

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County
Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2013-00046

RECEIVED

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S.C. Supreme Court

SHAWN LEONARD GLENNON,

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. Whether there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to testimony about the Petitioner's alleged pornography addiction based on Rule 404(b), SCRE when the testimony was not objectionable under Rule 404(b) and counsel articulated a valid strategic reason for failing to object to the testimony?

- II. Whether counsel was ineffective for advising the Petitioner his case was "winnable" when the Petitioner was also made aware of the possibility that he could be convicted at trial and counsel's advice was not unreasonable?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Berkeley County Clerk of Court. The Berkeley County Grand Jury indicted the Petitioner at the September 2010 term of court for voyeurism (2010-GS-08-1489). Michael O'Neal, Esquire, represented the Petitioner. The Petitioner proceeded to trial on August 29-30, 2011 and was convicted as indicted. The Honorable R. Markley Dennis sentenced the Petitioner to three years imprisonment. The Petitioner did not appeal.

The Petitioner subsequently filed an application for post-conviction relief on December 19, 2011. The Respondent filed its Return on June 8, 2012. An evidentiary hearing was commenced on October 1, 2012 at the Berkeley County Courthouse. The Petitioner was represented by Marybeth Mullaney, Esquire. The Respondent was represented by Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General. By Order dated November 5, 2012, the Honorable Kristi L. Harrington denied and dismissed the Petitioner's application with prejudice. The Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCR. The Respondent filed a response. By Order filed December 17, 2012, the Petitioner's motion was denied. The Petitioner filed a Notice of Appeal and Petition for Writ of Certiorari to this Court. This Return follows.

ARGUMENT

I. There is probative evidence to support the lower court's ruling that testimony elicited at trial about the Petitioner's alleged pornography addiction was not objectionable under Rule 404(b) when the testimony elicited was not evidence of other crimes, wrongs, or bad acts, trial counsel articulated a valid basis for not objecting to the testimony, and the Petitioner failed to carry his burden of proving prejudice.

The Petitioner asserts that the post-conviction relief court erred by finding trial counsel was not ineffective for failing to object to testimony about the Petitioner's alleged pornography addiction. The Respondent submits probative evidence exists to support the post-conviction relief court's finding that trial counsel was not ineffective for failing to object to testimony of the Petitioner's alleged pornography addiction and that the testimony was not objectionable under SCRE 404(b). The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant 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 the Applicant 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. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

At trial, Karen Glennon, the Petitioner's wife and the victim's mother, testified that "three months after we [she and Petitioner] got married, I discovered that he had a porn addiction". (App. 11:18-112:7). On cross-examination by Petitioner's counsel, Mrs. Glennon testified further the Petitioner used the main computer in the kitchen of their home to access pornographic websites. (App. 136:8-11). She testified further she had caught the Petitioner looking at pornography when he thought she was asleep. (App. 136:16-17). Mrs. Glennon also testified the police took the home computer as part of their investigation and did not find any pornographic websites had been accessed on the computer. (App. 141:9-22). The Petitioner took the stand at trial and testified he was not a pornography addict and that while he had looked at pornography before he did not do it for hours on end and did not view a large number of pornography websites. (App. 179:10-23).

The Petitioner asserts trial counsel was deficient for failing to object to Mrs. Glennon's testimony about the Petitioner's alleged pornography addiction based on Rule 404(b). The Respondent submits Mrs. Glennon's testimony did not constitute evidence of other crimes,

wrongs, or bad acts and even if the testimony were objectionable, trial counsel articulated a valid strategic reason for failing to object to the testimony. Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. State v. Wallace, 384 S.C. 428, 432, 683 S.E.2d 275, 277 (2009) (citing Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). “The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant. Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence.” Id. Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. Id.

