

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Allendale County
Court of Common Pleas
Honorable Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2014-UP-013 (S.C. Ct. App. Filed January 8, 2014)
Appellate Case No. 2014-000675

RODERICK BRADLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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S.C. Supreme Court

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ISSUE PRESENTED

Did the Court of Appeals correctly conclude the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object when the trial judge, during *voir dire*, failed to ask if any member of the jury pool was a rape victim when remand by the Court of Appeals for a ruling by the post-conviction relief court would have been improper and the Petitioner failed to carry his burden of proving prejudice resulted from counsel's performance?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Allendale County Clerk of Court. The Petitioner was indicted at the December 2003 term of the Allendale County Grand Jury for criminal sexual conduct (CSC) with a minor- 2nd degree (2003-GS-03-0209). He was represented by J.D. Bryan, Esquire. On August 25-26, 2004, the Petitioner proceeded to trial, after which he was found guilty. The Honorable Paul M. Burch sentenced the Petitioner to confinement for 11 years.

The Petitioner filed a timely Notice of Appeal and a Motion for New Trial pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure on September 7, 2004. James A. Brown, Jr., Esquire, represented the Petitioner on his post-trial motion. By Order dated April 22, 2005, the South Carolina Court of Appeals held the appeal in abeyance and remanded the case to the trial court to address the Rule 29(b) motion for a new trial. A post-trial hearing was convened before Judge Burch on August 18, 2005. By Order dated October 10, 2005, Judge Burch denied the Petitioner's motion for a new trial and all other post-trial motions.

After full briefing from both sides, the South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Bradley, Op. No. 2007-UP-532 (S.C. Ct. App. Filed November 19, 2007). The Remittitur was issued on December 5, 2007.

The Petitioner filed an application for post-conviction relief on November 12, 2008. The Respondent made its Return on May 12, 2009. The Petitioner amended his application on June 1, 2009. An evidentiary hearing was convened on August 31, 2009 at the Beaufort County Courthouse. The Petitioner was present at the hearing and represented by Michele Mangiaracina, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. By Order dated October 1, 2009, the Honorable Alexander S.

Macaulay denied and dismissed with prejudice the Petitioner's application for post-conviction relief.

The Petitioner filed a timely Notice of Appeal. The Petitioner's Petition for Writ of Certiorari was granted by Order dated September 4, 2012. After briefing and oral argument, the Court of Appeals affirmed the post-conviction relief court's denial of the Petitioner's post-conviction relief application. The Petitioner filed a Petition for Rehearing which was denied on February 27, 2014. The Petitioner filed a Petition for Writ of Certiorari to this Court. This Return follows.

ARGUMENT

The Court of Appeals correctly decided the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object when the trial judge, during *voir dire*, failed to ask if any member of the jury pool was a rape victim when remand of the matter to the post-conviction relief court would have been improper and the Petitioner failed to show that prejudice resulted from counsel's performance.

The issue on appeal at the Court of Appeals was whether the post-conviction relief (PCR) court erred in finding the Petitioner's PCR allegation- whether counsel was ineffective for failing to object when the trial judge failed to ask during *voir dire* if any member of the jury pool was a rape victim- was procedurally barred by S.C. Code Ann. §17-27-20(b). After briefing and oral argument, the Court of Appeals concluded the "PCR Court erred in finding Bradley's PCR allegation of ineffective assistance of counsel was procedurally barred by subsection 17-27-20(b)." The Court went on to find "Bradley's PCR allegation of ineffective assistance of counsel failed on the merits. At the PCT hearing, Bradley chose to rely on the record and presented no evidence of prejudice." (App. 2).

The Petitioner asserts the Court of Appeals erred by finding the Petitioner failed to carry his burden of proving counsel was ineffective for failing to object when the trial judge, during *voir dire*, failed to ask if any member of the jury pool was a rape victim. The Petitioner asserts instead of ruling on the merits of the Petitioner's claim, the Court of Appeals should have remanded the ruling for a decision on the merits by the post-conviction relief court. The Respondent submits the Court of Appeals was correct to rule on the merits of the claim rather than remand the matter to the lower court for a ruling. Remand is improper in this case since the allegation pursued on PCR was fully litigated to the post-conviction relief court and the Petitioner failed to carry his burden of proving counsel's performance was ineffective in this regard.

The record reflects the Petitioner was given the opportunity to fully present his case to support his allegation of ineffective assistance of counsel during the evidentiary hearing. After lengthy argument to the Court about the allegation the following exchange took place between PCR counsel and the Court:

Counsel: And I would like to mention that you know, we are not seeking an acquittal but a new trial by people that we are sure have not been the victim of the same crime that an application is being tried for. Thank you.

Court: All right, you may call your first witness.

Counsel: At this time, I'm not, I'm not calling anyone your Honor.

Court: All right, so you are relying on the record?

Counsel: I am relying on the record, and we believe the state closes. (App. 328:11-23).

After this exchange, additional argument was presented to the Court by both the Petitioner and the State. The Respondent submits the Petitioner was given the opportunity to litigate this allegation in the post-conviction relief and did present this allegation to the Court during an evidentiary hearing, therefore, remand of the matter would be improper. The Petitioner should not be given a second opportunity to re-litigate this claim simply because the PCR court ruled the claim was procedurally barred based on the Petitioner's limited presentation to the Court. The post-conviction relief court ruled on whether the claim was procedurally barred and the Court of Appeals was the proper court to review the PCR court's ruling and decide the merits of the Petitioner's claim.

The Respondent also submits the Court of Appeals correctly found that the Petitioner's claim of ineffective assistance of counsel failed on its merits. For the 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 (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. 115, 117-118, 386 S.E.2d 624, 625 (1989). “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).

