STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2013-000866

Travis Robinson.....Petitioner,

v.

State of South Carolina.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Did the PCR court properly find that trial counsel was not ineffective for not requesting a continuance immediately prior to trial where Petitioner and his co-defendant identified a third party whom they claimed was the actual shooter; and did Petitioner fail to prove resulting prejudice?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. Petitioner was indicted at the June 2008 term of the York County Grand Jury for attempted armed robbery (2008-GS-46-0856), assault and battery with intent to kill (ABWIK) (2008-GS-46-0854), and possession of a firearm during the commission of a violent crime (2008-GS-46-0855). Gary Lemel, Esquire, represented him.

On August 6, 2008, Petitioner proceeded to a jury trial pursuant to which he was found guilty of all charges as indicted. The Honorable John C. Hayes, III sentenced Petitioner to confinement for twenty (20) years for attempted armed robbery, twenty (20) years, concurrent, for ABWIK, and five (5) years, concurrent, for Possession of a firearm during the commission of a violent crime.

A timely notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals held that the issue raised was not preserved and affirmed Petitioner's conviction and sentence. State v. Robinson, Op. No. 201 l-UP-022 (filed January 25, 2011). The Remittitur was sent on February 18, 2011.

Petitioner filed an Application for Post-Conviction relief on December 12, 2011. The State filed its return on or about March 30, 2012. An evidentiary hearing was convened on October 10, 2012 at the York County Courthouse. Petitioner was represented by Julia Bass, Esquire. The State was represented by J. Rutledge Johnson of the South Carolina Office of the Attorney General. The Honorable Edgar W. Dickson denied relief in an order dated February 7, 2013 and filed March 1, 2013. (App.pp. 819-28).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR court properly found that trial counsel was not ineffective for not requesting a continuance immediately prior to trial where Petitioner and his co-defendant identified a third party whom they claimed was the actual shooter; further, Petitioner failed to prove resulting prejudice.

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR Petitioner must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner 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, 466 U.S. 668 at 674 (1984). Under the second prong, the PCR Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Petitioner argues that "[t]rial counsel's failure to request a continuance to allow time to properly investigate a new lead regarding the identity of the shooter violated Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where Petitioner and his co-defendant identified another individual with the same hairstyle and build as Petitioner as the actual shooter shortly before the start of trial and where the State alleged at trial that Petitioner

was the shooter." (Pet. p. 4). This argument is without merit.

This case concerns whether Petitioner was prejudiced by trial counsel not requesting a continuance when Petitioner's co-defendant provided his trial counsel with a mug shot of someone who was incarcerated in North Carolina just before trial. Both Petitioner and his co-defendant claimed this third party was the actual shooter in the crime for which they were charged and convicted. At the PCR hearing, Petitioner's trial counsel testified that he was made aware of this identification "right before trial." (App. p. 797 line 14). When asked at the PCR hearing why he did not request a continuance, trial counsel testified that he did not know. He explained:

> "I can't tell you why I didn't ask for a continuance at that point in time to explore that. I know Mr. Dunn (counsel for co-defendant) and I talked about it. I know we talked about the difficulties we would have because it would have been a cross state subpoena to try to get somebody else down here to testify about their role. We didn't know whether this individual would admit it or not. If he doesn't admit it you run into all sorts of issues at that time with third party guilt ... Judge Hayes was notoriously restrictive on the issue of third party guilt."

(App. p. 798 lines 4-17).

Additionally, trial counsel testified: "So [co-defendant's counsel] and I did discuss the difficulties of [serving a cross-state subpoena on alleged shooter]. Ultimately decided that basically we didn't have enough time to pursue it and we did not ask for a continuance." (App. p. 798 lines 20-23). When asked whether a request for a continuance would have been successful, trial counsel replied, "For a continuance, probably not, unfortunately, Judge Hayes when cases are scheduled for trial was not apt to grant continuances." (App. p. 799 lines 1-3).

It is most important to note that no testimony was presented at the PCR hearing by Petitioner from his co-defendant or from the "actual shooter." Further, the mug shot of the "actual shooter" was not presented as an exhibit at the hearing. The only evidence presented was Petitioner's self-serving testimony and trial counsel's testimony that Counsel saw the photograph just prior to trial.

The PCR court correctly held that "[Petitioner] has failed to show that the outcome of his case would have been different had Counsel requested a continuance to further investigate this "mugshot."" (App. p. 823). The burden is on Petitioner to show at the PCR hearing how the outcome of the trial would have been different had trial counsel requested a continuance. To establish counsel was inadequately prepared, a Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); See Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 131-32 (1997) (Defendant's trial counsel was not ineffective in prosecution for criminal sexual conduct with a minor, based on alleged failure to move for continuance to prepare the case, as defendant failed to show how additional preparation would have made a difference in the outcome); see also Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief). Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

In the instant case, Petitioner failed to present any credible evidence that this "third party" was the shooter and not Petitioner. Petitioner also failed to present witnesses' testimony as to the identity of the alleged shooter. The "real shooter" certainly did not testify at the PCR hearing. Further, Petitioner failed to present the mug shot of the "real shooter" at the PCR hearing. Rather, Petitioner's testimony at the PCR hearing was completely speculative. As such, Petitioner failed to make a showing that the outcome of the trial would have been different had trial counsel requested a continuance in order to investigate the identity of the real shooter in this case.

Finally, any alleged ineffectiveness on the part of trial counsel is not prejudicial because of the overwhelming evidence of Petitioner's guilt. A reasonable probability of a different result does not exist when there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991); see also Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114 (2002); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994); Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008).

First, Petitioner never disputed he was present at the scene of the shooting, or that he was in the car. (App. p. 795 lines 19-21). Additionally, Petitioner was positively identified as the shooter by three independent eyewitnesses: Melinda Parker, the attendant who was working at the gas station that night, identified Petitioner that night as well as in court during the trial (App. p. 270-82); Savalas Dodd, the victim of the shooting, identified Petitioner as the shooter in court during the trial. (App. p. 318 lines 16-22); and Nicole Howie, the passenger in the car that the victim was driving, identified Petitioner as the gunman. (App. p. 344). All three eyewitnesses testified to having clear, unobstructed views of the Petitioner at close range, and they all

identified him as the shooter. As such, the evidence against Petitioner at trial was overwhelming, so he can not show any resulting prejudice from trial counsel's decision not to seek a continuance to investigate the identity of the gunman.

Petitioner has failed to satisfy either prong of the Strickland test: counsel's conduct was not so egregious that it fell below prevailing professional norms, nor was Petitioner so prejudiced by counsel's conduct that a different outcome would likely have occurred. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

November 27, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Edgar W. Dickson, Circuit Court Judge

TRAVIS ROBINSON, 330152

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
SC Commission of Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 27th day of November 2013.

CHANDRA E. YOUNG
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