STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

2012-CP-40-03270
Appellate Case No. 2013-000498

LEROY BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEY FOR RESPONDENT

INDEX

ISSUES PRESENTED

I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to advise Petitioner of his continued Fifth Amendment rights to remain silent during the mitigation phase of sentencing after trial, where Petitioner waived his right to remain silent during trial, there is no affirmative duty requiring Counsel to re-advise Petitioner of his rights, and Counsel could not have known that Petitioner would admit his guilt during mitigation?

STATEMENT OF THE CASE

Petitioner is presently confined is the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted at the February 2008 term of the Richland County Grand Jury for Burglary after June 20th 1985, First Degree (2008-GS-40-11826). He was represented by Luke Shealy, Esquire. Petitoner proceeded to jury trial before the Honorable Clifton Newman. On December 11, 2008, Applicant was found guilty and sentenced to eighteen years imprisonment.

A timely Notice of Appeal was submitted on Petitioner's behalf. He was represented by Deputy Chief Appellate Defender Wanda H. Carter, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence pursuant to Rule 220(b)(1), SCACR. State v. Leroy Brown, 2011-UP-041 (S.C. Ct. App. filed February 1, 2011). The subsequent Petition for Rehearing was denied by order filed March 24, 2011.

A Petition for Writ of Certiorari was filed with the South Carolina Supreme Court on May 25, 2011. The state made its Return to the petition on June 21, 2011. By Order dated February 8, 2012, the South Carolina Supreme Court denied the petition. The Remittitur was issued on February 14, 2012.

Thereafter, Petitioner filed a timely application for PCR on May 8, 2012, alleging she was being held in custody unlawfully. Respondent made its Return on July 12, 2012, requesting that an evidentiary hearing be held on Petitioner's application.

On January 14, 2013, an evidentiary hearing on the matter was convened before the Honorable G. Thomas Cooper, Jr. at the Richland County Courthouse. By Order dated February 15, 2013, Judge Cooper denied and dismissed Petitioner's application with prejudice. Petitioner subsequently filed a Petition for Writ of Certiorari on March 8, 2013. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner 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 Petitioner 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.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to advise Petitioner of his continued Fifth Amendment rights to remain silent during the mitigation phase of sentencing after trial, where Petitioner waived his right to remain silent during trial, there is no affirmative duty requiring Counsel to re-advise Petitioner of his rights, and Counsel could not have known that Petitioner would admit his guilt during mitigation?

Petitioner argues the post-conviction relief (PCR) erred in finding that Counsel was not ineffective for failng to advise Petitoiner of his continued right to remain silent during mititagation phase of sentencing. However, this argument is meritless probative evidence support's the PCR court's finding that Counsel was not ineffective.

The Fifth Amendment provides that "no person...shall be compelled in any criminal case to be a witness against himself." U.S. Const.Amend. V. If a defendant does not testify, he forgoes the opportunity to tell his version of events to the jury. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). However, if a defendant chooses to testify, he subjects himself to cross-examination, including the possibility of impeachment with prior convictions. Id. A defendant's right to testify or not must be made with knowledge of the consequences. Id.

During trial, the trial judge conducted an on-the-record colloquy with the Petitioner regarding his wavier of his Fifth Amendment rights. (App. tr. p. 120 line 13—p. 123 line 12). Petitioner subsequently waived his right to remain silent by testifying during trial, after a complete colloquy with the trial judge and a discussion with Counsel. (App. tr. p. 182 line 22—p. 199 line 19). Subsequently, Petitioner was found guilty and Counsel argued on behalf of the Petitioner during sentencing mitigation. (App. tr. p. 257 line 14—p. 258 line 12). During

sentencing mitigation, the trial judge gave Petitioner an opportunity to speak on his own behalf. (App. tr. p. 258 line 15—p. 271 line 13). The trial judge asked various questions during Petitioner's mitigation. Specifically, the trail judge asked Petitioner "you're 52 years old. You are beyond – you should be beyond anything. When you committed this burglary, you were how old? The Defendant: 51." (App. tr. p. 265 line 23—p. 266 line 1). The Petitioner's statement was given after he knowingly and intelligently waived his Fifth Amendment right to remain silent.

Petitioner now argues Counsel was ineffective for failing to re-advise him of his Fifth Amendment right to remain silent, despite the fact that he knowingly and intelligently waived his rights. Petitioner attempts to create a novel affirmative duty, by requiring counsel to re-advise their clients of their Fifth Amendment right's during sentencing mitigation in non-capital cases. However, this Court has never recognized such a duty and Counsel cannot be held ineffective for failing to anticipate changes in the law. See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial).