The Respondent submits viewing pornography is a not a crime, wrong, or bad act. Mrs. Glennon’s testimony about the Petitioner’s alleged pornography addiction was not evidence of another crime, wrong, or bad act of the Petitioner. The viewing of pornography does not establish that the Petitioner was more likely than not to be guilty of voyeurism. The Respondent submits the Petitioner’s alleged pornography addiction was not objectionable under Rule 404(b). The Respondent submits the Petitioner failed to carry his burden of proving counsel should have objected to the admissibility of this testimony under Rule 404(b).

The Respondent submits even if testimony of the Petitioner’s alleged pornography addiction was objectionable on other grounds, trial counsel articulated a valid strategic basis for his failure to object. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). No 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 best to represent a criminal defendant. Id. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Id. (citing Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

At the evidentiary hearing, trial counsel testified his strategy at trial was as follows:

“And that’s why in the transcript when I asked her about his supposed porn addiction and about—and him about his supposed porn addiction, it was put in front of the jury that the police checked the computer that they said – that she saw him looking at the porno websites over and over again and found no evidence of any visits to any porn websites, and that the police never got any written porn websites that she said she turned over and got out of his pockets.” (App. 298:2-13).

Counsel’s reason for not objecting was to use the testimony about the Petitioner’s alleged pornography addiction to elicit testimony about the fact that the police checked the home computer, which Mrs. Glennon testified the Petitioner used frequently to view pornographic websites, and it was ultimately found not to contain evidence of any visits to pornographic websites. The Respondent submits trial counsel’s strategy was valid and it also gave the Petitioner’s the opportunity to take the stand and say that he did not have a pornography addiction. (App. 179:10-23). The Respondent submits this testimony was ultimately used to attack the credibility of the Petitioner’s wife. This Court should not second guess counsel’s valid trial tactic.

The Respondent submits counsel's failure to object did not prejudice the Petitioner because the testimony was used to impugn the credibility of the Petitioner's wife at trial. Mrs. Glennon testified that the Petitioner used their home's kitchen computer to view pornography. (App. 136:8-11). Based on this testimony, counsel elicited testimony from Mrs. Glennon on cross-examination that police took the home computer to do a forensic search and did not find anything. (App. 141:9-22). It was also beneficial to the Petitioner for the jury to hear the Petitioner's wife say that just because a person may have a pornography addiction does not mean that they are a sexual predator. (App. 138:2-7). This testimony elicited by trial counsel successfully called into question the witness's credibility. The Respondent submits there is probative evidence to support the lower court's ruling that counsel was not deficient for failing to object to testimony about the Petitioner's alleged pornography addiction and that prejudice did not result from counsel's performance.

II. Trial counsel was not deficient for advising the Petitioner that his case was "winnable" when counsel's advice was based on his review and investigation of the Petitioner's case, the Petitioner had a viable defense to present at trial, the Petitioner was made aware by counsel that he could possibly lose at trial, and counsel's advice about the Petitioner's possible success at trial was not unreasonable.

The Petitioner asserts based on the evidence presented against him at trial, trial counsel was ineffective for advising the Petitioner that his case was "winnable" and that he should reject the State's plea offer to probation. The Respondent submits trial counsel's advice to the Petitioner was not deficient. Counsel's advice was based on his review and investigation of the Petitioner's case, a viable defense was available, and ultimately it was the Petitioner's decision to plead guilty. The United States Supreme Court in Lafler v. Cooper concluded defendants are entitled to the effective assistance of counsel during plea negotiations. 132 S. Ct. 1376, 1384 (2012).

Trial counsel's advice to the Petitioner about his chances at trial was not improper. At the evidentiary hearing, trial counsel testified as followed about his advice to the Petitioner on the chances of success at trial:

"I went over the facts of the case with him. I talked to him. Found out his side of the story. Looked at all of the discovery. And after I finished my investigation, I told him, I said, you have a winnable case. Of course, I—as I always tell my clients, no matter how good your case is, there is still a chance we could lose it. I said, but your choice is pretty simple: You either take their offer or fight about it, have a jury trial. I showed him all the evidence that I had discovered. I explained to him the plan I had for trial, and it was his decision to take the case to trial." (App. 274:17-275:3).

