

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2013-000632

ANTONIO MOULTRIE,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court
Petitioner,

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QUESTION PRESENTED

I. Whether the lower court properly held counsel was not ineffective for failing to investigate a footwear impression found at the scene when no evidence was presented at the evidentiary hearing to show what additional evidence would have resulted had counsel further investigated the shoe print and Petitioner was able to argue the shoe print matched the victim's shoe in support of his self-defense claim at trial without having the victim's shoes?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Petitioner was indicted at the May 2008 term of the Charleston County Grand Jury for murder (2008-GS-10-4135). Martha Kent Runey, Esquire and Beattie Butler, Esquire represented Petitioner. Petitioner proceeded to trial and was convicted. Petitioner was sentenced by the Honorable G. Edward Welmaker to confinement for a period of forty-five years.

A Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire, of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Moultrie, Op. No. 2011-UP-543 (S.C. Ct. App. filed Dec. 5, 2011).

Petitioner filed an application for post-conviction relief (PCR) on December 21, 2011. A hearing was held before the Honorable R. Markley Dennis on January 22, 2013. Lesley A. Sasser, Esquire represented Petitioner. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General, represented the Respondent. By order dated March 8, 2013, and filed March 11, 2013, Judge Dennis denied and dismissed Petitioner's post-conviction relief application. Petitioner filed a timely Notice of Appeal and a Petition for Writ of Certiorari. This Return follows.

ARGUMENT

There is probative evidence to support the lower court's ruling that trial counsel was not ineffective for failing to investigate the shoe print evidence presented at trial when no evidence was presented at the evidentiary hearing to show what additional evidence would have resulted had counsel further investigated the shoe evidence and the Petitioner was able to argue the shoe print matched the victim's shoe in support of his self-defense claim at trial without the victim's shoes.

Petitioner asserts counsel should have investigated the footwear impression found in close proximity to a knife recovered at the scene to support the Petitioner's claim that the victim was in possession of the recovered knife and Petitioner stabbed the victim in self-defense. Petitioner also submits counsel was ineffective for failing to require the State to produce the victim's shoes prior to trial. Respondent submits the lower court properly held counsel was not ineffective for failing to investigate a footwear impression found at the scene of the murder. Respondent also submits the issue of whether or not counsel was ineffective for not requiring the State to produce the victim's shoes prior to trial is not preserved for appellate review. 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. 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. 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).

Petitioner was found guilty of the murder of Daniel Jones (the victim). (App. p. 369, lines 10-11). The victim had been "hanging out" with friends in a neighbor's front yard when Petitioner, who lived down the street, walked into the yard and put his hand in the victim's pocket. (App. p. 105, line 3-p. 106, line 23; App. p. 131, lines 3-16). The victim and Petitioner argued for a few minutes (App. p. 131, lines 18-25) until the victim left with Gerald Blake and drove to Blake's home. (App. p. 106, line 24-p. 107, line 24; App. p. 113, lines 2-6). Petitioner testified at trial that he was "angry" and that he kicked the victim's truck and insulted his mother as the victim and Blake drove off because he was "mad." (App. p. 260, lines 1-21). Petitioner then drove to Blake's home and stabbed the victim, who was in the front yard, while Blake was

behind the house. (App. p. 117, line 13-p. 120, line 19). Petitioner claimed self-defense at trial. (App. p. 77, lines 2-6).

At trial, Blake testified that about two minutes after he and the victim arrived back at his home, Petitioner drove into his front yard. (App. p. 114, line 16- p. 115, line 11). He did not see anything in Petitioner's hands when we walked up into the yard. (App. p. 116, lines 7-15). Blake testified the victim was not "upset" at that time. (App. p. 122, lines 16-21). When Blake came back into the front yard, he saw the victim standing at the back of the truck on the passenger side and the Petitioner standing on the front driver's side. (App. p. 118, lines 12-p. 119, line 24). The victim said to Blake: "he lied, he cut me with a box cutter." (App. p. 120, lines 15-22). Blake testified that when he confronted Petitioner, Petitioner said "your boy draw a knife on me." (App. p. 121, lines 15-19).

George Hemmingway, who had been at the neighbor's home with Blake, the victim, and Petitioner, testified that after the victim and Blake drove away, Petitioner said, "I'm going to f--- him up, I'm going to kill him," and then got in his cab and left. (App. p. 132, line 21-p. 133, line 9). Hemmingway testified he followed Petitioner to Blake's house to try to prevent him from starting an argument. (App. p. 133, lines 10-21). Hemmingway also testified that when Petitioner called him later that night, Hemmingway asked him "why he did that," and that Petitioner said "he make him mad." (App. p. 140, line 7-p. 141, line 3).

