STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-001709

Daniel McNeil, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the post-conviction judge properly find trial counsel was not ineffective for consenting to the introduction of a restraining order against Petitioner where trial counsel articulated a valid trial strategy for desiring introduction of the order, where Petitioner was advised of and insisted upon this strategy, and where no prejudice resulted from introduction of the order?

STATEMENT OF THE CASE

In March 2007, the Darlington County Grand Jury indicted Petitioner for first degree burglary (2007-GS-16-591) and assault and battery of a high and aggravated nature (2007-GS-16-592). (App. pp. 309-12). Tonya Copeland-Little, Esquire ("trial counsel"), represented Petitioner. (App p. 1) Petitioner proceeded to trial before the Honorable John M. Milling and a jury on January 22, 2008. (App p. 1). On January 23, 2008, the jury found Petitioner guilty as indicted. (App p. 222, lines 4-14). Judge Milling sentenced Petitioner to concurrent terms of fifteen (15) years for first degree burglary and eight (8) years for assault and battery of a high and aggravated nature. (App. p. 636).

Petitioner filed a timely notice of appeal, and M. Celia Robinson, Esquire, of the South Carolina Division of Appellate Defense perfected Petitioner's appeal. State v. McNeil, Op. No. 2010-UP-325 (S.C. Ct. App. filed June 23, 2010). The Court of Appeals Affirmed Petitioner's convictions on June 23, 2010. Id.

Petitioner filed an application for post-conviction relief on September 7, 2010. (App. pp. 228-34). W.S. "Trey" Watts, III, Esquire represented Petitioner. (App p. 240). The Honorable J. Michael Baxley ("post-conviction judge") convened an evidentiary hearing into the application at the Darlington County Courthouse on January 10, 2012. (App. pp. 240). The post-conviction judge denied relief in an order dated February 23, 2012, and filed March 6, 2012. (App. pp. 301-08).

ARGUMENT

I. Probative evidence supports the post-conviction judge's finding trial counsel was not ineffective for consenting to the introduction of a restraining order against Petitioner.

Petitioner asserts the post-conviction judge erred by finding trial counsel was not ineffective for consenting to the introduction of a restraining order against Petitioner because trial counsel improperly deferred to Petitioner's wishes at trial. However, probative evidence supports the post-conviction judge's findings that trial counsel based her decision on reasonable trial strategy and that the decision did not prejudice Petitioner. Therefore, Respondent submits the post-conviction judge properly denied Petitioner's application.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this

presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trail counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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." Id. at 117-18, 386 S.E.2d at 625.

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, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

At the evidentiary hearing, Petitioner testified he first learned the restraining order would be used at trial on the day of trial. (App. p. 250, line 15-p. 251, line 1). He further testified he only had a brief conversation with trial counsel about the restraining order at that time. (App. p. 251, lines 21-25). Petitioner also testified he never discussed with trial counsel how the restraining order would impact his trial. (App. p. 252, lines 1-5; 265, lines 6-13; p. 267, lines 18-20).

In contrast, trial counsel testified she had lengthy discussions with Petitioner about the impact the restraining order would have at trial. (App. p. 274, lines 12-14; p. 275, lines 18-23). As a result of those conversations, Petitioner insisted the introduction of the restraining order was beneficial to his case. (App. p. 274, lines 17-18; p. 280,

lines 9-12). Based on Petitioner's assertion the State's key witness was lying, trial counsel testified her trial strategy was to discredit the witness. (App. p. 284, lines 6-20). The introduction of the restraining order, in conjunction with other testimony, showed the witness was untruthful. (App. p. 289, lines 8-15). She further testified she did not believe this strategy was detrimental to Petitioner because the restraining order did not bolster the State's case against Petitioner. (App. p. 289, lines 1-3; p. 291, lines 14-24).

The post-conviction judge properly found trial counsel articulated a valid trial strategy for desiring introduction of the restraining order. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Failure to object to normally inadmissible evidence is not *per se* invalid trial strategy. Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) ("Indeed, it is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland." (citations omitted)). Here, trial counsel believed introduction of the restraining order discredited the State's key witness. Applicant and other witnesses testified the witness still had contact with Petitioner after the issuance of the restraining order. (App. p. 128, line 1-p. 130, line 16; p. 144, line 17-p.145, line 7; p. 145, line 14-p. 149, line 10). This testimony was in stark contrast to the witness' claim she had not had contact with Petitioner since issuance of the restraining order. (App. p. 73, line 18-23). Introduction of the restraining order was necessary to show the witness was untruthful about her interactions with Petitioner leading up to the incident.

