STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Dewayne Shawn McKenzie, ... 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

1. Did trial counsel err in not properly challenging the consent order that produced Petitioner's blood work/DNA evidence in the case at the in camera suppression hearing, to the extent that counsel failed to present the testimony of the attorney who signed the consent order in order to establish that the attorney was authorized to sign a consent order, and because counsel failed to preserved for appellate review the trial judge's error in denying Petitioner the opportunity to testify at the in camera suppression hearing in order to explain and verify that the attorney who signed the consent order had no authority to do so?

STATEMENT OF THE CASE

The Darlington County Grand Jury indicted Petitioner at the August 2005 term of General Sessions for second-degree criminal sexual conduct (CSC) with a minor (2005-GS-16-1570) and lewd act upon a child (2005-GS-16-1571). (App.pp.393-96). Cheveron T. Scott, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On March 22, 2006, the Honorable J. Michael Baxley sentenced Petitioner to consecutive terms of twenty (20) years for second-degree CSC with a minor and five (5) years for lewd act upon a child. (App.p.305, line 25 – p.306, line 8).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire represented Petitioner on appeal. (App.pp.309-21). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. McKenzie, Op. No. 2009-UP-061 (S.C. Ct. App. filed January 27, 2009). (App.pp.338-39).

Petitioner filed an application for post-conviction relief (PCR) on February 20, 2009 (2009-CP-16-0130). (App.pp.340-47). A hearing was convened at the Darlington County Courthouse on September 14, 2009. (App.pp.355-83). Petitioner was present and represented by Martin S. Driggers, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Paul M. Burch denied relief in an order dated October 19, 2009. (App.pp.385-91).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (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, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

At trial, trial counsel challenged the admissibility of the DNA evidence that was collected pursuant to a Schmerber[1] order. Trial counsel's initial argument was that Petitioner did not consent to the order. (App.pp.53-55). The State, however, produced a consent order that was signed by both the State and Petitioner's first attorney (Jay Ervin). (App.p.55). After consulting with Petitioner, trial counsel objected and argued the consent was not valid because Petitioner did not believe Ervin was ever his attorney. (App.pp.55-56). The State explained Ervin represented Petitioner when he signed the consent order in December 2003 but that he was relieved as counsel after a hearing in February 2004. The State further explained that, through her conversations with Ervin, "the Schmerber order was always intended to be a consent order." (App.pp.57-58). Trial counsel noted Ervin had told him that he represented Petitioner but that trial counsel wanted to have Petitioner testify on the matter. (App.pp.58-59). The trial judge declined

[1] Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966).

to take testimony from Petitioner, finding it would be self-serving. (App.pp.59-61). The trial judge reviewed the Clerk of Court's file and made a finding that Ervin represented Petitioner at the time he signed the Schmerber order. The trial judge denied the motion to suppress the DNA evidence but noted trial counsel could present Ervin as a witness before the commencement of trial. (App.pp.60-61).

At the PCR hearing, Petitioner argued he did not learn of Ervin's involvement in his case until the February 2004 hearing to relieve Ervin as counsel. (App.p.358). Petitioner argued he had never discussed his case with Ervin. (App.p.359). Petitioner argued he never gave anyone his consent to obtain a blood sample. (App.p.360). Petitioner argued trial counsel did not call Ervin to testify at the pre-trial hearing about the consent order. (App.p.363).

Trial counsel testified that, after Petitioner retained him, he received discovery materials from both the State and one of Petitioner's prior attorneys. (App.pp.371-72). Trial counsel testified he noticed there had been a consent order for the DNA test. (App.p.372). Trial counsel testified, however, that he was "caught off guard" when the State produced the second page of that consent order (containing the signatures). (App.pp.373-74). Trial counsel testified he had spoken to Ervin, who had confirmed he represented Petitioner. (App.p.374). Trial counsel stated he was surprised the trial judge did not allow Petitioner to testify during the suppression hearing about whether Ervin had represented him. (App.p.375). Trial counsel stated he "made a judgment call" in not calling Ervin to testify about the matter because he believed the trial judge would also find this testimony to be self-serving. (App.pp.375-76). Trial counsel stated he did not

object when the DNA evidence was entered because he did not want to prejudice the jury against the defense. (App.p.378).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving trial counsel did not properly challenge the Schmerber order. (App.pp.389-90).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "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 trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

A.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective for not calling Ervin to testify. During the suppression hearing, the trial judge examined the Clerk of Court's file and concluded it was "abundantly clear" that Ervin represented Petitioner when he signed the consent Schmerber order. (App.p.60). Trial counsel testified at the PCR hearing that Ervin told

him that he had previously represented Petitioner. Trial counsel testified that, based upon all of this information, he believed the trial judge would find Ervin's testimony to be self-serving. Trial counsel explained that, while the trial judge did invite him to call Ervin as a witness, he made a strategic decision not to do so. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

Regardless, Petitioner cannot prove he was prejudiced by trial counsel's decision to not call Ervin as a witness at the suppression hearing. Petitioner failed to present Ervin as a witness at the PCR hearing. As Ervin did not testify at the PCR hearing about his representation of Petitioner, any discussion about what impact his testimony would have had at the suppression hearing is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR 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.") (emphasis in original).

B.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective for not further objecting to the trial judge's decision to decline to take Petitioner's testimony. While trial counsel told the trial judge he wished to have Petitioner testify about Ervin's representation, the trial judge declined to take the testimony because he found it would be self-serving. The trial judge also noted

Petitioner was not qualified to address the legal issues surrounding the matter. (App.p.61). Trial counsel admitted he did not further challenge this ruling when the DNA evidence was admitted during trial. Trial counsel, however, explained that he chose not to do so because he believed it would draw the jury's attention and be damaging for his client. Based on the damaging nature of the DNA evidence, this was a valid strategic decision. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

Regardless, Petitioner cannot prove any resulting prejudice. Even without the admission of the DNA and paternity evidence, the State presented a strong case against Petitioner. The victim gave specific testimony about the night Petitioner raped her. The victim testified she was thirteen (13) years old at the time and became pregnant. (App.pp.98-104; p.107). The victim testified the rape occurred in the summer of 2002 and her obstetrician confirmed the date of conception would have been approximately July 14, 2002. (App.p.98; p.156). The victim testified that, once she realized she was pregnant, she implicated Petitioner in her statement to police. (App.pp.108-09). Therefore, there was not a reasonable probability that the trial would have resulted any differently if trial counsel had renewed his objection to the trial judge's decision to not take Petitioner's testimony. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

C.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

October 27, 2010

STATE OF SOUTH CAROLINA
In The Supreme Court

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The Honorable Paul M. Burch, Circuit Court Judge

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, 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 27th day of October, 2010.

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ATTORNEY FOR RESPONDENT