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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Honorable R. Scott Sprouse,
Circuit Court Judge

Appellate Case No. 2025-001507

JORGE RODRIGUEZ,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF QUESTIONS

- I. Whether the PCR court erred in finding that trial counsel articulated a reasonable strategy for failing to interview Petitioner's mother, the "key witness" in the case?
- II. Whether evidence supports the PCR court's determination that Petitioner knowingly and voluntarily waived his right to a direct appeal?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

- I. Whether the court correctly found Counsel was not ineffective for deciding not to interview Petitioner's mother, a witness with credibility issues, where Counsel articulated a valid and reasonable strategy in attempting to shield the witness from questioning from the solicitor about her testimony being developed or influenced by Counsel; and Petitioner failed to prove a reasonable probability that the result of trial would have been different if Counsel interviewed the witness?
- II. Whether the PCR court correctly found Petitioner knowingly and voluntarily waived his right to a direct appeal where the court found Counsel's testimony credible that following trial, he advised Petitioner of his right to an appeal, and after being informed of the right, Petitioner failed to inform Counsel that he desired an appeal?

STATEMENT OF THE CASE

In June 2020, the Spartanburg County Grand Jury indicted Jorge Rodriguez (“Petitioner”) for attempted murder and possession of a weapon during the commission of a violent crime. On October 11-13, 2022, Petitioner proceeded to a jury trial before the Honorable J. Mark Hayes, II. Assistant Solicitor Spenser Smith prosecuted the case. Ricky Harris, Esq., represented Petitioner. The jury convicted Petitioner of the lesser included offense of assault and battery of a high and aggravated nature (“ABHAN”). Judge Hayes sentenced Petitioner to twenty (20) years suspended to an active ten (10) year sentence followed by five (5) years of probation. Petitioner did not appeal.

On May 26, 2023, Petitioner filed an application for post-conviction relief (“PCR”) alleging ineffective assistance of counsel. On April 18, 2024, the State of South Carolina (“Respondent” or “the State”) filed its Return. On February 18, 2025, an evidentiary hearing convened before the Honorable R. Scott Sprouse. Petitioner was present and represented by Rodney W. Richey, Esq. Assistant Attorney General Bryan T. Hall represented the State. Following review, Judge Sprouse denied Petitioner’s PCR, finding he failed to meet his burden of proof. This petition follows.

STATEMENT OF THE FACTS

On December 25, 2019, Petitioner and his brother, Byrant Rodriguez (“Victim”) got into a verbal altercation. (App. 71). At some point, Petitioner retrieved a firearm and shot Victim in the head. (App. 73). Petitioner’s mother Judith Nodine (“Nodine”) heard the gunshot and observed Victim bleeding from his head, and Petitioner holding a pistol. (App. 73). Petitioner stated to Nodine, “what have I done? I’m sorry, mom” then fled from the house. (App. 73). Nodine called 9-1-1, and officers responded to the scene. (App. 73; 55). Victim survived the shooting but was left permanently injured.

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

- I. The PCR court correctly found Counsel was not ineffective for deciding not to interview Petitioner’s mother, a witness with credibility issues, where Counsel articulated a valid and reasonable strategy in attempting to shield the witness from questioning from the solicitor about her testimony being developed or influenced by Counsel; and Petitioner failed to prove a reasonable probability that the result of trial would have been different if Counsel interviewed the witness.**

The PCR Court correctly found Counsel was not ineffective for making a reasonable decision not to interview Petitioner’s mother, Judith Nodine (“Nodine”). A criminal defense attorney has a duty to conduct reasonable investigations. *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). “The scope of a reasonable investigation but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007). However, counsel’s duty to investigate is limited to reasonable investigations or a *reasonable decision* that makes a particular investigation unnecessary. *Id.* at 331, 642 S.E.2d at 597 (emphasis added). Where counsel decides not to undertake a particular investigation, “counsel’s decision not to investigate should be assessed for reasonableness under all the circumstances with *heavy deference to counsel’s judgment.*” *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014) (emphasis added). The court “must judge the reasonable of counsel’s conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 265, 763 S.E.2d at 634.

At the PCR hearing, Counsel testified that in preparing for Petitioner’s trial, he spoke to Petitioner’s mother, Nodine. (App. 472:19-23) Counsel testified that Petitioner insisted to him that Nodine was going to “completely exonerate” him. (App. 468: 1-4). Counsel testified that he did not interview Nodine because he did not want to expose or make her vulnerable to cross-examination by the State that her testimony was influenced by Petitioner or Counsel. (App. 473:6-

15). Counsel further testified that he believed having Nodine tell her story, fresh, to the jury gave Petitioner the best chance. (App. 473:16-19).

A. Counsel was not deficient for not interviewing Petitioner’s mother, a witness with credibility issues, where Counsel articulated a valid and reasonable strategy in attempting to shield the witness from impeachment by the solicitor through questioning about her testimony being developed and influenced by Counsel.