A forensic investigator, Al Hallman, testified shoe prints were found in the dirt driveway near the passenger side front tire. (App. p. 181, lines 4-19). Hallman also testified that the prints found by the front passenger tire were in a "defensive posture." (App. p. 183, line 17-p. 184 line 12). At trial, defense counsel timely objected to Hallman's expert testimony regarding the shoe prints. (App. p. 185, line 1-p. 192, line 17). The trial court ultimately ruled that the prosecution

was not permitted to elicit testimony regarding shoe print comparisons. (App. p. 192, lines 18-19). However, photographs of the footprints and of Petitioner's shoes had already been already admitted into evidence without objection. (App. p. 192, lines 20-24).

Hemmingway testified that he saw the victim pull out a box cutter earlier in the day, when Petitioner had reached in his pocket. (App. p. 144, lines 4-6; App. p. 146, lines 7-9). Petitioner testified at trial that the victim swung at him with two weapons—a knife in one hand, and a box cutter in the other. (App. p. 263, lines 4-6). Petitioner testified that he first pushed the victim away, but the victim kept swinging, so he pulled out his knife, opened it, and stabbed the victim in self-defense. (App. p. 263, lines 6-10). He further testified that he got in his car and left the scene carrying the knife that he had stabbed the victim with, which he later dropped as he ran. (App. p. 263, line 16-p. 266, line 5).

Investigators discovered a folding knife at the scene, which had blood on the cutting edge of the knife. (App. p. 176, lines 11-25). Matthew Fitts, who was admitted as an expert in DNA and serology, testified that the victim's DNA was the only DNA found on the knife. (App. p. 218, line 4-220, line 20). No other knives were recovered. (App. p. 205, lines 7-12). Additionally, investigators did not find any of the victim's DNA in Petitioner's car. (App. p. 164, line 17-p. 165, line 25; App. p. 170, line 13-23; App. p. 219, lines 12-p. 220 line 4). Detective Donald Watson testified that that Petitioner had no cuts, bruises, open wounds, or scrapes on his hands, fingers, arms or face when he turned himself in the day after the stabbing. (App. p. 152, lines 18-20). Trial counsel argued in closing that the footprints found by the front passenger tire belonged to the victim. (App. p. 319, lines 21-23).

As an initial matter, Respondent submits the issue of whether or not trial counsel was ineffective for failing to require the State to produce the victim's shoes prior to trial was not

preserved for appellate review. The record reflects this issue was not raised by the Applicant in his application and not ruled on by the court in the Order of Dismissal.

It is well settled that an issue that has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised, but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. Respondent submits this issue was neither raised nor ruled on by the lower court. Therefore, whether or not trial counsel was ineffective for failing to require the State to produce the victim's shoes prior to trial was not preserved for appellate review and should not be considered by this court.

Respondent submits there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to investigate the possibility that the victim's shoes matched the footprint impressions taken at the scene. Petitioner failed to carry his burden of proving what additional evidence would have resulted had counsel further investigated the footwear impression found at the scene. Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be

directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial counsel’s investigation of the footwear impression evidence was reasonable based on their understanding from the State that the footwear impression would not be an issue at trial. Counsel testified the footwear impression was an issue that they did not foresee being critical at trial. (App. p. 433, lines 20-24). Counsel testified they were aware of the content of the State’s case from the Petitioner’s preliminary hearing, they knew that the footwear impression did not match the Petitioner’s shoe prints, and they were able to develop a trial strategy based solely on this evidence. (App. p. 472, lines 7-19). Respondent submits based on the counsel’s understanding of the State’s case at the time, their investigation was reasonable and their performance was not deficient. While counsel later learned the State’s trial strategy had changed, we must evaluate counsels’ investigation based on what they thought to be reasonable prior to trial. See Strickland v. Washington, 466 U.S. 668, 680 (1984) (holding “investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight”).

