

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Beaufort County
Honorable D. Craig Brown, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2011-193110

PRESTON COSTA, #312879,

Petitioner,

vs.

STATE OF SOUTH CAROLILNA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES 11

QUESTION PRESENTED1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

There is probative evidence to support the lower court’s finding that the Petitioner failed to establish ineffective assistance of counsel for trial counsel’s failure to call Holmes and Lockhart as alibi witnesses at the Petitioner’s third trial.

A. Trial counsel was not deficient for failing to call Holmes and Lockhart as alibi witnesses at trial when counsel articulated a reasonable trial strategy for failing to call the two witnesses.

B. Trial counsel’s performance did not result in prejudice to the Petitioner.

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases:

<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985).	3
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).	3, 4
<u>Edwards v. State</u> , 392 S.C. 449, 710 S.E.2d 60 (2011).	8, 9
<u>Jackson v. State</u> , 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998).	8
<u>Roseboro v. State</u> , 317 S.C. 292, 454 S.E.2d 312 (1996).	7
<u>Stokes v. State</u> , 308 S.C. 546, 419 S.E.2d 778 (1992).	7, 8
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984).	3, 9
<u>Underwood v. State</u> , 309 S.C. 560, 425 S.E.2d 20 (1992).	7
<u>Whitehead v. State</u> , 308 S.C. 119, 417 S.E.2d 529 (1992).	7
<u>Wolfe v. State</u> , 326 S.C. 158, 485 S.E.2d 369 (1997).	4

QUESTION PRESENTED

Did the lower court properly determine that trial counsel was not ineffective for failing to call Holmes and Lockhart as alibi witnesses at trial when counsel thought that the witnesses credibility would be an issue for the Petitioner at trial, counsel attempted to put forth two other witnesses who would help establish a timeline for the Petitioner's alibi, and the Petitioner failed to prove that prejudice resulted from counsel's performance?

STATEMENT OF THE CASE

The Petitioner was indicted at the June 2004 term of the Beaufort County Grand Jury for armed robbery (2004-GS-07-0925). Trasi Campbell, Esquire, represented the Petitioner at trial. On December 5-7, 2005, the Petitioner proceeded to trial for the third time¹, after which a jury found him guilty as indicted. The Honorable John C. Few sentenced the Petitioner to confinement for twenty-five (25) years.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal was perfected. Robert M. Dudek, Esquire, represented the Petitioner on appeal. After full briefing, the South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Costa, Op. No. 2009-UP-158 (S.C. Ct. App. filed March 31, 2009). The Remittitur was issued on April 30, 2009.

The Petitioner filed an application for post-conviction relief (PCR) on May 15, 2009. The Respondent made its Return on December 30, 2009. An evidentiary hearing into the matter was convened on April 18, 2011 at the Colleton County Courthouse. The Petitioner was present at the hearing and represented by Charles T. Brooks, III, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent. On April 27, 2011, the Honorable Craig D. Brown denied and dismissed with prejudice the Petitioner's PCR application. The Petitioner filed a timely Notice of Appeal. The Petitioner filed a Petition for Writ of Certiorari on June 14, 2012. This Return follows.

¹ The Petitioner's previous two trials resulted in hung juries.

ARGUMENT

There is probative evidence to support the lower court's finding that the Petitioner failed to establish ineffective assistance of counsel for trial counsel's failure to call Holmes and Lockhart as alibi witnesses at the Petitioner's third trial.

Petitioner asserts that the post-conviction relief court erred by finding that counsel was not ineffective for failing to call Dennis Lockhart and Melvin Holmes as alibi witnesses at the Petitioner's third trial. Respondent submits probative evidence exists to support the post-conviction relief court's findings that the Petitioner failed to carry his burden of proving that he received ineffective assistance of trial counsel. 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, 104 S.Ct. 2052, 80 L.Ed.2d 674, (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. 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).

A. Trial counsel was not ineffective for failing to call Holmes and Lockhart as alibi witnesses at trial when counsel articulated a reasonable trial strategy for failing to call the two witnesses.

Petitioner asserts that trial counsel was ineffective for failing to call Melvin Holmes and Dennis Lockhart as alibi witnesses at trial. Petitioner asserts that the trial strategy articulated by trial counsel was invalid in light of the defense theory of the case.