Counsel was not deficient where he articulated a valid and reasonable strategy for not interviewing Nodine. *Strickland* requires that the court give deference to the reasonable strategic decisions made by trial counsel. *Strickland*, 466 U.S. at 688-89 (stating “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant.”). Judicial scrutiny of counsel’s performance must be highly deferential. *Id.* at 689.

“Generally, trial counsel will not be deemed ineffective when he or she has expressed a valid reason for using a particular trial strategy.” *Washington v. State*, 440 S.C. 550, 573, 891 S.E.2d 668, 681 (Ct. App. 2023) (citing *McKnight*, 378 S.C. at 43, 661 S.E.2d at 359). “Because advocacy is an art and not a science,” courts are required to give “deference to counsel's informed decisions [;]” counsel’s “strategic choices must be respected in these circumstances if they are based on professional judgment.” *Strickland*, 466 U.S. at 681. Courts “must be wary of second-guessing trial counsel’s tactics.” *Edwards*, 392 S.C. at 457, 710 S.E.2d at 64.

In *Edwards*, the Supreme Court determined a lawyer was not ineffective for failing to call a witness to testify at trial that the applicant had no involvement in a murder where lawyer testified at the PCR hearing that his decision not to call the witness to testify was strategic. *Id.* at 455, 710 S.E.2d at 63-64. The lawyer testified that he disagreed with the witness’ version of the facts and expressed serious concerns about the witness’ ability to withstand cross examination by the

solicitor. *Id.* The court rejected the lawyer’s hindsight assertion that he would now reconsider his decision not to call the witness. *Id.* Instead, the court viewed the lawyer’s decision under the circumstances at the time the decision was made. *Id.* The Court held that the lawyer was not deficient because the lawyer articulated a valid strategic reason for not calling the witness. *Id.* at 458, 392 S.C. at 65.

Similar to the lawyer in *Edwards*, Counsel articulated a valid strategic reason for not interviewing Nodine: due to concerns about her ability to withstand questioning by the solicitor. Counsel reasonable relied on Petitioner’s insistence that Nodine would “completely exonerate” him, and Counsel believed Nodine testifying freshly to the jury would give Petitioner the best change of success at trial. (App. 473). Counsel knew at the time that Nodine had credibility issues and knew the solicitor would attempt to impeach her, which jeopardized her credibility. Counsel knew that the solicitor would question Nodine about whether Counsel and Petitioner developed or influenced her testimony, which Counsel described as a “common” strategy to try and impeach a witness. (App. 473). To prevent the solicitor from employing the line of questioning, Counsel made the decision not to interview Nodine. If Counsel had interviewed Nodine, Counsel would have given the solicitor the opportunity to question her on whether her testimony had been developed or influenced by Counsel and thus would’ve given credence to the solicitor’s argument to the jury that Nodine was misrepresenting. This line of questioning and a subsequent argument by the solicitor would have further weakened Nodine’s credibility to the jury, which Counsel sought to avoid.

Chief among Counsel’s reasons for not interviewing Nodine was his concern about her credibility and ability to withstand questioning by the solicitor. *See id.* at 458, 710 S.E.2d at 65 (stating chief among the lawyer’s reasons for not calling a witness was his concern about the

witness' ability to withstand cross-examination due to the witness' vacillation, and the lawyer knew that "entirely consistent evidence" would be presented to contrast the witness' version of the facts). Counsel knew that Nodine's credibility was crucial to Petitioner's defense, and Counsel made a strategy decision not to take any action that could potentially expose her credibility to additional attacks. Counsel cannot be deemed deficient for making a reasonable decision to shield a witness from impeachment where a witness' credibility is crucial to his trial strategy, and the proposed witness poses serious credibility concerns. *See id.* at 458, 710 S.E.2d at 65 ("A witness' credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions...") (citation omitted).

Counsel's trial strategy proved to be successful despite the solicitor's impeachment of Nodine, since the jury found Petitioner guilty of the lesser-included offense. Counsel articulated a valid and reasonable strategy in not interviewing Nodine to shield her from additional attacks to her credibility by the solicitor. Therefore, the PCR court correctly found Counsel was not deficient.

B. Petitioner failed to prove prejudice by failing to prove a reasonable probability that the result of trial would have been different but for Counsel not interviewing Petitioner's mother.

Petitioner argues Counsel was deficient for not interviewing Nodine. However, Petitioner failed to prove a reasonable probability that the result of his trial would have been different but for Counsel's conduct and thus failed to prove prejudice as required by *Strickland*. To prevail on a claim that counsel failed to interview or call witnesses, an applicant must prove counsel's inaction resulted in prejudice by showing a reasonable probability the result of the trial would have been different *based on the witness's testimony*. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (emphasis added). The applicant's mere speculation regarding a witness' testimony

cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.* (holding the applicant failed to show counsel failing to contact a witness resulted in prejudice where the applicant failed to produce the witness at the PCR hearing to show a reasonable probability that the result of trial would've been different).

