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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO Horry COUNTY
Honorable Deadra L. Jefferson,
Circuit Court Judge

Appellate Case No. 2025-000587

LESLIE DAVIS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

BRYAN T. HALL
Assistant Attorney General
S.C. Bar No. 106039
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

PETITIONER’S STATEMENT OF QUESTIONS

Whether the PCR court erred by holding that trial counsel could not have known about the potential for bifurcation of Petitioner’s trial simply because the trial occurred prior to this Court’s decision in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019)?

RESPONDENT’S COUNTERSTATEMENT OF QUESTIONS

Whether the PCR court correctly found Counsel was not ineffective for failing to move for bifurcation of Petitioner’s trial for CSC with a minor – first degree since *State v. Cross* was not the law at the time of Petitioner’s trial, Counsel was not required to anticipate changes in the law that did not exist at the time of trial, and bifurcation in a non-capital trial was not a prevailing professional norm at the time of trial?

STATEMENT OF THE CASE

In July 2016, the Horry County Grand Jury indicted Petitioner for criminal sexual conduct (“CSC”) with a minor – first degree (2016-GS-26-03323). On January 7-10, 2019, Petitioner proceeded to a jury trial before the Honorable Benjamin H. Culbertson. Assistant Solicitors Leigh Andrew and Mary-Ellen Walter prosecuted the case. Kia T. Wilson, Esq., represented Petitioner. Petitioner was convicted, and Judge Culbertson sentenced him to thirty (30) years.

On January 17, 2019, a notice of appeal was filed on Petitioner’s behalf. On appeal, Petitioner was represented by Adam S. Ruffin, Esq., who filed a brief raising the following issue.

Whether the court erred in admitting [Applicant]'s prior "rape in the first degree" conviction in his criminal sexual conduct with a minor first degree trial where [Applicant] offered to stipulate to this element of the offense and the State refused to accept the stipulation and therefore [Applicant] was substantially and unfairly prejudiced in violation of Rule 403, SCRE?

The Court of Appeals affirmed Petitioner’s conviction, determining the probative value of Petitioner’s prior rape conviction was not substantially outweighed by the danger of unfair prejudice. *State v. Davis*, 437 S.C. 93, 876 S.E.2d 321 (Ct. App. 2022), *reh’g denied*. The remittitur was sent on July 28, 2022.

On September 26, 2022, Petitioner filed an application for post-conviction relief (“PCR”) in which he alleged ineffective assistance of counsel. On July 31, 2024, an evidentiary hearing convened before the Honorable Deadra L. Jefferson. Shayla Flores, Esq., represented the State. Steven W. Fowler, Esq., represented Petitioner. On March 17, 2025, Judge Jefferson denied Petitioner’s PCR. This petition follows.

STATEMENT OF THE FACTS

Petitioner is the biological father of minor victim (“Victim”). (App. 189). Petitioner and Victim lived together when she was eight (8) years old. (App. 189). Melesa Squires, a drug addict who babysat Victim from time to time, witnessed her exhibiting strange behavior. (App. 191). One morning, Squires found Victim in bed naked and vomiting. (App. 192-93). Later that day, Victim told Squires that Petitioner sexually assaulted her. (App. 198). Squires called 911, and Victim was taken to the hospital. (App. 198). Following a physical examination, Janet Moore, nurse examiner observed redness in Victim’s genital area. (App. 260). Doctor Carol Rahter concluded that Victim had a normal exam. (App. 340). In a videotaped forensic interview, Victim told Dianne Nordeen, a forensic examiner, that she was raped from January to March of 2016.

At trial, the State sought to use Petitioner’s prior sexual assault conviction to prove the prior sexual conviction element of CSC – first degree pursuant to S.C. Code Ann. § 16-3-655(A)(2). For this element, the State was required to prove Petitioner had a previous conviction for an offense listed in §§ 23-3-430(C)-(D). Petitioner had previously been convicted of rape in the first degree in 1986 in New York. (App. 254). Counsel moved to exclude the introduction of Petitioner’s prior rape conviction and sex offender registry. (App. 109). Counsel argued instead that the State could stipulate the prior conviction. (App. 112). Counsel did not move for a bifurcated trial.

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

The PCR court correctly found Counsel was not ineffective for failing to move for bifurcation of Petitioner’s trial for CSC with a minor – first degree since *State v. Cross* was not the law at the time of Petitioner’s trial, Counsel was not required to anticipate changes in the law that did not exist at the time of trial, and bifurcation in a non-capital trial was not a prevailing professional norm at the time of trial.

The PCR court correctly found Counsel was not ineffective for failing to move for a bifurcated trial similar to the defendant in *State v. Cross*, 427 S.C. 465, 832 S.E.2d 281 (2019). The PCR court correctly found that since *Cross* had not been decided at the time of Petitioner’s trial, Counsel was not deficient for not requesting a bifurcated trial and could not have known that would have been the better practice under the circumstances of Petitioner’s trial.

