RECEIVED
NOV 13 2014
S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Colleton County
Honorable James R. Barber III, Circuit Court Judge

Appellate Case No. 2014-000922

MELVIN DANIEL,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#100269

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

QUESTION PRESENTED

I. Whether the post-conviction relief court erred by finding trial counsel was ineffective for failing to obtain an expert witness to testify a trial when counsel vigorously cross-examined the State's expert witnesses and attacked the State's medical evidence without the use of an expert witness and the lower court's prejudice finding was based solely on counsel's hindsight testimony?

STATEMENT OF THE CASE

On July 18, 2007, the Respondent proceeded to a trial by jury and was convicted of homicide by child abuse. He was sentenced by the Honorable Perry Buckner to confinement for twenty-years. The Respondent was represented at trial by Harris Beach, Esquire.

On May 10, 2004, EMS was dispatched to an apartment where the victim was found lying unresponsive on the couch with a large hematoma at the top of his forehead. (App. 73, 82). Earlier that day, the victim's mother had left the 14 month old child with the Respondent who had agreed to watch the child while she went to work. (App. 89-90). The victim's mother testified at trial that when she left the victim with the Respondent he was a healthy little boy and did not have any hematomas or contusions on his head. (App. 90). The Respondent provided a statement to police that he and the victim were running around the apartment when the victim tripped over a cable that was crossing the hallway. (App. 104).

At trial, the State presented the testimony of several medical experts who had examined the victim. First, the State presented the testimony of Dr. Joel Cochran. After examining the victim, Dr. Cochran concluded the victim's severe head injury was not consistent with a simple trip and fall. (App. 123-124). The State presented the testimony of Dr. Sarah Schuh who also examined the victim. (App. 134). Dr. Schuh testified the injury sustained by the victim caused significant bleeding above and around the victim's brain in several areas. (App. 137). Dr. Schuh also concluded the victim's injuries were not consistent with a simple trip and fall over a cord onto carpet by a healthy child. (App. 138). The State presented the testimony of Dr. William Vandergrift. Dr. Vandergrift testified he examined the victim and found significant injury to the victim's brain stem. (App. 143, 147).

The State concluded its case by presenting the testimony of Dr. Erin Presnell. Dr. Presnell performed the autopsy on the victim. (App. 156). She testified the final cause of the victim's death was abusive inflicted head trauma. (App. 157, 171). She testified further that severe injuries like the victim's are not typically seen from a running fall onto carpeted floor (App. 160:12-14). Dr. Presnell testified her finding of severe injury as the cause of death was not consistent with tripping over a wire and falling onto carpet. (App. 171:17-25).

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. Kathrine H. Hudgins of the South Carolina Office of Indigent Defense filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Respondent's appeal. State v. Daniel, Op. No. 2010-UP-149 (S.C. Ct. App. filed February 23, 2010). The Remittitur was issued on March 12, 2010.

The Respondent filed an application for post-conviction relief on August 2, 2010. He amended his application on February 18, 2014. The Petitioner filed its Return on November 16, 2010. An evidentiary hearing was convened on February 20, 2014 at the Beaufort County Courthouse. The Respondent was present and represented by Gerald Maree, Esquire. Ashleigh R. Wilson, of the South Carolina Office of the Attorney General represented the Respondent. By Order dated March 31, 2014, the Honorable James R. Barber, III granted the Respondent a new trial on the basis that counsel was ineffective for failing to procure or retain expert testimony favorable to the Respondent. The Petitioner filed a timely Notice of Appeal. This Petition follows.

ARGUMENT

The Petitioner asserts the post-conviction relief court erred by finding trial counsel was ineffective for failing to obtain an expert witness to challenge the State's medical testimony. The Petitioner submits the Respondent failed to carry his burden of proving counsel's performance was deficient and that but for counsel's performance the outcome of the Respondent's trial would have been different. This Court should grant this petition and reverse the lower court's ruling.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 286 S.C. 441, 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). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citing Strickland, 466 U.S. at 690, 104 S.Ct. 2052.)

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. "Surmounting Strickland's high bar is never an easy task." Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011). The Petitioner submits the Respondent did not satisfy either requirement of the Strickland test.

On appeal, "if no probative evidence exists to support the findings, the Court will reverse." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011) (citing Dempsey v. State, 363 S.C. 365, 368-69, 610 S.E.2d 812, 814 (2005)).

A. The lower court erred by finding trial counsel was deficient for failing to call an expert witness to challenge the State's expert testimony when counsel was able to vigorously cross-examine and attack the State's medical evidence without the use of an expert witness.

The lower court erred by finding trial counsel was deficient for failing to call an expert witness to testify for the defense at trial. The Respondent claims counsel should have called an expert witness at trial to attack the testimony of the State's medical expert witnesses. The Petitioner submits this claim is without merit and the Respondent failed to present any evidence showing counsel's failure to call an expert witness was unreasonable.