The State submits that Petitioner failed to prove prejudice by failing to call Nodine as a witness at the PCR hearing to show how her testimony would have developed differently from the facts she testified to at trial if Counsel had interviewed her. Petitioner supposes that Nodine's trial testimony would have been more developed and more favorable to Petitioner if Counsel had interviewed her. However, Petitioner failed to present evidence to substantiate his claim. Instead, Petitioner's supposition of a different outcome is based on pure speculation and unsupported by the record. *Glover*, 318 S.C. at 498, 458 S.E.2d at 540 ("pure conjecture as to what a witness' testimony *would have been* is not sufficient to show a reasonable probability the result of trial would have been different" (emphasis added) (citing *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993))).

Further, the State asks this Court to consider the prejudice analysis as articulated in *Edwards*. In *Edwards*, the Supreme Court determined an applicant was not prejudiced by his lawyer not calling a witness to testify that a shooting resulting in a murder was the witness' fault and the applicant was not involved. *Edwards*, 392 S.C. at 458-59, 710 S.E.2d 65-66. The Court reasoned that while the witness the lawyer did not call may have served to corroborate the applicant's testimony concerning his involvement in the crime, the benefit of calling the witness "must be evaluated against the legitimate concerns regarding [the witness'] credibility and the strong evidence of [the applicant's] guilt." *Id.* 392 S.C. at 460, 710 S.C. at 66. Weighing the witness' testimony against the evidence presented, the Court determined the witness' credibility

concerns and the strong evidence of the applicant's guilt "run directly counter to the possibility that the jury would have reached a different result if [the witness] had testified." *Id.* As a result, the Court determined that the applicant was not prejudiced from his lawyer not calling the witness to testify at trial. *Id.* at 458-60, 710 S.E.2d at 65-67.

Similar to *Edwards*, the benefit of Counsel interviewing Nodine must be evaluated against Counsel's legitimate concerns about her credibility and ability to withstand questioning by the solicitor. Nodine's credibility issues due to her numerous prior inconsistent statements run directly counter to the possibility that the jury would have reached a different verdict even if Counsel had interviewed her. As Counsel testified to, an interview of Nodine would have given the solicitor an additional line of attack by which to question Nodine. Additionally, even if Counsel had interviewed Nodine, Petitioner would have had difficulty overcoming the facts and evidence of the case: Petitioner shot his brother in the head on Christmas following a verbal argument. Therefore, Petitioner failed to prove prejudice, and the PCR court correctly denied relief.

II. The PCR court correctly found Petitioner knowingly and voluntarily waived his right to a direct appeal where the court found Counsel's testimony credible that following trial, he advised Petitioner of his right to an appeal, and after being informed of the right, Petitioner failed to inform Counsel that he desired an appeal.

The PCR court correctly found Petitioner knowingly and voluntarily waived his right to a direct appeal and is not entitled to a belated appeal. Following a trial, counsel is required to inform a defendant of their right to an appeal. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedures of *Anders v. California*, 386 U.S. 738 (1967). Where the PCR judge determines that applicant did not knowingly and voluntarily waive his right to a direct appeal from his trial,

applicant may be allowed a belated appeal of trial errors. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974); *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

The PCR court found Counsel's testimony credible that following trial, he advised Petitioner of his right to an appeal. (App. 493; 463:17-21). The PCR court found Counsel's testimony credible that Counsel informed Petitioner that if he wished to appeal, he must notify Counsel within ten (10) days. The PCR court found Counsel's testimony credible that after being advised of his right to appeal and the ten (10) day timeline, Petitioner did not contact Counsel to appeal. (App. 493; 463:22-24). The PCR court also found Counsel's testimony credible that if Petitioner had informed Counsel that he wanted to appeal, Counsel would have filed a notice of appeal. (App. 493; 463:). Based on Counsel's credible testimony, the PCR court found Petitioner's omission constituted a knowing and voluntary waiver of his right to appeal.

Petitioner incorrectly argues that the PCR court's finding that Petitioner waived his right to an appeal is not supported by the evidence. However, the PCR court's conclusion is directly supported by the credible testimony of Counsel, and this Court is bound by the PCR court's credibility findings. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) ("Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses"). Further, this Court is bound by the PCR court's conclusion of law which is supported by the probative evidence from Counsel's credible testimony. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 ("This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.") (citation omitted).

Therefore, the PCR court correctly found, based on Counsel's credible testimony, that Petitioner chose not to exercise his right to appeal after being advised by Counsel. Accordingly, the PCR court correctly denied Petitioner a belated appeal and correctly denied Petitioner's PCR.

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,



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