STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-213543

WILLIAM LARRY CHILDERS, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW.....6

ARGUMENT.....8

CONCLUSION.....14

ISSUES PRESENTED

I. Is there evidence of probative value to support the post-conviction relief court's ruling that Counsel was not ineffective for representing Petitioner despite previously representing a witness, where there was no conflict of interest because any connections between Petitioner's case and any remaining ethical obligations counsel owed to a former client on an unrelated case are too tenuous to create an actual conflict and Petitioner failed to show any actual prejudice from this alleged deficiency?

II. Is there evidence of probative value to support the post-conviction relief court's ruling that Counsel was not ineffective for failing to move for the suppression of Petitioner's boots, where Counsel articulated a valid trial strategy by allowing reference to cumulative evidence to discredit an investigating officer and Petitioner failed to show that the introduction of the boots affected the outcome of the proceeding?

III. Is there evidence of probative value to support the post-conviction relief court's ruling Counsel was not ineffective for failing to prevent Petitioner from mentioning his post-arrest comments to law enforcement while testifying, where Petitioner has failed to establish that his admission to the jury that he asked the police for a lawyer was the result of counsel's inadequate preparation and Petitioner failed to show that his admission affected the outcome of the proceeding?

STATEMENT OF THE CASE

Petitioner was indicted during the December 2010 term of the Kershaw County Grand Jury for murder (2000-GS-28-32806); discharging a firearm into a dwelling (2000-GS-28-32805); and assault and battery with intent to kill (2000-GS-28-32804). Petitioner was represented by W. Glenn Rogers, Jr., Esquire. On September 18-20, 2001, Petitioner proceeded to a jury trial before the Honorable J. Ernest Kinard Jr., where Petitioner was convicted as indicted of murder and discharging a firearm into a dwelling and the lesser included offense of assault and battery of a high and aggravated nature. Judge Kinard sentenced Petitioner to life imprisonment for murder, to a concurrent ten years imprisonment for assault and battery with intent to kill, and to an additional concurrent ten years imprisonment for the lesser included offense of assault and battery of a high and aggravated nature.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf. Following briefing and argument, the South Carolina Court of Appeals affirmed Petitioner's convictions for discharging a firearm into a dwelling and assault and battery of a high and aggravated nature and reversed his murder conviction and remanded for a new trial. State v. Childers, 358 S.C. 614, 621, 595 S.E.2d 872, 876 (Ct. App. 2004). Thereafter, the South Carolina Supreme Court reversed the Court of Appeals and affirmed all of Petitioner's convictions and sentences. State v. Childers, 373 S.C. 367, 374, 645 S.E.2d 233, 236 (S.C. 2007). Petitioner's subsequent Petitioner for Rehearing was denied and the Remittitur was sent on June 7, 2007. Petitioner then sought certiorari to the United States Supreme Court, which was denied on November 13, 2007.

On October 14, 2008, Petitioner filed an application for post-conviction relief. Respondent made its Return and Motion to Dismiss on October 20, 2008, asserting that the

application was untimely because it was filed more than a year after the South Carolina Supreme Court issued its Remittitur. The Honorable L. Casey Manning, acting in his capacity as Chief Administrative Judge of Common Pleas for the Fifth Judicial Circuit Court, issued a Conditional Order of Dismissal, dated November 3, 2008 and filed November 7, 2008, provisionally dismissing the application. Following several filings between the parties in November 2008, Judge Manning issued an Order that a hearing be convened in December 2008 to address the validity of the Conditional Order of Dismissal. A hearing was convened on December 18, 2008, before the Honorable J. Michelle Childs, after which Judge Childs issued an Order denying Respondent's Motion to Dismiss and granting an evidentiary hearing on the merits of Petitioner's application.

An evidentiary hearing into the matter was convened on April 16, 2010, before the Honorable Clifton Newman at the Richland County Courthouse. Petitioner was present at the hearing and was represented by Jeffrey P. Bloom, Esquire. Respondent was represented by Assistant Attorney General Brian T. Petrano of the South Carolina Attorney General's Office. On August 15, 2011, Judge Newman issued an Order of Dismissal, denying Petitioner's application for post-conviction relief. On September 1, 2011, Petitioner filed a Motion to Alter or Amend the judgment pursuant to Rule 59(e), SCRCP. Respondent made its Return on December 5, 2011. On June 1, 2012, Judge Newman held a hearing on Petitioner's motion. On December 3, 2012, Judge Newman denied Petitioner's Motion to Alter of Amend.

