STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-212481

JOY MACK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#100269

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Is there probative evidence to support the lower court's ruling that the Petitioner failed to carry his burden of proving ineffective assistance of counsel for counsel's failure to cross-examine the victim on his pending charges and for counsel's failure to obtain an expert witness on eyewitness identification?

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the June 2008 term of the Charleston County Grand Jury for armed robbery (2008-GS-10-5695), assault and battery with intent to kill (ABWIK) (2008-GS-10-5696), and kidnapping (2008-GS-10-5697). Alex Apostolou, Esquire, represented the Applicant. The Applicant proceeded to trial on February 23-26, 2009, after which a jury found him guilty as indicted. The Honorable J.C. Nicholson, Jr. sentenced the Applicant to confinement for twenty-two (22) years each for armed robbery and kidnapping and twenty (20) years for ABWIK. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Elizabeth Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense, represented Applicant on appeal. After full briefing by both sides, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Mack, Op. No. 2011-UP-215 (S.C. Ct. App. filed May 17, 2010). The Remittitur was issued on June 2, 2011.

The Petitioner filed an application for post-conviction relief on July 5, 2011. The Respondent made its Return on September 27, 2011. An evidentiary hearing into the matter was convened on May 22, 2012 at the Charleston County Courthouse. The Petitioner was represented by James K. Falk, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. By Order filed June 8, 2012, the Honorable Kristi Lea Harrington denied and dismissed the Petitioner's application with prejudice. The Petitioner filed a timely Notice of Appeal and Petition for Writ of Certiorari. This Return follows.

ARGUMENT

Petitioner asserts that the post-conviction relief court erred by finding the Petitioner failed to carry his burden of proving ineffective assistance of counsel for counsel's failure to cross-examine and impeach the victim with his pending charges and for counsel's failure to consult an expert on eyewitness identification. Respondent submits probative evidence exists to support the post-conviction relief court's findings that counsel provided effective assistance of counsel. The petition should be denied and the appeal dismissed.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 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).

Courts use 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to cross-examine the victim on his pending charges when counsel's adequately impeached the victim's identification testimony without presenting evidence of the victim's pending charges.

The Petitioner asserts the lower court erred by finding counsel's failure to cross-examine the victim on his pending charges did not prejudice the Petitioner at trial. The Respondent submits there is probative evidence to support the lower court's ruling that Petitioner "failed to meet his burden of proving trial counsel was ineffective for failing to join co-defendant's motion to impeach the victim with his pending criminal charges" and that "trial counsel adequately impeached the victim's credibility without referring to his pending charges." (App. 683-684).

The Respondent submits counsel was not ineffective for failing to impeach the victim with his pending criminal charge. Prior to opening arguments, counsel for the Petitioner's co-defendant argued that he should be able to question the victim about his pending criminal charge for counterfeiting goods because it went to the victim's credibility and bias. (App. 152-154). The trial judge ruled the line of questioning was not appropriate. (App. 154). Counsel for the Petitioner did not join in the co-defendant's motion to cross-examine the victim on his pending charges. Despite Petitioner's inability to question the victim on his pending charges, counsel was able to adequately cross-examine the victim and call into question the reliability of the victim's

identification of the Petitioner as the suspect who entered his store with an AK47 and hit him over the head with the gun repeatedly during the robbery.

The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). At trial, counsel on cross-examination of the victim thoroughly challenged the reliability of the victim's identification of the Petitioner as one of the men who robbed his store.

On cross-examination, trial counsel elicited testimony from the victim about the inconsistencies in the victim's description of the suspect. The victim stated his testimony to police the day of the robbery was that the man was wearing jeans, a red shirt, and gray skull cap. (App. 211:8-23). The victim then admitted that his testimony at trial the day before was that the man was wearing black jeans, a black hoodie, and a black snow cap. (App. 210:2-7). Ultimately, the victim testified his previous descriptions of the suspects clothing did not match up and that he did not recall what the suspect was wearing. (App. 212:4-10).