Furthermore, Counsel cannot be found ineffective for failing to anticipate Petitioner's admission of guilt. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding counsel was not ineffective for failing to interview Victim in defendant's case even though Victim testified on behalf of defendant during post-conviction relief hearing as defendant presented no evidence that Victim had same position regarding defendant at time of guilty plea). In the instant case, both Counsel and Petitioner testified that Petitioner continually denied his guilt. Specifically, Counsel testified "as long as I'd represented him he always maintained that he did not do it, that he had maintained to me probably to me probably much in the way that he testified

at trial." (App. tr. p. 323 lines 3-6). Based on Petitioner's continued assertions of his innocence, Counsel could not have reasonably anticipated that Petitioner would admit his guilt during sentencing mitigation. Therefore, Counsel cannot be found ineffective for failing to re-advise Petitioner of his Fifth Amendment right to remain silent, where Petitioner knowingly and intelligently waived his rights, no such affirmative duty exist requiring counsel's to re-advised their clients of their Fifth Amendment's right's during sentencing mitigation in a non-capital case, and Counsel could not have reasonably anticipated that Petitioner would admit his guilt.

Furthermore, Petitioner argues he was prejudice by Counsel's alleged ineffectiveness because there is a reasonable probability that the South Carolina Court of Appeals would have ruled differently had he chosen to remain silent and not admit his guilt. However, this argument is without merit as Petitioner's direct appeal issue is meritless.

On direct appeal, Petitioner argued the trial court erred in denying his motion for a directed verdict. However, in ruling on a motion for direct verdict, the trial judge must view the evidence and all of its reasonable inferences, in the light most favorable to the State. See State v. Frazier, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (2007). The trial court has a duty to deny a directed verdict motion if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilty of the accused. See State v. Copeland, 321 S.C. 318 326, 468 S.E.2d 620, 626 (2001). The trial judge is concerned only with the existence of evidence and not its weight; therefore, he is not request to find that the evidence infers guilt to the exclusion of any other reasonable hypotheses. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004).

Based upon the evidence presented at trial, taken in the light most favorable to the State, the trial court properly denied Petitioner's directed verdict motion. (App. tr. p. 159 line 16—p. 171 line 12). The cases cited by Petitioner in support of their argument are distinguishable

because in those cases, the State was unable to line the defendant to the crime scene at the time of the crime. See State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2009) (in burglary case, directed verdict was required where, although the defendant's fingerprint was located on a screen propped up against the victim's house, there was no evidence that the screen had been on the window at the presumed point of entry, and the defendant had lawfully been on the premises at least three times previously); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004) (murder defendant entitled to a directed verdict where, although his fingerprint was found on a coffee cup lid inside the victim's borrowed car, there was no evidence that the victim was killed in the car and no evidence linking the defendant to the crime scene where the body was found); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) (in double murder case, directed verdict was warranted where no one could place the defendant at the crime scene; where the palm print found was not his; where the footprint at the scene was only "similar" to some found in an area where he admitted being; and where there was no evidence tying him to the cigarette butts found on the scene except that he smoked the same popular brand).

In the instance case, Petitioner's fingerprint on the inside of the house, combined with the other circumstantial evidence, placed him at the scene of the crime at the time of the crime. The fingerprint's location on the inside of the window- a stationary fixture in the house- established his presence in the house. (App. tr. p. 97-101). The fingerprint was located at the burglar's clear point of entry. (App. tr. p. 45-46; 79-81). The fingerprint was necessarily fresh because it would not have lasted a long time in that location. (App. tr. p. 138 lines 12-15). More importantly, evidence was presented that the print could not have been placed in that particular location on the inside of the window by a person standing outside the window. (App. p. 96-101; p. 107; p. 110-

114). Therefore, in this case, unlike in Mitchell case, Petitioner had no prior lawful opportunities to place his fingerprint inside the victim's house. (App. p. 40; p. 54; p. 64; p. 80-81).

Accordingly, notwithstanding Petitioner's own testimony providing an alternate theory regarding the fingerprint's origin, there was substantial circumstantial evidence presented during the State's case supporting that Petitioner committed the burglary. The jury was proper authority to determine, from the testimony, the photographs of the window, and the location of Petitioner's fingerprint, whether the State proved beyond a reasonable doubt that Petitioner committed this crime. Therefore, the trial court properly denied Petitioner's directed verdict motion and Petitioner can show no prejudice as a result of Counsel's alleged ineffectiveness.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Deputy Attorney General
Bar No. 100934

By: _____
ATTORNEYS FOR RESPONDENT

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January 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable G. Thomas Cooper. Jr., Circuit Court Judge
Case No. 2012-CP-40-4209
Appellate Case No. 2013-000498

LEROY BROWN, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Daniel Gourley, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

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

This 21st day of January, 2014.

for DANIEL GOURLEY
Assistant Attorney General
S.C. Bar No. 100934

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ALAN WILSON
ATTORNEY GENERAL

January 21, 2014

RECEIVED
JAN 21 2014
S.C. Supreme Court

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

Re: **Leroy Brown v. The State of South Carolina**
Appellate Case No. 2013-000498

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Daniel Gourley
Assistant Attorney General
S.C. Bar No. 100934

MEH/ko
Enclosures

cc: Lara M. Caudy, Esquire
Trisha Allen, Victim's Services