

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to Greenville County
Common Pleas

The Honorable Thomas A. Russo, Trial Judge

The Honorable Daniel D. Hall, Post-Conviction Relief Judge

DOUGLAS KELLY PHILLIPS ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2025-000955

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

KAYLEE C. KEMP
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

PETITIONER’S ISSUE PRESENTED.....1

RESPONDENT’S COUNTERSTATEMENT OF ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT

 The record supports the PCR court’s conclusions that trial counsel was not ineffective for forgoing cross-examination of the Victim and her mother, Peggy Robinson, when trial counsel provided valid reasons for not doing so, and that the information elicited on cross-examination would unlikely provide for a reasonable doubt respecting guilt under the circumstances....4

CONCLUSION.....10

PETITIONER'S ISSUE PRESENTED

Did the PCR court err in finding counsel employed a trial strategy in failing to cross-examine either of the key witnesses against Petitioner when the jury's decision turned on the unchallenged credibility of those two witnesses?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the PCR court reasonably conclude that trial counsel was not ineffective for forgoing cross-examination of the Victim and her mother, Peggy Robinson, when trial counsel provided valid reasons for doing so, and that the information elicited on cross-examination would unlikely provide for a reasonable doubt respecting guilt under the circumstances?

STATEMENT OF THE CASE

During its February of 2014 term, the Pickens County Grand Jury indicted Petitioner for third degree criminal sexual conduct with a minor (2013-GS-39-2329) and two counts of second degree criminal sexual conduct with a minor (2013-GS-39-2328; -2327). (App. 311-316).

On July 25-26, 2016, Petitioner's case was called to trial with the Honorable Thomas A. Russo presiding. (App. 1)/ Petitioner was represented by Cheryl Aaron, Esq., (Trial Counsel) and Assistant Solicitor Christopher Jones prosecuted the case. (App. 1). The jury found Petitioner guilty as indicted, and Judge Russo sentenced Petitioner to imprisonment for 15 years for third degree criminal sexual conduct with a minor and to 20 years for each count of second degree criminal sexual conduct with a minor, to be served concurrently and with credit for time served. (App. 307-308, 317-319). Judge Russo also ordered that Petitioner was to be placed in sex-offender treatment, if available, by the Department of Corrections, and ordered that he register as a sex offender for the remainder of his life. (App. 307-308).

Petitioner, through counsel, filed a timely notice of appeal. On appeal, Petitioner argued the trial court erred in ruling that the victim's testimony that Petitioner had molested her on previous occasions was admissible. The Court of Appeals affirmed in an unpublished opinion. *State v. Phillips*, Op. No. 2019-UP-016 (S.C. Ct. App. filed January 9, 2019) (per curiam). The Remittitur was issued on January 25, 2019.

Petitioner filed a *pro se* application for post-conviction relief on June 25, 2019. (App. 320). An evidentiary hearing was held on March 9, 2023, at the Greenville County Courthouse with the Honorable Daniel D. Hall presiding. (App. 339). Petitioner was present with his counsel Don A. Thompson Esq. Assistant Attorney General Taylor Smith of the South Carolina Attorney General's Office represented the State. (App. 339). On April 14, 2025, Judge Hall filed an Order denying and dismissing the application with prejudice. (App. 374). Petitioner then initiated this appeal.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters “depends on the specific issue” before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court’s factual findings “and will uphold them if there is evidence in the record to support them.” *Smalls*, 422 S.C. at 180, 810 S.E.2d at 839 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

Ineffective Assistance Claims

To show a violation of the Sixth Amendment, an applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland*, at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Strickland*, at 700.

To conduct a fair review of counsel’s performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Further, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is the applicant’s burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. *See also Speaks v. State*, 377

S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“the burden of proof is on the applicant to prove the allegations in his application”).

ARGUMENT

The record supports the PCR court’s conclusions that trial counsel was not ineffective for forgoing cross-examination of the Victim and her mother, Peggy Robinson, when trial counsel provided valid reasons for not doing so, and that the information elicited on cross-examination would unlikely provide for a reasonable doubt respecting guilt under the circumstances.

