RECEIVED
APR 25 2014
S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-001692

Perry Keith Strickland,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective for advising Petitioner against testifying at trial?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted at the May 2007 term of the Spartanburg County Grand Jury for murder (06-GS-42-1226) and assault and battery with intent to kill (06-GS-42-1225). The Petitioner was represented by John G. Reckenbeil, Esquire. On July 11, 2007, the Petitioner proceeded to trial and was convicted by a jury of the lesser included charges of voluntary manslaughter and assault and battery of a high and aggravated nature. He was sentenced by the Honorable J. Derham Cole to concurrent sentences of twelve years for voluntary manslaughter and ten years for assault of a high and aggravated nature.

A timely Notice of Appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Strickland, Op. No. 4714 (filed July 21, 2010). A Petition for Rehearing was filed and subsequently denied by the Court on August 27, 2010. Petitioner then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on April 7, 2011. The Remittitur was returned on April 12, 2011.

The Petitioner subsequently filed a PCR application on September 6, 2011. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on April 4, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Kenneth P. Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing, The Honorable J. Mark Hayes, II denied the PCR application by written Order dated July 26, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court properly held that Counsel was not ineffective in advising Petitioner against testifying at trial.

In July 2007, Petitioner proceeded to trial on charges of murder and assault and battery with intent to kill. (App. p. 13). The Court reviewed with Petitioner his right to testify on his own behalf and Petitioner elected to not testify in his defense. (App. p. 288-90; 297-99). At the same time, the Court, the State, and Counsel discussed Petitioner's prior record and whether or not particular convictions would be allowed for impeachment purposes. (App. p. 290-95). Ultimately, Petitioner was convicted of the lesser-included charges of voluntary manslaughter and assault and battery of a high and aggravated nature. (App. p. 366). However, Petitioner alleged that Counsel was ineffective for misadvising Petitioner to not testify on his own behalf at trial.

In a post-conviction relief proceeding, the Petitioner 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 Petitioner 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, 2064, 80 L.Ed.2d 674, 692 (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, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured 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 Petitioner 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.

At the evidentiary hearing, Petitioner testified that he did not believe that he caused any of the injuries that caused the victim's death acting in self-defense. (App. p. 416-7). Petitioner also denied having a knife that evening or ever carrying a knife. (App. p. 421). Petitioner testified that the victim and Huckabee both had knives that night. (App. p. 422, lines 5-6; p. 423, lines 3-5). However, Petitioner testified that he was not able to present his side of the story to the jury because Counsel advised him not to testify at trial. (App. p. 424). Petitioner stated that Counsel advised him that the State would not be able to prove the murder charge, but if Petitioner testified, Petitioner risked having the manslaughter charge presented to the jury and risked having his criminal record being used against him. (App. p. 424). Petitioner testified that in hindsight, he believed he should have testified in his own defense. (App. p. 426). Petitioner

also testified that even if his criminal record was used to impeach him, he would have preferred to testify at trial. (App. p. 433).

Counsel testified that he advised Petitioner to not testify based upon trial strategy. (App. p. 438). Counsel's strategy was to obtain an acquittal on the murder charge on the basis of self-defense. (App. p. 440). Counsel stated that he was concerned that the State would antagonize Petitioner during cross-examination and the Petitioner's "attitude of animosity" going into the decedent's trailer would certainly work against them. (App. p. 438). Counsel testified that he believed the testimony from defense witness Smith would support the claim of self-defense and show that the Petitioner did not introduce a knife into the fight. (App. p. 438). Although the Court ruled that the jury should be presented with the voluntary manslaughter charge as well, Counsel testified that he did believe that Petitioner's testimony would have made that situation worse. (App. p. 441).

Counsel acknowledged that he was concerned about Petitioner's criminal record, in particular, those convictions more than ten years old. (App. p. 445). Petitioner had two false information convictions from 2002 that could have been introduced to show lack of credibility regardless of whether any of his other convictions came in. (App. p. 291). Petitioner also had two grand larceny and two burglary convictions from 1993 that may have been allowed because of when their suspended sentence ended. (App. p. 291). Even without taking the prior convictions outside the ten year limit into account, there were ample reasons for Counsel to advise Petitioner not to testify. Further, although the judge had not ruled on the record regarding those convictions more than ten years old, Counsel testified that he recalled an in chambers meeting in which Judge Cole indicated he was leaning towards allowing those convictions. (App. p. 445-6).

Counsel had sufficient strategic reasons for advising Petitioner not to testify. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992); See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLoughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Furthermore, Petitioner has also failed to show prejudice. Under the second prong of the Strickland test, Counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for [C]ounsel's unprofessional errors, the result of the proceeding would have been different." Cherry 300 S.C. at 117-18, 386 S.C.2d at 625. As the PCR Court noted in its Order dismissing Petitioner's Application for Post-Conviction Relief, Petitioner himself demonstrated during his testimony at the PCR Evidentiary Hearing that he had a "difficult time explaining how the altercation occurred," and that in his explanation, Petitioner had "difficulty overcoming the 'heat of passion' element of voluntary manslaughter. (App. p. 456). The PCR Court properly found that it could not determine a different outcome would have occurred had Counsel not advised Petitioner to refrain from testifying. (App. p. 456).

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

By: _____
ATTORNEYS FOR THE RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

April 25, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Circuit Case No.: 2011-CP-42-3860
Appellate Case No.: 2013-001692

PERRY KEITH STRICKLAND, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Lara M. Caudy, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 25th day of April, 2014.

Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
25th day of April, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/18/2017

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

April 25, 2014

Via Hand Delivery
Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Perry Keith Strickland v. State of South Carolina
Circuit Court Case No: 2011-CP-42-3860
Appellate Case No.: 2013-001692

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Deputy Attorney General

SHW/aam
Enclosures

cc: Lara M. Caudy, Esquire (w/enclosure)