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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

February 10, 2014

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

Re: George Porterfield a/k/a Larry Brown v. The State of South Carolina
Appellate Case No. 2013-000245

Dear Mr. Shearouse:

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

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH/ko
Enclosures

cc: Robert M. Dudek, Chief Appellate Defender, Appellate Defense
Trisha Allen, Victim's Services

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-40-5023
Appellate Case No. 2013-000245

GEORGE PORTERFIELD, # 226071
Also known as LARRY BROWN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

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ISSUE PRESENTED

Is there sufficient evidence of probative value in the record to support the post-conviction relief court's finding that trial counsel was not ineffective for electing not to request a jury instruction on self-defense, where counsel testified, and the record reveals, that the facts presented at trial did not support a jury instruction on self-defense, and Petitioner failed to prove any resulting prejudice from this alleged deficiency of counsel?

STATEMENT OF THE CASE

Petitioner was indicted during the February 2007 term of the Richland County Grand Jury for Murder and Attempted Armed Robbery (2007-GS-40-11094; -11099). Petitioner was represented by E. Deon O'Neil, Esquire and James D. Cooper, III, Esquire, both of the Richland County Public Defender's Office. On August 24-28, 2009, Petitioner proceeded to trial before the Honorable J. Michelle Childs and a jury. On August 28, 2009, the jury convicted Petitioner as indicted. Judge Cooper sentenced Petitioner to life imprisonment for murder and a concurrent ten years imprisonment for Attempted Armed Robbery.

Petitioner timely filed a notice of appeal and a direct appeal was perfected. Following the submission of an Anders brief and Petitioner's *pro se* brief, the South Carolina Court of Appeals dismissed the appeal. State v. Larry Brown, a/k/a George Porterfield, Op. No. 2012-UP-322 (S.C. Ct. App. filed May 30, 2012). The Remittitur was sent on June 19, 2012.

Petitioner filed an application for post-conviction relief on July 23, 2012. Respondent made its Return on October 12, 2012, requesting an evidentiary hearing be held. An evidentiary hearing was convened January 15, 2013, before the Honorable G. Thomas Cooper, Jr. Petitioner was present and represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney of the South Carolina Attorney General's Office. Trial Counsel E. Deon O'Neil (hereinafter "Counsel") was also present and testified at the hearing. By Order dated and filed January 30, 2013, Judge Cooper denied and dismissed Petitioner's application with prejudice.

Petitioner's Petition for Writ of Certiorari was filed on September 27, 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) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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, *supra*.

The proper measure of performance is whether counsel 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, *supra*. An applicant must overcome this presumption to be granted post-conviction relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies 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 his “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.

ARGUMENT

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for electing not to request a jury instruction on self-defense, where counsel testified, and the record reveals, that the facts presented at trial did not support a jury instruction on self-defense, and Petitioner failed to prove any resulting prejudice from this alleged deficiency of counsel.

Petitioner argues that the post-conviction relief court erred by not finding Counsel ineffective based on Counsel's failure to request a jury instruction on self-defense. Petitioner contends that the facts presented at trial warranted a self-defense jury instruction, and as Counsel did not articulate a valid trial strategy for not requesting a self-defense instruction, the post-conviction relief court should have found Counsel deficient. Petitioner further asserts that he was prejudiced by Counsel's alleged deficient performance because a self-defense instruction was warranted. However, the post-conviction relief court's ruling should be upheld, as there is evidence of probative value in the record to support its ruling.

The post-conviction relief court correctly found that Counsel articulated valid reasons for his decision not to request a jury instruction on self-defense. At the evidentiary hearing, Counsel testified he recalled Applicant's case well, including his decision not to request a jury instruction on self-defense. (App. p. 930; p. 933-934). Counsel testified that there were several witnesses who testified at trial that Petitioner pulled out a gun immediately upon entering victim's apartment with the intent to rob the decedent. (App. pp. 933-935). Counsel testified that the State's theory of the case was that Petitioner and a co-defendant barged into decedent's hotel room and immediately demanded money and drugs from the decedent, which was supported by the testimony of several witnesses at trial. (App. p. 933-934). Counsel testified he did not request a jury instruction on self-defense because he did not believe one was warranted based on

the testimony presented at trial. (App. pp. 941-942). Specifically, Counsel noted that Petitioner was acting unlawfully at the time of the altercation and was not actively defending himself when the weapon discharged six times, which would negate self-defense. (App. pp. 940-941). Counsel testified that for these reasons, he did not believe a self-defense charge was warranted.