Petitioner filed a Petition for Writ of Certiorari on March 12, 2014. This Return 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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his 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, Id.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies 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, supra. 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.

ARGUMENT

I. There is evidence of probative value to support the post-conviction relief court's ruling that Counsel was not ineffective for representing Petitioner despite previously representing a witness, where there was no conflict of interest because any connections between Petitioner's case and any remaining ethical obligations counsel owed to a former client on an unrelated case are too tenuous to create an actual conflict and Petitioner failed to show any actual prejudice from this alleged deficiency.

A defendant who failed to raise an objection to a potential or possible conflict of interest at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to establish a violation of the Sixth Amendment. Cuyler, 446 U.S. 335, 348 (1980); Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 691 (2007); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001); Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). Where an actual conflict of interest existed, a defendant need not show prejudice resulting from that conflict. Cuyler, 466 U.S. at 348-50; Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). "But until a defendant shows that his counsel ***actively represented*** conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Lomax v. State, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008) (quoting Duncan, 281 S.C. at 438, 315 S.E.2d at 811) (emphasis added).

Neither South Carolina nor the United States Supreme Court has held that ethical obligations to a former client on an unrelated case that concluded years prior can create an actual conflict of interest sufficient to relieve a defendant of his need to show prejudice to receive relief. The United States Supreme Court has called into question whether such an interpretation would be a proper. Mickens v. Taylor, 535 U.S. 162, 175 (2002) ("the language of [Cuyler] itself does not clearly establish, or indeed even support, such expansive application."). Noting that Cuyler "stressed the high probability of prejudice arising from multiple concurrent

representation, and the difficulty of proving that prejudice," see 446 U.S. at 348-49, the Court stated that "[n]ot all attorney conflicts present comparable difficulties." Mickens, 535 U.S. at 175.

The current situation clearly fails to present "comparable difficulties" to multiple concurrent representation. Id. Not only is the probability of prejudice here substantially lower—Petitioner and Staples were not competing for better plea deals or accusing one another of committing the same crime—but the *actual* prejudice here is clearly quantifiable: it was nonexistent. Staples was a not a crucial witness for the State—he was not one of the eyewitnesses to the shooting and his testimony was merely cumulative to that of other witnesses. It is unreasonable to suggest, in light of the "overwhelming" evidence against Petitioner,[1] that questioning Staples about his juvenile record would lead to a different outcome at trial. In all likelihood, the outcome would have been the same regardless of whether Staples had testified at all.

Additionally, the South Carolina Supreme Court has held that "[a]n actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." Staggs, 372 S.C. at 551, 643 S.E.2d at 692. There is little reason to believe that this includes duties owed to former clients with entirely unrelated cases—particularly where the former client played as minor of a role as Staples did in Petitioner's trial. However, even if such duties are included, Petitioner has failed to meet his burden in showing that an actual conflict exists. Petitioner references the South Carolina Rules of Professional Conduct ("the Rules") in support of his assertion that counsel still owed Staples a "duty." The Rules, however, whose "purpose is to regulate and guide the legal profession by defining proper ethical conduct," have

[1] See App. p. 976.

no bearing on the constitutionality of a criminal conviction. Langford v. State, 310 S.C. 357, 361, 426 S.E.2d 793, 795 (1993) (emphasis added). A conflict of interests under Rule 1.7 does not constitute a conflict of interests for the purposes of the Sixth Amendment.[2] Id. Nor is likely that these duties can be found in the rules at all. See Mickens, 535 U.S. at 176. The purpose of relieving defendants of the need to show prejudice in these situations is not "to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Id.

As discussed above, where the alleged conflict centers around an unrelated former representation, any connection is too tenuous relieve Petitioner of his need to show prejudice obtain relief. Furthermore, Petitioner failed to show any actual prejudice from this alleged conflict. As a result, the post-conviction relief court should be affirmed.

II. There is evidence of probative value to support the post-conviction relief court's ruling that Counsel was not ineffective for failing to move for the suppression of Petitioner's boots, where Counsel articulated a valid trial strategy by allowing reference to cumulative evidence to discredit an investigating officer and Petitioner failed to show that the introduction of the boots affected the outcome of the proceeding.

