, Petitioner cannot show any prejudice as a result of Counsel’s alleged deficiency as there is overwhelming evidence to support Petitioner’s guilt.


CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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By: 
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November 4, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

JIMMY D. PORTEE,

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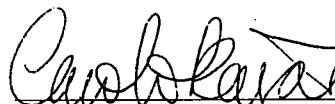
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender David Alexander
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 4th day of November, 2013



CAROLINE KAISER
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

November 4, 2013

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S.C. Supreme Court

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

Re: Jimmy D. Portee v. State of South Carolina
Appellate Case No. 2012-213469
Lower Court Case No. 2010-CP-40-8149

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/ck
Enclosures

cc: Appellate Defender David Alexander (2 copies)