When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel’s conduct by the law available at the time of trial and “every effort be made to eliminate the distorting effects of hindsight.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689). Counsel is not required “to be clairvoyant or anticipate the changes in the law which did not exist at the time of trial.” *Teamer v. State*, 416 S.C. 171, 183, 416 S.E.2d 109, 115 (2016) (quoting *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)); see also *Harden v. State*, 360 S.C. 405, 408, 360 S.E.2d 48, 49 (2004) (“An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.”).

In *Cross*, the Supreme Court held that in a trial for CSC with a minor – first degree, the trial court erred in denying the defendant’s motion to bifurcate the trial. *Cross*, 427 S.C. at 484, 832 S.E.2d at 291. The Court held that evidence of a defendant’s prior conviction was admissible to prove the prior-conviction element of CSC with a minor – first degree, and the State must be allowed to introduce the conviction. *Id.* The Court reasoned, however, that the trial court should have conducted a bifurcated trial when the defendant requested: the first phase requiring the State

to prove sexual battery with a minor; the second phase requiring the State to prove the prior conviction. *Id.* at 483-84, 832 S.E.2d at 291.

Under *Strickland*, this Court is required to evaluate the reasonableness of Counsel not requesting a bifurcated trial under the law that existed at the time of trial. Since the Court decided *Cross* on July 24, 2019, six (6) months after Petitioner's January trial, *Cross* was not the law at the time of Petitioner's trial. Counsel could not have known and was not required to anticipate that the Court would issue a ruling in *Cross* providing for a bifurcated trial under the circumstances. To the extent Petitioner argues Counsel should have known to request a bifurcated trial, Counsel is not required to anticipate or foresee successful appellate challenges to novel questions of law. *Teamer*, 416 S.C. at 183, 786 S.E.2d at 115 (“[R]easonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.”).

Petitioner argues bifurcated trials are not novel questions of law. While bifurcation itself is not a novel question of law, bifurcation as applied to a non-capital case sexual assault case was a novel question. Petitioner was similarly situated to the defendant in *Cross*, both of whom were on trial for CSC with a minor – first degree, and the State sought to prove the prior-conviction element of section 16-3-655(A)(2) by presenting evidence of a prior conviction. While bifurcation may have “been [an option] all along” as Petitioner argues, in the absence of established case law providing bifurcation under in a non-capital sexual assault case such as Petitioner's, a prevailing professional norm did not exist at the time of trial. *See Cross*, 427 S.C. at 485, 832 S.E.2d at 292 (J. Few concurring) (stating “In South Carolina, there is no provision of law that even permits a circuit court to bifurcate a non-capital trial. As far as the record of this case indicates—and in my own personal experience—there has never been even one bifurcated non-capital criminal trial in the history of the state courts of South Carolina.”).

Where there was no prevailing professional norm existing for bifurcation at the time under the specific circumstances of Petitioner's trial, Counsel's conduct cannot be deemed unreasonable or deficient for not requesting one. *See Strickland*, 466 U.S. at 688 (stating the measure of an attorney's performance "remains simply reasonableness under prevailing professional norms."). Additionally, while bifurcation may have been the better practice under the circumstances, Counsel cannot be deemed deficient for deviating from what is considered a "best practice" where a prevailing professional norm for the course of action did not exist. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.").

Further, even if Counsel's decision to seek a stipulation to the prior conviction instead of bifurcation was not ideal, her performance was still constitutionally effective since the Sixth Amendment requires *competent* representation not *perfect* representation. *See id.* at 110 ("*Strickland* does not guarantee perfect representation, only a reasonably competent attorney.") (internal quotations and citation omitted); *see also Dunn v. Reeves*, 594 U.S. 731, 739 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach *that no competent lawyer would have chosen.*" (emphasis added and citation, internal quotations, and brackets in original omitted)). Therefore, the PCR court correctly found Counsel was not ineffective for failing to move to bifurcate Petitioner's trial.

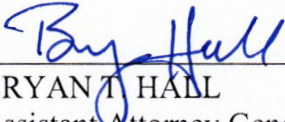
Where Petitioner failed to prove deficiency, this Court need not address prejudice. However, to preserve the argument, the State addresses prejudice as follows. Petitioner failed to prove a reasonable probability that the result of his trial would have been different but for Counsel

not seeking a bifurcated trial. Even if the case were bifurcated, the CSC case depended solely on the credibility of witnesses, and the jury ultimately found Victim credible. Additionally, even if the case were bifurcated, the State proved Petitioner's prior rape conviction. Petitioner's argument of a different outcome if the trial were bifurcated is based purely on speculation. Therefore, the PCR court correctly denied relief.

CONCLUSION

Based on the foregoing argument, the PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests that this Court affirm the PCR court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,



BRYANT T. HALL
Assistant Attorney General

S.C. Bar No. 106039
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEY FOR RESPONDENT

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