The Respondent submits the Petitioner failed to carry his burden of proving counsel’s performance was deficient. An attorney’s performance is not deficient if it is reasonable under professional norms. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989)). Counsel’s performance in this instance was reasonable under professional norms.

The record reflects that during *voir dire*, the potential jurors were asked “Have any of you had close friends, or yourself, or had close relatives, immediate family members, that’s been the victim of a violent crime?”. (App. 36:17-19). No juror responded affirmatively. The Respondent submits trial counsel could not have been expected to request that the Court inquire into whether any of the jurors had been the victim of rape or sexual battery when none of the potential jurors indicated they were the victims of a violent crime. An attorney is never required to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Since we cannot expect trial counsel to be clairvoyant as to facts about the background of jurors that was discovered post-trial, we must evaluate his conduct at the time the alleged ineffectiveness occurred. During *voir dire*, the potential juror’s response to the Court’s question prevented counsel from needing to ask whether any jurors had been the victim of rape or sexual battery. The Respondent submits further, the

Petitioner has presented no evidence or made any assertion that counsel would have exercised a peremptory strike during *voir dire* had he known of the information.

The Respondent also submits that any alleged deficiency by counsel for failing to request further *voir dire* on the issue was cured by counsel's "Motion for a New Trial" pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure. When counsel learned of that two jury members may have been the victim of rape or sexual battery and they had not disclosed that information to the Court during *voir dire*, he requested that the Court grant the Petitioner a new trial. Ultimately, the issue was resolved after a hearing. The Petitioner has failed to show how trial counsel's performance was deficient.

The Respondent submits further the Court of Appeals also correctly found that the Petitioner failed to carry his burden of proving prejudice resulted from counsel's performance. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Id. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. at 695, 104 S. Ct. at 2068-69.

Counsel's failure to request questioning about whether the jurors had been the victim of rape or sexual battery would not have caused the fact finder to have a reasonable doubt respecting the Petitioner's guilt. Whether the Petitioner was entitled to a new trial on the basis of

a statement from one juror who claimed two other jurors disclosed they were victims of rape during deliberation was fully litigated when counsel filed a “Motion for a New Trial”. The trial judge denied the Petitioner’s motion and concluded “This Court has made a finding that neither the affidavit nor the testimony of Juror Grant is credible. Because Juror Grant’s affidavit is not credible, no evidentiary hearing on the alleged concealment was required. Assuming *arguendo* that an evidentiary hearing was required, I conclude as a matter of law, that Juror Whitney did not intentionally conceal information during *voir dire*.” (App. 297). The issue was also reviewed on direct appeal and this Court concluded “Given the court’s limited scope of review, the trial court’s credibility findings, Juror W’s testimony, and the interest in protecting the integrity of the jury deliberations this court is constrained to affirm the trial court’s holding”. (App. 348). Since this issue was reviewed by both the trial judge and this Court on direct appeal and neither Court held the juror’s statement warranted a new trial, it is unlikely trial counsel’s failure to request further questioning during *voir dire* would have warranted the granting of post-conviction relief and a new trial.

The Petitioner asserts prejudice should be presumed when a rape victim is selected to sit on the jury for a criminal sexual conduct case. The Respondent submits the Petitioner has failed to present any case law supporting his claim that this Court should presume prejudice in cases where a juror has been the victim of a crime similar to the crime of the accused. There is no *per se* rule that requires the exclusion of jurors who have been victims (or whose close relatives have been victims) of a crime similar to that with which the defendant is charged. United States v. Fulks, 454 F.3d 410, 433-34 (4th Cir. 2006).

The presence of a rape victim on the jury for a trial in which the defendant is charged with criminal sexual conduct with a minor does not automatically preclude the defendant from

getting a fair trial or impartial jury. A criminal defendant has no right to a trial by any particular jury, by only a right to a trial by a competent and impartial jury. Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (citing State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)).

The Petitioner has presented no evidence to indicate that the jurors alleged to have withheld their prior experience as rape victims were unable to be fair and impartial jurors. Despite at least one of the jury members at the Petitioner's trial being the victim of rape, all jurors on the panels agreed they could be fair and impartial during *voir dire*. After announcing the Petitioner was charged with criminal sexual conduct with a minor- second degree, the Court asked the potential jurors "Any member of the petit jury panel conscious of any interest, any bias, or any prejudice for or against the defendant, if so, please stand." The Court also asked the potential jurors "Can each member of the petit jury panel give the State and the defendant, Roderick Bradley, a fair and impartial trial, if not please stand at this time." (App. 36: 8-16). Neither question received a response from the potential jurors which would indicate the jurors inability to be fair and impartial to both the State and the defendant. This Court should affirm the finding of the Court of Appeals.

CONCLUSION

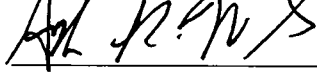
Based on the foregoing, Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

[Signature on the following page.]

Respectfully submitted,

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August 1, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Allendale County
The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2014-000675
Lower Court Case No. 2008-CP-03-0285

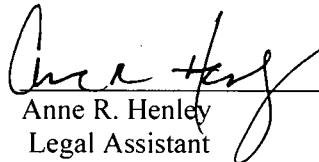
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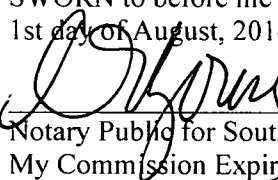
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari to The SC Supreme Court has been mailed to the opposing counsel Kathrine Hudgins, this 1st day of August 2014.


Anne R. Henley
Legal Assistant

SWORN to before me this
1st day of August, 2014.


Notary Public for South Carolina. (L.S.)
My Commission Expires: 10/28/2014