Further, Counsel testified that he had a strategic reason for not requesting a self-defense charge. Counsel testified that based on his experience as a criminal defense attorney, a shooting during a struggle for a gun was best argued to the jury as involuntary manslaughter, not self-defense. (App. p. 935-936). As discussed above, Counsel did not believe he would be successful in obtaining jury instructions on both involuntary manslaughter and self-defense, as self-defense was not particularly warranted based on the testimony presented at trial. (App. pp. 936-937). Counsel testified that he made the strategic decision to request a jury charge on involuntary manslaughter while declining to request a self-defense charge as he wanted to avoid confusing or otherwise losing credibility with the jury, as these two charges are somewhat contradictory. (App. p. 941).

The post-conviction relief court found that Counsel's intentional and informed decision to decline a jury instruction on the law of self-defense was an objectively reasonable exercise of valid trial strategy. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). While self-defense and involuntary manslaughter are not mutually exclusive, and Counsel may have been able to have the jury instructed on both legal theories in this case, counsel's decision to only request an involuntary manslaughter charge was an objectively reasonable trial strategy based upon the underlying facts of the case. See State v. Light, 378 S.C.

641, 664 S.E.2d 465 (2008) (“When there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges [on involuntary manslaughter and self-defense] as there is ‘any evidence’ to support each charge.”). Here, Counsel testified that he did not believe the facts warranted a self-defense charge and did not want to confuse the jury by presenting two contradictory instructions, particularly when one was not consistent with the facts of the case. By eliminating self-defense from consideration, Counsel was able to limit the number of legal theories the jury would be able to consider, which Counsel reasonably believed would avoid confusion and allow the jury to focus more intently on involuntary and voluntary manslaughter verdicts as opposed to murder. Based on the foregoing, there is evidence of probative value to support the post-conviction relief court’s determination that Counsel was not deficient in this regard.

Further, Petitioner has failed to establish any resulting prejudice from this alleged deficiency. The post-conviction relief court correctly determined that Petitioner failed to prove any resulting prejudice, as there was no reasonable likelihood that had the jury been instructed on self-defense, the outcome of Petitioner’s case would have been different. In making this determination, the post-conviction relief court found that Petitioner’s testimony at the evidentiary hearing outlining his version of the incident to be “wholly **not** credible.” (App. p. 954) (Emphasis in original). After reviewing the trial transcript in full, the post-conviction relief court discerned that as Petitioner’s testimony at trial was the *only* evidence presented that would support a verdict of not-guilty based upon self-defense and having assessed Petitioner’s credibility and testimony to that end at the evidentiary hearing, it found no reasonable likelihood the jury would have returned a verdict of not-guilty based upon self-defense had such a jury

charge been given. (App. pp. 955). Specifically, the post-conviction relief court concluded that evidence presented at trial, including the testimony from several eye witnesses and one of Petitioner's co-defendants, clearly established a consistent and more credible account of the incident refuting any indication Applicant was acting in self-defense. (App. p. 955). Based on the record before it, along with the testimony presented at the evidentiary hearing, the post-conviction relief court found that it was "firmly convinced there is no reasonable likelihood that had the jury been instructed on the law of self-defense, the outcome of Applicant's case would have been any different." (App. p. 955).

There was clear evidence of probative value in the record to support the post-conviction relief court's findings. Petitioner has failed to meet his burden of proof as to this argument. Therefore, the post-conviction relief court's Order of Dismissal should be upheld.

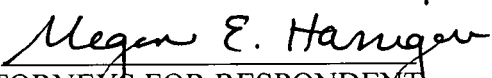
CONCLUSION

For the foregoing reasons, the State submits that the Petition for Writ of Certiorari 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

MEGAN E. HARRIGAN
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Assistant Attorney General

By: 
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February 10, 2014

STATE OF SOUTH CAROLINA
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GEORGE PORTERFIELD

Also known as LARRY BROWN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.


PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Ceriorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

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

This 10th day of February, 2014.


MEGAN E. HARRIGAN
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