Petitioner asserts that the PCR court erred in finding that counsel was not deficient for not cross-examining Peggy Robinson and the Victim. The PCR court concluded that trial counsel’s decision not to cross-examine both witnesses was a matter of reasonable trial strategy, and the testimony presented at the evidentiary hearing as well as the record before the court supports the PCR court’s conclusion. Despite Petitioner’s contention, the PCR court considered and reasonably concluded that trial counsel’s testimony provided valid strategic reasons for not cross-examining two unpredictable witnesses. *Strickland* requires that “every effort be made to eliminate the distorting effects of hindsight” and that counsel’s decisions be evaluated at the time they were made. 466 U.S. at 689, 104 S.Ct. 2052. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Discussion

Petitioner argues that the facts of this case are similar to those in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), and that the PCR court erroneously accepted trial counsel’s trial strategy explanation at face value. (Petition at 10-11). Specifically in *Smalls*, our Supreme Court held that trial counsel was ineffective for not cross-examining a witness regarding a car jacking

charge that the State dismissed prior to the defendant's trial because it was reasonably possible that the witness would have admitted—as he did at the PCR hearing—the State made him a deal that “handsomely rewarded” him for his cooperation. 422 S.C. at 184, 810 S.E.2d at 841. Such is not the case here. The PCR court made reasonable conclusions and credited the validity of the trial strategy after considering trial counsel's testimony, the circumstances of the case, the potential testimony that could have been elicited from the witnesses and the effect it could have had on Petitioner's case.

As an initial matter, the victim nor her mother testified at the evidentiary hearing and Petitioner's speculation that their testimony would have been beneficial to his case, by itself, cannot establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Further, Petitioner did not present what trial counsel should have asked the witnesses on cross examination other than that there were discrepancies in their testimony, which trial counsel provided reasonable strategy for not addressing on cross-examination but addressing in closing argument. *See Strickland, supra* (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim;” “[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.”).

Contrary to Petitioner's assertion that the PCR court found trial counsel's reasons for not cross-examining the witnesses valid at face value, trial counsel's testimony reflects that an objectively reasonable decision was made - that did not negatively impact the defense - to argue that the witness' testimonies are inconsistent and thus lacking in credibility in closing arguments rather than on cross-examination.

A. The Victim

Trial counsel considered both witnesses to be “wild cards” and was concerned with the information regarding additional instances of sexual abuse that Petitioner was not charged with to be presented to the jury had she pursued cross-examination. (App. 361-362, 369-370). Considering the victim was permitted to testify to previous incidents of abuse which led up to the incidents for which Petitioner was on trial for during the proffer, trial counsel wanted to avoid having the jury hear allegations of additional instances of sexual abuse. (App. 362). Further, trial counsel testified that the inconsistency in the victim’s testimony was largely with specific dates of the abuse, locations where it took place, and how old she was during each incident. (App. 369). Trial counsel specifically did not want to cross-examine the victim regarding the location of the abuse because had the victim confused the locations, it would illustrate that Petitioner abused her an additional time in McCormick, which was not the location the State alleged the charged events took place. (App. 369-370). Such information is undoubtedly prejudicial to Petitioner and trial counsel was weary to cross-examine the victim on these discrepancies considering the information was allowed on proffer.

Additionally, trial counsel did not consider the victim’s inability to recall specific dates of abuse and her age at the time over the years to be worth badgering the victim about on cross-examination. (App. 371). Further, the State had already established on direct examination that the victim was largely relying on the statements she made to police and that she had trouble remembering specific dates. Trial counsel reasoned that the best time to point out the victim’s inconsistencies in her allegation would be in closing argument and would allow her to avoid badgering the victim on details that are objectively reasonable to forget or confuse. (App. 371). Further, trial counsel testified that Petitioner expected the victim to “tell the truth” and when the

victim recounted the allegations on direct examination, she discussed the situation with Petitioner thoroughly and Petitioner did not have any confidence in the victim's ability to tell what he considered to be the truth. (App. 363). At the evidentiary hearing, Petitioner did not testify as to what trial counsel should have asked the victim on cross examination other than that there were discrepancies in her testimony, which trial counsel provided reasonable strategy for not addressing on cross-examination but addressing in closing argument.

Petitioner argues that trial counsel's trial strategy explanation was not objectively reasonable, citing to state precedent that recites somewhat comparable instances where trial counsel's explanation was not considered reasonable under the circumstances. However, courts resolve the reasonableness of trial strategy on a case-by-case basis. *See Solomon v. State*, 347 S.C. 635, 557 S.E.2d 666 (2001). Here, the PCR court did as such. Considering what the victim testified to during the proffer and subsequently on direct examination, trial counsel made a strategic decision to forgo cross-examination to avoid the risk of additional instances of abuse being discussed in front of the jury. Further, Petitioner asserts that trial counsel failed to challenge the discrepancies in the victim's testimony, however, trial counsel reasoned that those discrepancies had already been acknowledged on direct examination and were not worth badgering the victim over in light of the circumstances and decided to address the discrepancies in closing argument. The PCR court reasonably resolved the allegation and properly gave deference to trial counsel's representation under the circumstances.