Respondent also submits there is nothing in the record to show that had counsel investigated the victim’s shoe print prior to trial, evidence favorable to the defense would have resulted. Specifically, the Petitioner has presented nothing to indicate the footwear impression found at the scene would actually have matched the victim’s shoe print. It is possible that the footwear impression at the scene did not belong to the victim. Petitioner’s allegation that counsel was ineffective for failing to investigate the shoe print evidence prior to trial is based on mere speculation and there is nothing in the record to indicate the investigation would have led to any different result. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The lower court

properly held “the Applicant has presented no evidence showing what would have resulted had counsel investigated whether the victim’s shoe print matched the footprint impressions taken at the scene.” (App. p. 500).

Respondent also submits no prejudice resulted from counsels’ performance. Even without any proof that the footprint impression at the scene matched the victim’s shoes, Petitioner was able to argue to the jury that the footwear impression was the victim’s, the victim was in possession of a knife, and the Petitioner stabbed the victim in self-defense.

At the evidentiary hearing, counsel testified they presented a self-defense claim to the jury without evidence about the victim’s footprint. (App. p.468, line 15- p. 469, line 10). Counsel also testified, while they would have liked to have the victim’s shoe print, without it they were able to argue to the jury that the footwear impression did not match the Petitioner’s shoe print and must have come from the victim’s shoes. (App. p. 472, lines 22-25).

Counsel testified it was clear from the photos submitted to the jury that the footwear impression found near the front tire on the **passenger side** of the truck did not match the Petitioner’s shoe. (App. p. 438, lines 8-11, p.443, line 2-4, App. p. 449, line 7- App. p.450, line 5). Blake testified at trial that he saw the victim standing at the back **passenger side** of the truck and the Petitioner standing on the driver’s side by the front tire. (App. p. 119, lines 5-24). Hemingway testified he saw the victim carrying a box cutter the day of the incident. (App. p. 144, lines 4-8). Fitts testified the victim’s blood and DNA were found on a folding knife discovered on the scene. (App. p. 221, line 16- App. p.222, line 1).The Petitioner testified he was never on the passenger side of the truck. (App. p. 281, lines 6-8).

During the Petitioner’s closing argument, trial counsel argued to the jury the altercation between the Petitioner and the victim took place on the driver’s side of the victim’s truck and

after the victim was stabbed, he walked around the front of the truck and placed his knife on the front passenger tire where it was found by police. (App. p. 317, line 18- p. 327, line 13). Based on the testimony elicited at trial and trial counsel's closing argument, it is likely that a jury could have concluded the Petitioner was acting in self-defense and the footwear impression found at the scene was that of the victim even without evidence to show the impression found at the scene actually matched the victim's shoe. Respondent submits the Petitioner failed to carry his burden of proving prejudice resulted from counsel's failure to investigate.

Lastly, Petitioner asserts that the facts in this case warrant a presumption of prejudice. Respondent submits the facts of this case do not meet the high standard that is required for prejudice to be presumed.¹ Respondent submits there is probative evidence to support the lower court's finding that the Petitioner simply failed to carry his burden of proving prejudice resulted from counsel's performance.

CONCLUSION

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

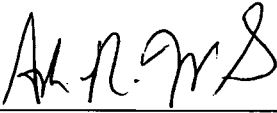
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¹ The Supreme Court recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry ... is not worth the cost." Nance v. Ozmint, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006) (citing Strickland v. Washington, 466 U.S. 668, 692 and U.S. v. Cronic, 466 U.S. 648, 658 (1984)). In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate: 1.) when the defendant is completely denied counsel "at a critical stage of his trial", 2.) if there has been a constructive denial of counsel, and 3.) "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Absent these narrow circumstances of presumed prejudice, defendants must show actual prejudice under Strickland. Id.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 24, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable R. Markley Dennis, Circuit Court Judge

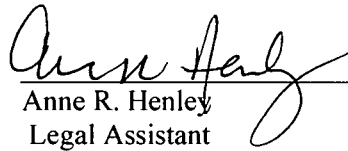
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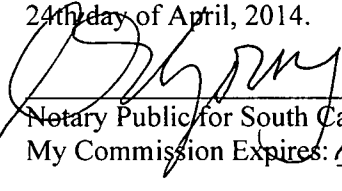
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari To The SC Supreme Court has been served upon opposing counsel, Kathrine Hudgins, this 24th day of April 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
24th day of April, 2014.



Notary Public for South Carolina

(L.S.)

My Commission Expires: 10/28/2014



ALAN WILSON
ATTORNEY GENERAL

April 24, 2014

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APR 24 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: Antonio Moultrie, #332073 v. State of South Carolina
Appellate Case No. 2013-000632

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari to the South Carolina Supreme Court 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: Kathrine Hudgins, Esquire