At the evidentiary hearing, the Petitioner testified that he had potential alibi witnesses and that he told trial counsel about these witnesses prior to his trial. (App. 282:18-23). He testified that he gave trial counsel the name of four alibi witnesses including Melvin Holmes and Dennis Lockhart. (App. 282:24- 283:2). Petitioner testified that he was with Holmes and Lockhart at the DMV and Plum's during the time of the crime. (App. 283:6-12). He testified that trial counsel did not interview or bring to trial his alibi witnesses. (App. 284:5-11).

Also present at the evidentiary hearing to testify on the Petitioner's behalf were Melvin Holmes and Dennis Lockhart. Holmes testified at the hearing that no one spoke to him prior to the Petitioner's trial about the Petitioner's case. (App. 286:22- 287:1). He testified that on the day of the armed robbery, he went to the DMV and Plum's with the Petitioner. (App. 287:4-16).

He testified that he could not recall the exact time, but he was sure it was during the time the crime occurred. (App. 287:17-22). Holmes testified that he never spoke with trial counsel about the Petitioner's case. (App. 287:23-25).

Dennis Lockhart testified that he took Holmes and the Petitioner to the DMV and to Plum's and then they return to the Petitioner's house. (App. 290:15-19). He testified that he did not recall the exact time he picked up the Petitioner, but that it was in the morning. (App. 291:10-13). Lockhart also testified that he did not speak to trial counsel or anyone else about the case prior to the Petitioner's trial. (App. 291:19-292:1).

As to trial counsel, the record reflects that trial counsel is an experienced criminal practitioner. Counsel testified at the hearing that she met with the Petitioner more than twenty (20) times prior to trial. (App. 293:13-14). She testified that the Petitioner's defense at trial was an alibi and mistaken identity. (App. 293:23-24). Counsel testified that the Petitioner gave her the names of potential alibi witnesses and that she spoke with the witnesses prior to trial. (App. 294:4-10). She testified that she spoke with Lockhart prior to trial at the Beaufort County Detention Center on August 9, 2004. (App. 294:12-13). Counsel testified that she discussed Lockhart's testimony and felt that he would not be a helpful witness at trial. (App. 294:15-19). Counsel testified that she felt Lockhart's credibility would be an issue and would have a negative impact on her presentation of the Petitioner's case. (App. 294:20-23). She testified that at the time when she spoke with Lockhart, he had a pending armed robbery charge and other legal issues. (App. 294:24-295:1).

Trial counsel also testified that she spoke with the owner of Plum's Restaurant and a representative from the DMV in her efforts to establish a timeline for the Petitioner's alibi. (App. 295:2-7). Counsel also testified that she had no independent notes in reference to Mr. Holmes,

however, her investigator's notes reflect that Holmes' position was that he was with the Petitioner at the DMV on the day of the armed robbery. (App. 295:8-12).

Counsel testified that through the testimony of the DMV clerk and the owner of Plum's she was able to establish a timeline for the Petitioner's alibi. (App. 295:18-296:9). She testified that she decided not to call Holmes and Lockhart as witnesses at trial prior to the Petitioner's first trial, which resulted in a hung jury. (App. 296:10-13). Counsel testified that before the second trial, she and the Petitioner made the same decision not to call Holmes and Lockhart and the second trial also resulted in a hung jury. (App. 296:14-15). Counsel testified that in the third trial, with the same evidence, the judge refused to grant the alibi charge and the Petitioner was convicted. (App. 296:16-18).

She testified that a factor in her decision-making process to not call Lockhart and Holmes was the fact that they both were part of a six-person photo line up that was admitted into evidence in the trial in all three cases. (App. 296:21-25). She testified further that she was familiar with both Holmes and Lockhart and that she felt their credibility would have been an issue and would have been more of a problem for the Petitioner. Counsel testified that since Holmes and Lockhart were also in the photo lineup, she felt that that was damaging and she was not sure how to overcome that other than trying to establish the alibi timeline in a manner that did not hurt the Petitioner. (App. 299:11-18).