Counsel also elicited testimony from the victim on cross-examination about the victim's inability to identify any suspects shortly after the robbery. The victim testified he told the police two hours after the robbery that he would not be able to recognize any of the men who robbed his store. (App. 213:2-16). Counsel then questioned the victim about the fact that two weeks after the robbery he was able to identify the men who he says robbed his store. (App. 213:17-22). The victim also testified on cross-examination that the only physical description he was able to give police was that one of the suspects was light skinned. (App. 218:16-21).

Counsel highlighted to the jury during the victim's cross-examination the short window of time in which the victim had to view the suspects. The victim testified the incident only lasted three to five minutes and he only had the chance to view the man yielding the AK47 briefly while he was walking towards him in the store. (App. 217:8-19, 249:18-25). Counsel also questioned the victim about the distance from which he viewed the suspect yielding the AK47. Lastly, counsel elicited testimony from the victim about the fact that he saw the Petitioner's photo in the newspaper and saved the photo. (App. 254:20-255:19).

The Respondent submits counsel's cross-examination of the Petitioner was also aligned with counsel's trial strategy to "highlight the fact that there was absolutely no evidence other than the eyewitness testimony", to "poke holes at the identification", and "to impeach the person and their credibility as far as possible". (App. 641:4-13). The Petitioner's suggestion that counsel should have further impeached the victim on his pending charges after thorough cross-examination on the reliability of the victim's identification is not sufficient to support a claim of ineffective assistance of counsel.[1]

Since counsel was able to cross-examine and challenge the reliability of the victim's identification without presenting evidence of the victim's pending charges, the Petitioner has failed to show how counsel's performance affected the outcome of the Petitioner trial. The Respondent also submits counsel's testimony at the evidentiary hearing about the critical nature of the victim's pending charges for impeachment purposes should not be considered by this court when assessing whether or not the Petitioner was prejudiced by counsel's performance. "[E]ven

[1] See Yaitsky v. United States, 2:04-CR-1097-PMD, 2008 WL 3845446 (D.S.C. Aug. 18, 2008) (holding while counsel has an obligation to investigate possible methods for impeaching a prosecution witness and failure to do so may constitute ineffective assistance of counsel, failure to investigate any method is distinct from failing to investigate all methods of impeachment; counsel attempted to impeach the government's witnesses using a different method of impeachment and the fact that other methods of impeachment existed does not mean the Petitioner received ineffective assistance of counsel).

if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Harrington v. Richter, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011) (citing Strickland, 466 U.S., at 688, 104 S.Ct. 2052). The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry his burden of proving counsel's performance was ineffective for his failing to impeach the victim with his pending charge for selling counterfeit goods.

II. There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to consult an expert witness on eyewitness identification when the Petitioner failed to present testimony from the expert at the evidentiary hearing and trial counsel was aware of several studies on eyewitness identification and questioned the victim based on his knowledge of the studies on eyewitness identification.

The Petitioner asserts the lower court erred by finding the Petitioner failed to present an eyewitness expert at the evidentiary hearing and failed to carry his burden of proving counsel was ineffective for failing to consult with an eyewitness expert prior to trial. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to present the testimony of any expert witness at the evidentiary hearing and failed to show that the outcome of the Petitioner's trial would have been different had an eyewitness expert been presented to the jury.

The Petitioner asserts that when the lower court ruled the Petitioner did not present its eyewitness expert testimony at the evidentiary hearing, it disregarded admitted evidence of the expert witness' testimony that was presented by the Petitioner at the evidentiary hearing. The Petitioner also asserts an affidavit of the purported expert's conclusions was admitted into evidence. The Respondent submits the record is clear that the expert's affidavit was not admitted into evidence to be considered by the lower court. The record reflects the Petitioner moved to admit the affidavit of a Jennifer Bogarty into evidence. (App. 653:8-21). The record also reflects the State objected to the admission of the affidavit as hearsay and on the basis that the witness was not present to be cross-examined on her conclusions and methodology. (App. 654:7-16). The Court sustained the State's objection and admitted the affidavit and Ms. Bogarty's CV as Court Exhibits 1 and 2 for purposes of preserving the Court's ruling for appeal. (App. 656:2-6). The Court reiterated its ruling not to allow the affidavit in lieu of Bogarty's live testimony at the end of the hearing when counsel for the Petitioner requested that the affidavit be admitted a second time. (App. 676:1-15).