Petitioner argues that Counsel rendered ineffective assistance by failing to have evidence obtained from an illegal search suppressed. However, Petitioner's argument here fails on both prongs of the Strickland test. Counsel testified that he did not object to the initial introduction of the boots because he knew the officer was incorrect and wanted to be able to expose that to the jury later. App. p. 891-899. Combined with his later statement that while the boots had some

[2] That being said, there was no conflict here under the Rules, either. Because there was no actual prejudice, there was no "risk that the representation of [Petitioner]" would have been "materially limited by [Counsel's] responsibilities to [Staples]." He was a relatively minor witness who presented cumulative testimony.

value, it was the eye-witness testimony that convicted Petitioner, (See App. p. 898.), Counsel's strategy is obvious: to allow reference to a piece of cumulative evidence in exchange for making one of the investigating officers look either dishonest or incompetent. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)).

Petitioner's argument also fails to meet the prejudice prong of the Strickland test, as there is no reasonable likelihood that the result of the proceeding would have been different absent this alleged deficiency. Regardless of any value the boots had to the State's case, Counsel acknowledged that it was the eye-witness testimony that resulted in Petitioner's conviction. App. p. 898. Additionally, the cigarette butt, (App. p. 672), the 911 call (App. p. 135), and the testimony of witnesses who saw Petitioner hiding near the property under and behind a school bus (App. p. 178) all indicate that Petitioner had been stalking the house prior to walking up and executing the victim, rendering the boots even less meaningful to the State's case or the trial's outcome.

Finally, there is compelling evidence contradicting Petitioner's self-defense claim, and it has little to do with whether the boot prints were admitted or not. Several eye witnesses who *personally knew* Petitioner stated that he simply walked up and shot the victim with no provocation, before anyone could react, and then walked back into the woods. App. p. 264, 312.

As there is probative evidence to support its findings, the post-conviction relief should be affirmed.

III. There is evidence of probative value to support the post-conviction relief court's ruling Counsel was not ineffective for failing to prevent Petitioner from mentioning his post-arrest comments to law enforcement while testifying, where Petitioner has failed to establish that his admission to the jury that he asked the police for a lawyer was the result of counsel's inadequate preparation and Petitioner failed to show that his admission affected the outcome of the proceeding.

Petitioner's final claim is that Counsel failed to prevent him from undermining his own credibility with the jury when he testified that he told the police that he needed to stop talking and get a lawyer. This claim fails as a matter of law. Petitioner notes that the State may not comment on a defendant's exercise of his constitutional rights,[3] and that such comments violate the rule set out in Doyle v. Ohio, 426 U.S. 610 (1976). Here, there is no allegation by Petitioner that the State made any such comment, or even insinuated as much. Petitioner's argument would necessarily *expand* those cases to include statements made by criminal defendants during their own testimony at trial. Such a ruling would allow criminal defendants everywhere the benefit of a new trial simply by testifying that they had invoked their right to counsel while being interrogated by police.

Nor has Petitioner established that Counsel was inadequately prepared for trial. Petitioner points out, correctly, that Counsel admitted to not being "satisfied with the amount of time [he] had" with Petitioner. App. p. 887. However, "[t]he brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008).

Further, as evidence of failure to prepare, Petitioner states that Counsel never instructed him that he should not volunteer that he had exercised his constitutional rights. App. p. 860. The post-conviction relief court found that Petitioner's testimony was not credible, stating that

[3] McFadden v. State, 342 S.C. 637, 640-41, 539 S.E.2d 391, 393 (2000)

"the [Petitioner] himself elected not to work with [Counsel] prior to trial," and that he "assisted [Counsel] only as the case proceeded and presented his 'version' of events only reactively to the testimony of the State's witnesses." App. p. 975. The reasonableness of Counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Strickland, 466 U.S. at 691.

Petitioner's claim for ineffective assistance of counsel also fails on the prejudice prong. First, Petitioner has failed to allege or even support the notion that the outcome of the proceeding would have been different had Counsel adequately prepared him. At best, Petitioner would not have volunteered to the jury that he told investigators he wished to speak to a lawyer. Given the overwhelming evidence against Petitioner, it is unreasonable to believe that such an omission would have changed the outcome of the proceeding. App. p. 976.

Because there is probative evidence to support the post-conviction relief court's findings, its judgment on this issue should be affirmed.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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July 31, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to KershawCounty
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No.2012-213543

WILLIAM CHILDERS, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to the Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same 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

I further certify that all parties required by Rule to be served have been served.

This 31st day of July, 2014.

Megan E. Harrigan

MEGAN E. HARRIGAN
ASSISTANT ATTORNEY GENERAL

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ALAN WILSON
ATTORNEY GENERAL

July 31, 2014

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

Re: William Childers v. State of South Carolina
Appellate Case No. 2012-213543

Dear Mr. Shearouse:

I am enclosing the original and six copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Victim Services