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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Hon. Robin H. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2025-000088

Antwon M. Baker, Jr., Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General
S.C. Bar No. 106415

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTION PRESENTED

I. Whether this Court should affirm the PCR court's ruling that trial counsel was not deficient for not presenting Petitioner as a witness in his pretrial immunity hearing since Petitioner avoided the dangers associated with testifying and the bulk of Petitioner's testimony was admitted through other means.

STATEMENT OF THE CASE

In July 2012, the Spartanburg County Grand Jury indicted Antwon Baker for murder (2012-GS-42-3668). In May 2013, Petitioner was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. On June 3-6, 2013, Petitioner proceeded to trial before the Honorable J. Derham Cole. A jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and as charged for the unlawful carrying of a pistol. Judge Cole sentenced Petitioner to eighteen years' imprisonment for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Petitioner filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Baker, Op. No. 2015-UP-178. Petitioner filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Petitioner filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

Petitioner filed a PCR application on December 21, 2015. Respondent made its Return on July 12, 2016, moving for a more definite statement by Petitioner and requesting an evidentiary hearing. On December 30, 2016, Petitioner submitted an Application Addendum to add additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina. At the evidentiary hearing, Petitioner testified on his own behalf. Respondent called Robert Ianuario, Esquire, and Derrick Bulsa, Esquire, as witnesses. The PCR court found Petitioner failed to meet his burden of proof and denied his application in a written order dated July 8, 2018.

Petitioner appealed that order. This Court remanded due to the PCR court's failure to make sufficient findings of fact and rulings of law in State v. Baker, Op. No. 2024-UP-118. On remand, the PCR court again found Counsel was not ineffective. Petitioner filed a timely notice of appeal.

STATEMENT OF FACTS

Petitioner was convicted of voluntary manslaughter and unlawful carrying of a pistol, arising out of the shooting death of Anthony Young (Victim). Victim and Petitioner were both present at a Waffle House, located on Highway 29 in Spartanburg. (App'x. 114; 162; 170; 190). There was a history of prior physical altercations between Petitioner and Victim. (App'x. 26-8). On the night of the shooting, Petitioner drove into the parking lot of Waffle House at the same time as Victim was standing outside the restaurant. (App'x. 26-7). Petitioner witnessed Victim and a group of friends standing, and before exiting his vehicle, Petitioner placed a loaded pistol in his waistband. (App'x. 36-9). Video evidence showed Petitioner enter the restaurant and place an order at the counter. (App'x. 27).

After exiting the restaurant, Petitioner encountered Victim and a group of friends, and an argument began. (App'x. 109-112). Petitioner turned to walk back inside the Waffle House and was struck in the back of his head. (App'x. 104; 216). Petitioner removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (App'x. 109-112). A witness testified as Victim was running away, Petitioner shot Victim *in the back* five times. (App'x. 194). Petitioner's pistol was later recovered in the trunk of his girlfriend's vehicle. (App'x. 242). Law enforcement officers located Petitioner and his vehicle at an apartment complex and Petitioner was then placed under arrest. (App'x. 129-30). An officer testified that when approached Petitioner stated, "I did that thing at the Waffle House." (App'x. 130).

Before trial, Petitioner sought immunity pursuant to the Protection of Persons and Property Act. (App'x. 15). Counsel first called Foster, the officer who investigated the incident. (App'x. 24). Foster testified Petitioner arrived at the restaurant that morning and noticed the Victim. (App'x. 26-7). Foster testified the two had a violent past and that Petitioner was armed.

(App'x. 26-8). Foster further stated after some words were exchanged Petitioner followed Victim outside. (App'x. 26-7). Foster attested Petitioner claimed he told others to let it go and leave it alone. (App'x. 29). Foster also stated Petitioner asserted the group threatened to rob him and he thought one of the men had a gun in their waistband. (App'x. 30). Foster testified Petitioner stated he attempted to leave but was hit in the back of the head trying to reenter the restaurant, which is when he turned and began shooting. (App'x 26). Foster explained the security footage showed Petitioner was outside when he claimed to have been hit. (App'x. 27). Foster testified that Petitioner claimed to shoot in an arc to spread out the crowd. (App'x. 41). Despite this claim, Foster explained only Victim was shot, notably five times in the back. (App'x. 36).