B. Peggy Robinson (The Victim's Mother)

Petitioner also asserts that the PCR court erred in finding that counsel was not ineffective for forgoing cross-examination of Peggy Robinson. In finding that counsel was not ineffective, the PCR court took into account Peggy's testimony at trial, trial counsel and Petitioner's testimony at

the PCR evidentiary hearing, and the potential consequences of cross-examining Peggy at trial under the circumstances. The PCR court concluded that trial counsel provided a valid reason for not cross-examining Peggy, and that had trial counsel elicited the information Petitioner wanted, there is not a reasonable probability that the outcome of trial would have been different. *Strickland supra*. Petitioner has failed to show otherwise.

In sum, Peggy was the mother of the victim and was dating Petitioner during the course of the sexual abuse of the victim. Peggy was a combative witness for the State and did not want to testify against Petitioner at trial. (App. 171-174). After the victim disclosed the sexual abuse to her pediatrician, Peggy made a statement to law enforcement that she had found Petitioner and the victim in the victim's room watching a movie, joined them in the bedroom, and then had intercourse with Petitioner while the victim watched. (App. 174). At trial she confirmed that she made the statement, and that Petitioner told her that on July 4, 2012, Petitioner had let the victim "play with his d***," followed by both of them performing oral sex on each other. (App. 174-175).

At the evidentiary hearing, Petitioner explained that he had initially hired Richard Warder, Esq., to represent him and that Peggy gave a statement to Mr. Warder's paralegal in support of him. (App. 355). Petitioner testified that he knew trial counsel was aware of and had the statement from Peggy, and that had trial counsel cross-examined Peggy in regard to the statement, reasonable doubt could have been raised. (App. 355-356). Trial counsel confirmed that Peggy provided a written statement recanting her statement she had made to law enforcement. (App. 363). Trial counsel testified that she believed the recantation was "fraught with problems" and that she anticipated that the prosecution would have argued that had she wanted to recant, Peggy would have gone to the police. (App. 364). Trial counsel testified that she didn't think that was valuable to discuss in front of the jury. (App. 364).

Notably, the PCR court weighed the credibility of Peggy's testimony that was presented to the jury against the value of cross-examining Peggy on the recantation she made to Petitioner's former counsel. Peggy was charged with and pled guilty to two counts of unlawful neglect of a child as a result of the incident in which she and Petitioner had intercourse in front of the victim. (App. 183, 364). After Peggy's arrest while she was in jail, she confirmed that she spoke to her nephew on the phone and when her nephew asked her why she didn't tell anyone about the abuse, she told him that she didn't want to get Petitioner in trouble and that he is her world. (App. 175-176). She confirmed that she told her nephew about the incident in the victim's bedroom as well as the incident on July 4, 2012. (App. 176). She confirmed that she commented to her nephew, "what am I supposed to do tell them it didn't happen?" (App. 176). Peggy also confirmed that she spoke with Denise, Petitioner's ex-wife, while she was in jail and told her that she didn't want Petitioner to get in trouble. (App. 181). She confirmed that she told Denise about the incident in the victim's bedroom as well as the July 4, 2012, incident. (App. 182). She confirmed that she told Denise that when she took the victim to the pediatrician, she didn't know the victim was going to tell the pediatrician about the incidents. (App. 183).

Considering Peggy's credibility was significantly diminished on direct examination, trial counsel reasoned that asking Peggy about the recantation would have been met with further criticism from the State on reply, which would not have been beneficial to discuss in front to the jury. (App. 364). The PCR court determined that it was unlikely that the jury would have given her testimony any credence considering the elicited information on direct examination.

Further the PCR court noted that Peggy did not testify at the evidentiary hearing, nor was specific information regarding the recantation presented. To establish prejudice from the witness' failure to testify at trial, the witness must be presented in accordance with the rules of evidence.

See Bannister v. State, 333, S.C. 298, 509 S.E.2d 807 (1998); *see also Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (“where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel’s failure to bring it forward.”).

Petitioner asserts that this case turns solely on credibility, however, fails to show that if trial counsel had cross-examined Peggy in regard to the recantation, that it would have assisted in making her story believable. On direct examination, it was made clear that Peggy did not want to incriminate Petitioner and evidence was presented that Peggy would have lied to protect him. Considering the evidence presented on direct examination, the recantation would only have supported the narrative that Peggy was untruthful.

Accordingly, Petitioner is unable to meet the *Strickland* burden. The PCR court reasonably concluded that trial counsel was not deficient in her decision to forgo cross-examinations of the victim and her mother. Further, the PCR court reasonably found that Petitioner has not shown that there is a reasonable probability that had trial counsel cross examined the victim and her mother, that the jury would have reasonable doubt respecting guilt. *Strickland, supra*. The PCR court’s findings were proper, and Petitioner has failed to show otherwise.

CONCLUSION

Based on the foregoing, Respondent asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

DON ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

KAYLEE C. KEMP
Assistant Attorney General
SC Bar No: 107073

By: 
KAYLEE C. KEMP

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

November 17, 2025
Columbia, South Carolina

ATTORNEYS FOR RESPONDENT