STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-04-4101

BRAXTON J. BELL, 310304, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAELON E. MAY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED

I. Whether the PCR Court correctly found that trial counsel was not ineffective for failing to investigate by interviewing and/or calling witnesses who knew the Victim, had been the aggressor in previous altercations with Petitioner, where Petitioner was claiming self-defense?

STATEMENT OF THE CASE

For the purposes of this Return, the Respondent adopts the Statement of the Case put forth in the Petition for Writ Certiorari.

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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, 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 ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington. 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 v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

I. The PCR Court correctly found that trial counsel was not ineffective for failing to investigate by interviewing and/or calling witnesses who knew the Victim, had been the aggressor in previous altercations with Petitioner, where Petitioner was claiming self-defense.

The PCR Court correctly ruled that trial counsel as not ineffective for failing to investigate by interviewing and/or calling witnesses who knew the Victim, had been the aggressor in previous altercations with Petitioner, where Petitioner was claiming self-defense at trial. The Petitioner asserts trial counsel was ineffective because he did not properly investigate Petitioner's case because trial counsel did not talk to the witnesses Petitioner had given counsel who could testify about the prior bad relationship that existed between the Victim and the Petitioner.

At the PCR hearing, trial counsel testified that there was no one that actually saw the struggle and eventual shooting that took place between the Victim and the Petitioner on the night of the incident. (App. 577, lines2-8). Trial counsel explained that the witnesses were either out there before when the struggle was going on or came up after the struggle, after it was over; and that nobody saw exactly what took place. (app. 577, lines12-14). Trial counsel testified that in order to establish self-defense, as far as the actual struggle itself, the defense's only witness was the Petitioner, the forensics, and Doctor Woodward. (App. 578, lines10-14). Additionally, trial counsel stated that with regard to the witnesses that Petitioner informed him of, counsel could not remember why he was not able to find the witnesses, but that trial counsel did try to locate these witnesses. (App. 590, lines9-12). In fact, Petitioner's mother, Joyce Bell, testified at the PCR hearing that she met and spoke with trial counsel prior to the Petitioner's trial. (App. 614, lines11-20). In its Order denying PCR to the Petitioner, the PCR Court found that trial counsel conducted a pre-trial investigation during

which counsel interviewed witnesses but elected not to call them to testify at trial as a matter of trial strategy. (App. 649).

At the PCR hearing, the Petitioner presented the testimony of Leon Gray, D'Sean Bell, and Joyce Bell. (App. 602 - 617). These witnesses were not present the night of the incident. Leon Gray testified that the relationship between the Victim and Petitioner mostly seemed like it was laughing and stuff like that, then they would get into fights; and that the Victim and Petitioner got along alright and would play together. (App. 603-604). D'Sean Bell testified that he was the Petitioner's cousin, that he saw the Victim and Petitioner get into fights prior to the incident, and that Petitioner never said he was scared of the Victim. (App. 608, lines15-16; 609, lines5-6). Joyce Bell testified that she is the Petitioner's mother, that Petitioner and the Victim got along, and that she would not say Petitioner was afraid of the Victim. (App. 612, lines3-6; 613, lines11-14). Trial counsel testified that he did not call these witnesses to testify at trial and would make the same decision not to call them today even after hearing their testimony at the PCR hearing. (App. 633, line15 – 634, line6). Strickland requires that trial counsel be given leeway to 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). 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). The PCR Court found that trial counsel did not call them to testify at trial because his trial strategy was self-defense, and even though the witnesses did say there had been altercations in the past, they also said the two had been friends, and trial counsel felt this might hurt his case, especially because Petitioner was asserting self-

defense. (App. 648).

Petitioner alleged that trial counsel did not call a prime witness, Adrian, who was present at a fight between the Victim and Petitioner. (App. 624, lines19-23). However, Petitioner did not present any witness named Adrian at the PCR hearing. An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Prejudice from trial counsel's failure to interview of call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990). The Applicant'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). Accordingly, Petitioner cannot prove any resulting prejudice from trial counsel not calling Adrian to testify at trial, therefore trial counsel cannot be held ineffective for not calling witness Adrian.

At Petitioner's trial, trial counsel brought out the prior altercations between the Victim and Petitioner in his opening statement, through the testimony of Joseph Kelley Jones, and in his closing argument to the jury. (App. 113, lines1-8; 365-370; 461, line14 – 462, line3). Joseph Jones testified at trial for the Petitioner, concerning the prior altercations between the Petitioner and the Victim, and specifically about the Victim being the aggressor in these prior altercations. (App. 370, lines11-14). There is ample evidence in the record that was presented at trial concerning the prior altercations between Petitioner and the Victim, and the fact that the Victim was the aggressor on some occasions. Even if trial counsel had called the previously discussed witnesses, their testimony would have been cumulative to the

evidence and testimony presented at trial by Petitioner's trial counsel. Trial counsel testified that the additional testimony of Leon Gray, D'Sean Bell, and Joyce Bell would not have changed the outcome of Petitioner's proceeding. (App. 633, line15 – 634, line6).

In assessing an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 539 U.S. 510 (2003). A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland v. Washington, 466 U.S. 668, 689 (1984).

Accordingly, the PCR Court correctly ruled that Petitioner's trial counsel was not ineffective for failing to investigate by interviewing and/or calling witnesses who knew the Victim, had been the aggressor in previous altercations with Petitioner, where Petitioner was claiming self-defense at trial. Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State , 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAELON E. MAY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
September 14, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-04-4101

BRAXTON J. BELL, #310304,

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:

LaNelle DuRant, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 14th Day of September, 2011

Lena Pelishenko
LEGAL ASSISTANT
Office of the Attorney General