After hearing the testimony and reviewing the record, the post-conviction relief court rejected Petitioner's claim of ineffective assistance of counsel, finding that counsel was not ineffective for failing to call Lockhart and Holmes as witnesses at trial. (App. 311). The Court held that testimony from Holmes and Lockhart would not have established a true alibi because the Applicant could have been present with these witnesses at the DMV and Plum's restaurant

and still have committed this armed robbery. (App. 311). The Court also held that counsel made a strategic decision not to call Holmes and Lockhart because she believed they would have had a negative impact on her presentation of the Petitioner's case. (App. 312).

As to trial counsel failing to call Holmes and Lockhart as alibi witnesses at the Petitioner's third trial, the Respondent submits that counsel made a reasonable strategic decision under the circumstances. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. 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. Strickland, 466 U.S. at 688-689. "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. 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).

Respondent submits that the post-conviction relief court was correct when it found that counsel made a reasonable strategic decision under the circumstances. Trial counsel gave credible testimony that prior to the Petitioner's trial she investigated and interviewed the Petitioner's potential alibi witnesses. She testified further that prior to the Petitioner's first trial she and the Petitioner decided not to call Holmes and Lockhart as witnesses at trial. Counsel

based that decision on her believe that the witnesses credibility would have been an issue at trial and her believe that they would not have been helpful to the Petitioner's case.

The trial strategy articulated by trial counsel in this case was held to be reasonable in Stokes v. State². In Stokes, trial counsel stated that he chose not to use certain witnesses at trial because, "in his judgment at the time, their testimony would not have been of value to the Petitioner's case". Stokes, 308 S.C. at 548, 419 S.E.2d at 779. The Supreme Court affirmed the lower court's ruling that "trial counsel adequately put forth a defense by calling the only witness whom he believed to be credible and supportive of the defense strategy." Id. Like in Stokes, Petitioner's counsel articulated a strategic reason for deciding not to call Holmes and Lockhart as alibi witnesses at trial. Counsel testified that she thought the witnesses would not help the Petitioner's case and that they were not credible. Also like in Stokes, trial counsel attempted to put forth testimony from the only witnesses whom she believed to be credible and supportive of the defense strategy- the representative from the DMV and the owner of Plum's Restaurant.

In Edwards v. State, this Court held that "[a] witness's 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." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011). In Jackson v. State, this Court held that counsel was not deficient for failing to call a witness at trial when corroboration of the defendant's statement was more credible through the testimony of another witness and the witness' credibility would have been an issue if he testified. Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998).

Here, trial counsel articulated a valid strategic reason for her decision not to call Holmes and Lockhart as witnesses at trial. Counsel testified that both Holmes and Lockhart would have

² 308 S.C. 546, 419 S.E.2d 778 (1992).

had credibility issues if they took the stand and that she felt they would not have helped the presentation of the Petitioner's case. She also testified that in the Petitioner's prior trials, she did not call either Holmes or Lockhart and she was able to corroborate the Petitioner's alibi with a timeline she was able to establish through the testimony of the DMV representative and the owner of Plum's. The validity of counsel's strategy is to be viewed under an 'objective standard of reasonableness.' Edwards, 392 S.C. at 456, 710 S.E.2d at 64 Here, counsel has articulated a reasonable ground for employing this strategy. Therefore, her performance cannot be considered to be deficient. The lower court properly held that the Petitioner failed to carry his burden of proving that trial counsel's performance was deficient.

B. Trial counsel's performance did not result in prejudice to the Petitioner.

The defendant 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 v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Id. at 693. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id.

The Petitioner has failed to prove that prejudice resulted from trial counsel's performance. Trial counsel employed the reasonable trial strategy of not calling Lockhart and Holmes as alibi witnesses in all three of the Petitioner's trial. The Petitioner's first two trials resulted in a hung jury. The Petitioner cannot now claim that trial counsel's strategy was unreasonable simply because the previously successful strategy was unsuccessful when

employed during his third trial. The errors alleged by the Petitioner are not sufficient to undermine confidence in the outcome of his trial. The standard for the trial strategy is not how successful the strategy is, but rather whether the strategy was reasonable. The lower court properly held that the Petitioner failed to carry his burden of proving that trial counsel's performance resulted in prejudice.


CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 
Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

October 31, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

The Honorable D. Craig Brown, Circuit Court Judge

PRESTON COSTA,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Dayne C. Phillips, Esquire
South Carolina Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 31st day of October, 2012



ANNE R. HENLEY
LEGAL ASSISTANT