Five casings were recovered from the scene from the front door through the adjacent parking lot. (App'x. 42). The casings were determined to match Petitioner's gun. (App'x 49). Foster testified there was no evidence that anyone else at the scene had a firearm. (App'x. 49). Also, Foster testified witnesses stated Petitioner chased the Victim through the parking lot until Victim collapsed, at which point Petitioner kicked Victim in the head repeatedly. (App'x. 27). The statements Petitioner made to police after the incident were admitted into evidence. (App'x. 50). The court found the act did not apply since this incident went beyond that of a vehicle, home, or person's place of business despite Counsel's argument to the contrary. (App'x. 54). Petitioner was ultimately found guilty as charged at trial.

At the PCR hearing, Petitioner testified he wanted to be called as a witness during the immunity hearing but counsel warned him against doing so. (App'x. 662). Petitioner testified he would have stated he feared for his life because he was outnumbered, believed others had guns, and was by himself. (App'x 662). Petitioner also testified he would have emphasized his prior altercation with the group. (App'x. 663). Petitioner testified he thought one of the men had a gun

in their waistband but clarified that he never actually saw a firearm. (App'x. 665). Petitioner claimed he was not shooting to kill but to "get away from the crowd." (App'x. 680).

Trial counsel testified he decided not to present Petitioner as a witness at the immunity hearing since he "did not want to subject him to cross-examination" because he believed his sense of "bravado" would come off as disrespectful, and the solicitor would be able to use Petitioner's testimony and insights about his demeanor to prepare for trial. (App'x. 645–46; 656). Trial counsel believed he could elicit sufficient evidence from the State's investigator to make a valid self-defense case. (App'x. 645). Trial counsel further stated he advised Petitioner to not testify and did not remember Petitioner adamantly wanting to testify. (App'x. 647, lines 21–25).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. Trial counsel was not deficient for not presenting Petitioner as a witness in his pretrial immunity hearing because the decision was based upon a reasonable trial strategy. Furthermore, Petitioner failed to establish prejudice because the bulk of Petitioner's testimony was admitted through other means.

The PCR court properly found Counsel was not deficient because he articulated a valid trial strategy. Counsel stated he thought Petitioner's statements to police covered everything necessary and that he did not want to subject Petitioner to cross examination. Further, no prejudice was established because Petitioner's testimony was substantially similar to what the judge heard from Foster before finding Petitioner was not entitled to immunity.

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. Trial counsel was not deficient because the decision not to call Petitioner was based on reasonable trial strategy.

"Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." Barton v. State, 432 S.W.3d 741, 749 (Mo. 2014) (en banc). A defendant is not entitled to "errorless or perfect counsel whose competency of representation is to be judged by hindsight." Robertson v. State, 187 S.W.3d 475,

483 (Tex. Crim. App. 2006). In fact, an effort should be made to "eliminate the distorting effects of hindsight." Id.; Cooper v. State, 898 S.E.2d 600, 605 (Ga. Ct. App. 2024).

Trial counsel testified that he decided not to present Petitioner as a witness at the immunity hearing because he "did not want to subject him to cross-examination" and believed his sense of "bravado" would come off as disrespectful, and the solicitor would be able to use Petitioner's testimony and insights about his demeanor to prepare for trial. (App'x. 645–46; 656). Trial counsel believed he could elicit sufficient evidence from the State's investigator to make a valid self-defense case. (App'x. 645). Trial counsel further stated Petitioner preferred not to testify. (App'x. 689). Counsel's decision to advise against Petitioner being called as a witness was reasonable because the substance of Petitioner's testimony was admitted through alternative means without the potential risk associated with Petitioner testifying. Counsel's statement alone does not show deficiency. Counsel's testimony that he "screwed up" is a retrospective self-assessment colored by outcome rather than an objective evaluation under Strickland. As noted in Robertson, a defendant is not entitled to errorless or perfect representation. The relevant question is not whether Counsel later regretted his decision, but whether the approach, from Counsel's perspective at the time, was one no competent lawyer would have taken. Cf. Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Petitioner has failed to rebut the presumption that Counsel provided adequate representation because Counsel was able to present Petitioner's version of events without the risk associated with Petitioner testifying. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010)

(explaining "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Next, Counsel was not deficient for failing to call Petitioner because Petitioner's testimony would not have entitled him to immunity under the act. Correspondingly, Petitioner suffered no prejudice because the testimony offered at the PCR hearing would not have resulted in a different outcome. The Protection of Persons and Property Act begins with an unequivocal statement of legislative intent: "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code § 16-11-420(A).