The Respondent also submits the Court's finding that it could not speculate on the difference the eyewitness expert's testimony would have made at the Petitioner's trial when the expert did not testify at the hearing was proper. The lower court's finding is supported by this Court's ruling in Dempsey v. State. In Dempsey, this Court held any prejudice a defendant suffered due to counsel's failure to offer expert testimony on child sexual abuse was merely speculative due to the fact that the defendant failed to have an expert testify at his post-conviction relief hearing. 363 S.C. 365, 610 S.E.2d 812 (2005).

In support of his assertion that the lower court admitted the expert's affidavit into evidence and then disregarded the evidence, the Petitioner cites State v. Frazier, 357 S.C. 161,

592 S.E.2d 621 (2004). The portion of the Frazier opinion cited by the Petitioner cites this Court's holding in State v. Whaley, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991). The Respondent submits this Court's holding is Whaley is distinguishable from the facts of this case and is not dispositive of the issue in this case. In Whaley, the defendant sought to introduce evidence of an expert on eyewitness identifications and the trial court ruled the testimony inadmissible. Id. at 371. This Court held that while the admission of expert testimony is a matter within the sound discretion of the trial court, "an expert's testimony is admissible where, as here, the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independence reliability". Id. at 372. Unlike the defendant in Whaley, the Petitioner was not seeking to introduce testimony from the eyewitness expert, but an affidavit of the witness' findings and her CV. The Respondent submits had the lower court accepted into evidence the expert's affidavit, it would have been forced to speculate as to how the testimony would have affected the outcome at trial without the ability to hear and see the expert's testimony and without the ability to make any credibility findings based on the witness' testimony.

Lastly, the Respondent submits the Petitioner was not prejudiced by counsel's failure to consult with an eyewitness expert. The Petitioner asserts without an eyewitness expert the Petitioner could not adequately challenge the victim's identification of the Petitioner and explain why the victim's identification was untrustworthy. In Lorenzen v. State, this Court held trial counsel's failure to call an expert witness during trial did not prejudice the defendant, and therefore did not constitute ineffective assistance of counsel when the defendant failed to show a reasonable probability that the result of the trial would have been different and counsel

vigorously cross-examined the State's witness and attacked the credibility of the evidence. 376 S.C. 521, 531, 657 S.E.2d 771, 776-777.

Trial counsel testified at the evidentiary hearing that he was familiar with the studies on eyewitness identification include the science about how the length of time someone is exposed to an incident affects their ability to make an identification later (App. 658:6-13), the weapon focus effect (App.659:7-21), cross-racial bias (App. 656:14-25), and the how stress is an aggravating factor affecting the accuracy of identification (App. 659:22-660:8). The Respondent submits trial counsel was not only familiar with several of the studies on eyewitness identification that the Petitioner asserts would have been presented by the purported eyewitness expert, he was also able to adequately cross-examine the victim using his knowledge of these studies. The record reflects trial counsel cross-examined the victim on how long the incident lasted (App. 217:8-19) and whether he was focused on the suspect's gun and what the gun looked like. (App. 215-216). The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to consult with an eyewitness expert and that as a result the outcome of his proceeding would have been different.

CONCLUSION

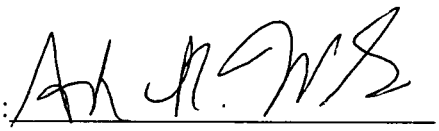
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 
Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

Nov. 14, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

JOY MACK Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari has been served upon opposing counsel, Benjamin J. Tripp, this 14th day of November, 2013.

Anne R. Henley
Legal Assistant

SWORN to before me this 14th day of October, 2013.

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

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
NOV 14 2013
S.C. Supreme Court

November 14, 2013

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

RE: Joy Mack, # 315439 v. State of South Carolina
Appellate Case No. 2012-212481

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's 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 return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Benjamin J. Tripp, Esquire