"I told him that he had a choice of taking that offer or having a trial. I explained to him that I would investigate the government's case against him and report back to him as to whether I thought he had a winnable case. I told him that once I did that, that I would show him all the evidence that I had discovered in my investigation and only if he also thought he had a winnable case, would we take it to trial. And that's what we did." (App. 300:5-16).

The Respondent submits counsel's advice to the Petitioner was not improper especially in light of trial counsel's ability to articulate a viable defense to present on the Petitioner's behalf at trial. Trial counsel testified the Petitioner's defense at trial would be the Petitioner did not make the tape, he discovered it by accident, he retained the tape to give him time to figure out how to present the tape to his wife with whom he was having marital difficulties at the time, but the wife found the tape before he was able to bring it to her attention. (App. 277:1-6, 298:20-299:12).

The Respondent submits counsel's advice to the Petitioner was also not improper considering counsel made the Petitioner aware of the possibility that he could be convicted at trial, advised the Petitioner that it was his choice to reject the plea offer, and never told the Petitioner to reject the guilty plea. (App. 300:14-16). The Respondent also notes the Petitioner provided conflicting testimony at the evidentiary hearing about whether he would have pled guilty and admitted his guilt instead of proceeding to trial. The lower court after hearing the

Petitioner's testimony ultimately found the Petitioner's to be not credible. At one point, the Petitioner testified had he not been offered a plea under Alford, which was not a part of the plea offer from the State, he would not have pled guilty and admitted his guilt. (App. 316:24-217:1). The Petitioner when questioned by PCR counsel, then testified he would have pled guilty had counsel told him he was going to lose the case. (App. 318:2-11). This Court should not find persuasive Petitioner's testimony that he would have pled guilty and admitted his guilt had counsel not told him he had a "winnable case".

The Respondent also submits counsel's advice to the Petitioner was not too far-fetched in light of counsel's successes at trial. At trial, counsel was able to have suppressed the Petitioner's statements to police. (App. 85:22-24). Counsel testified for the most part the Court's rulings and his objections went the Petitioner's way. (App. 280:2-4). The jury's note to the Court during deliberation that they could not reach a unanimous decision is also evidence that Petitioner's loss at trial was not highly likely as the Petitioner asserts. Based on all the variables that could present themselves during a criminal trial, it was not unreasonable for counsel to advise the Petitioner that he could be successful at trial. This Court should not find counsel's advice improper simply because the Petitioner was ultimately convicted at trial. The Respondent submits the Petitioner failed to carry his burden of proving counsel's advice to the Petitioner on their chances at trial was improper.

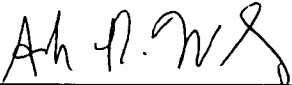
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 3, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Berkeley County
The Honorable Kristi Lea Harrington, Circuit Court Judge

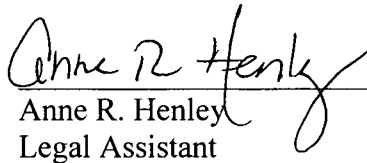
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v.

STATE OF SOUTH CAROLINA, Respondent.

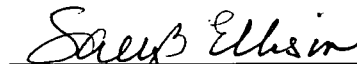
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Returns to Petition for Writ of Certiorari has been served upon opposing counsel, Benjamin J. Tripp, this 3rd day of February, 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
3rd day of February, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: 3/8/2022



ALAN WILSON
ATTORNEY GENERAL

February 3, 2014

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FEB 03 2014

S.C. Supreme Court

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

RE: Shawn Leonard Glennon v. State of South Carolina
2011-CP-08-3504
Appellate Case No. 2013-0000456

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Returns to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Benjamin Tripp, Esquire