Likewise, a restraining order may be issued against person engaged in harassment or stalking. S.C. Code Ann. § 16-3-1750. Harassment and stalking are defined as actions that cause a victim to "suffer mental or emotional distress" or fear death, assault, bodily injury, criminal sexual contact, kidnapping, or damage to property. S.C. Code Ann. § 16-3-1700. The witness here did not behave like a person who is a victim of such actions by Petitioner. Accordingly, the introduction of the restraining order further undermines the witness' credibility by showing she was untruthful when she sought the restraining order. Thus, trial counsel's decision to consent to introduction of the order was in line with her trial strategy to discredit the witness. See Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 562 (4th Cir. 1999) (valid trial strategy to not object to a witness' testimony where attorney believed cross-examination of witness would be more devastating than exclusion).

Furthermore, Petitioner insisted upon this course of action. Although tactical decisions at trial are left to counsel, consultation with a defendant about trial strategy is always a prudent measure. See Abney v. State, 408 S.C. 41, 52, 757 S.E.2d 544, 550 (Ct. App. 2014), reh'g denied (Apr. 24, 2014) ("Here, trial counsel's testimony at the PCR hearing supports the PCR court's finding that trial counsel consulted with Abney in deciding not to request the lesser included offense."). Here, the trial strategy was to challenge the credibility of the State's witnesses. Petitioner understood the introduction of the restraining order was part of that strategy. Although Petitioner claims on appeal trial counsel improperly consented to his wishes in introducing the order, he claimed at the evidentiary hearing he never discussed the tactic.[1] However, the record indicates trial

[1] Although Petitioner claimed trial counsel never explained the impact of the restraining order, the post-conviction judge found this testimony not credible in light of trial counsel's testimony Petitioner insisted

counsel carefully considered the issue before making a tactical decision, with Petitioner's consent, to allow the State to introduce the restraining order. Petitioner cannot now complain of trial counsel's performance when he insisted upon that performance at trial. C.f. Mayo v. State, 347 S.C. 422, 425-26, 556 S.E.2d 380, 382 (2001) (counsel not ineffective where applicant voluntarily injects objectionable material into evidence).

Regardless, the post-conviction judge also properly found overwhelming evidence of Petitioner's guilt precluded a finding of ineffectiveness. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (no reasonable probability the result of the trial would have been different where there is overwhelming evidence of petitioner's guilt). Two witnesses testified Petitioner forced himself into the victim's apartment armed with a knife. (App. p. 25, lines 3-17; p. 69, line10-p.70, line 9). Petitioner admitted to bringing the knife to the victim's apartment. (App. p. 152, line 13-p. 153, line 10). There was damage to the screen door of the victim's apartment consistent with the witnesses' testimony. (App. p. 83, lines 15-17). In light of this overwhelming evidence, trial counsel was correct in her assessment that the restraining order would not bolster the State's case against Petitioner.

Accordingly, the record contains significant probative evidence trial counsel acted reasonably and within professional norms when implementing the trial strategy Petitioner specifically requested. The record also contains significant evidence no prejudice resulted from trial counsel's actions. Accordingly, the post-conviction judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

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upon introduction of the restraining order. See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a post-conviction judge's credibility findings).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

July 14, 2014.

STATE OF SOUTH CAROLINA
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APPEAL FROM DARLINGTON COUNTY
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Appellate Case No.: 2013-001709
Lower Court Case No.: 2010-CP-16-0590

DANIEL McNEIL, Applicant,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for a Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to: **David Alexander, Esquire**

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

This 14th day of July, 2014

JOSHUA L. THOMAS
SC Bar No. 100777
ATTORNEY FOR RESPONDENT

SWORN to before me this 14th day of July, 2014.

Notary Public for South Carolina.
My Commission Expires: May 14, 2024

ALAN WILSON
ATTORNEY GENERAL

July 14, 2014

RECEIVED
JUL 14 2014
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Daniel McNeil v. State of South Carolina**
Appellate Case No: 2013-001709
Lower Court Case No. 2010-CP-16-0590

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies each of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
S.C. Bar # 100777

JLT/jacc
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Victim Services