S.C. Code § 16-11-440(A) establishes a presumption of reasonable fear of death or serious bodily harm when a person is attacked in his residence, dwelling, or occupied vehicle by an intruder. Alternatively, § 440(C) provides that a person who is not engaged in an unlawful activity and is attacked while in his business or "another place where he had a right to be" is not required to retreat from such an assault. § 440(C) differs in three respects: 1) it does not require an intrusion, but only an attack, and 2) it is not limited to residences, dwellings, and occupied vehicles, but includes businesses and other places where the defendant "has a right to be"; and 3) it leaves the burden of proving reasonable fear with the defendant. Under subsection (C), Defendant must prove to the court by a preponderance of the evidence that he: 1) was acting lawfully; 2) killed Victim in self defense; and 3) was in his business or "another place where he had a right to be."

Pursuant to the Act, the burden is on the defendant to establish his entitlement to immunity. State v. Andrews, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019). To meet the burden of

establishing entitlement to immunity the defendant must prove all necessary elements of self-defense by a preponderance of the evidence. State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019).

Regarding self-defense, the following four elements must be present in order for that particular defense to be established in South Carolina:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).

Petitioner's offered testimony did not tend to establish entitlement to immunity beyond Foster's testimony. At the hearing the court heard testimony that Petitioner was struck in the back of the head, Petitioner was threatened by the group, Petitioner thought someone else had a gun in their waistband, Petitioner shot in an arc shape to draw the crowd back, and Petitioner and the group had a violent history. Notably, this was successfully introduced without the risks associated with Petitioner taking the stand at trial. Counsel's decision not to call Petitioner was within the zone of reasonableness because Petitioner's proposed testimony would have provided little to no benefit at the hearing.

B. Petitioner has not shown prejudice.

Because of the above, Petitioner has not shown prejudice from counsel's alleged deficiency in failing to call him as a witness at the immunity hearing. A different outcome is not reasonably probable because Petitioner's testimony would not have established a right to immunity under the act. The bulk of Petitioner's testimony was already admitted through his prior statements to police. See United States v. Harris, 408 F.3d 186, 192–93 (5th Cir. 2005) (Finding no prejudice where proposed testimony "would not have offered any direct evidence concerning the altercation outside of the evidence already adduced[.]"). Additionally, the testimony showed Petitioner illegally armed himself with a handgun early in the morning and walked to an altercation with a group he had a prior history with. Instead of avoiding the conflict, testimony indicated Petitioner approached the group, shot the victim five times in the back, and tailed him through the parking lot to further attack the Victim. Accordingly, a different outcome is not reasonably probable. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) ("Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide."); see also State v. Council, 129 S.C. 116, 123 S.E. 788, 789 (1924) ("A man may deprive himself of the right of self–defense by words as well as by acts[.]"); Howard v. United States, 656 A.2d 1106, 1111 (D.C. 1995) ("a defendant is not entitled to a self-defense instruction if he deliberately places himself in a position where he has reason to believe his presence would ... provoke trouble."). Prejudice is not present because Petitioner contributed to the conflict when he, while armed, approached a group he had an extensive violent history with, shot Victim in the back five times, and followed the Victim through the parking lot. Appellant failed to establish that he was without fault in bringing about the difficulty, because he, by his

own admission, deliberately placed himself with a weapon in a place where his presence would provoke trouble. Certiorari should be denied.

CONCLUSION

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

ALAN WILSON
Attorney General

ANDREW D. POWELL
Assistant Attorney General

BY: _____
ANDREW D. POWELL
Bar # 106415

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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