The Respondent submits trial counsel's failure to call an expert witness at trial did not result in deficient performance since counsel vigorously cross-examined the State's medical experts and attacked the credibility of the State's evidence without the use of an expert witness. The South Carolina Supreme Court has held counsel's failure to procure an expert witness does

not render their representation deficient when counsel vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (holding counsel was not deficient for failing to procure an expert witness to challenge the DNA evidence presented at trial when trial counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).

The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

The Petitioner submits counsel thoroughly cross-examined each of the State's medical experts at trial. The State presented the testimony of Dr. Cochran who examined the victim and testified the victim's injuries were not consistent with a slip and fall over a cord. (App. 123-124, 126). Trial counsel cross-examined Dr. Cochran on retinal hemorrhaging and whether the victim's injuries could have been consistent with multiple falls (App. 126). Dr. Cochran also admitted during counsel's cross-examination that he did not remember the victim having a hematoma on his forehead when he examined him. (App. 125). Lastly, counsel cross-examined Dr. Cochran on the lack of evidence showing the victim's injuries were sustained by a violent shaking. (App. 127).

The State presented the testimony of Dr. Schuh who also examined the victim and testified the victim's injuries were not consistent with a slip and fall. (App. 138). Trial counsel cross-examined Dr. Schuh on the fact that an injury found on the victim's chin was consistent

with being intubated. (App. 139-140). Counsel also elicited testimony from Dr. Schuh about the short time she spent examining the victim and the fact that she was an employee of the State of South Carolina. (App. 140-141).

The State presented the testimony of Dr. William Vandergrift. Dr. Vandergrift examined the victim and found significant brain dysfunction. (App. 144). On cross-examination by trial counsel, Dr. Vandergrift admitted he did not remember the victim having a hematoma on his head when he initially saw the victim. (App. 151). Dr. Vandergrift also testified that if the victim had fallen, the hematoma on the victim's forehead could indicate where the victim's injury occurred. (App. 151).

The State presented the testimony of Dr. Erin Presnell. Dr. Presnell was the forensic pathologist who did the victim's autopsy. (App. 156). Dr. Presnell testified the final cause of the victim's death was abusive inflicted head trauma. (App. 171). Dr. Presnell also testified that the victim's severe injuries were not consistent with tripping over a wire and falling on a carpet. (App. 171). On cross-examination by defense counsel, Dr. Presnell conceded that "there are falls from certain distances that can do internal damage." (App. 172:22-25). She also mentioned articles and medical literature to support the proposition that single head trauma can result from short falls. (App. 175). Counsel also cross-examined Dr. Presnell on whether multiple falls could produce a cumulative injury and how fast symptoms of this type of injury would appear. (App. 173-176).

The record reflects trial counsel conducted medical research, reviewed medical literature, spoke to a medical doctor, and reviewed the victim's medical records to find information that would support the Respondent's version of events. (App. 378:16-24, 379:2-6, 380:5-8, 381:4-12, 384:14-385:7, 389:11-25, 406:5-13). The Petitioner submits trial counsel conducted extensive

investigative research on the injuries sustained by the victim and was well prepared to cross-examine the State's medical experts on their findings.

Based on the testimony trial counsel elicited from the State's expert witnesses on cross-examination, counsel was also able to further attack the State's medical evidence during his closing argument. During closing, trial counsel argued the following based on the testimony of the State's medical experts: the medical experts were hired by the State to bolster the State's evidence, Dr. Cochran did not recall the victim or the victim's injuries, Dr. Shuh was a hired gun whose conclusions were not very extensive and left room for reasonable doubt, Dr. Vandergrift testified it would take 24 hours for the victim's injuries to manifest and the victim was not in the hands of the Respondent during the previous 24 hour period, and the experts disagreed on whether or not the victim's injuries would manifest immediately. (App. 237-251).

While counsel could have retained a medical expert to testify at trial, counsel should not be held deficient for simply choosing an alternative means to challenge the State's medical evidence. In this case, it is well within the bounds of reasonableness, for this Court to conclude that trial counsel could follow a strategy that did not require the use of experts. See Harrington v. Richter, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011) (recognizing the viability of cross-examination in lieu of an independent expert and that there is no right to an equal and appropriate expert to the prosecution expert).

The lower court erred because its deficiency finding was not based on a standard of reasonableness, but rather, based on the fact that the Respondent simply presented a plausible alternative method to challenge the State's medical evidence during his post-conviction relief proceeding. The relevant question is not whether counsel could have hired an expert witness, but rather whether the alternative means to challenge the State's evidence employed by counsel was

reasonable. See Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995) (finding the presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense). Trial counsel's failure to procure an expert witness did not render his representation deficient when counsel vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. The Petitioner submits the Respondent failed to carry his burden of proving counsel's failure to obtain an expert witness was unreasonable under professional norms.

B. The lower court erred by finding trial counsel's performance prejudiced the Respondent when the lower court's finding was based on hindsight and it is unlikely the incredible testimony of the expert witness presented by the Respondent at the evidentiary hearing would have affected the outcome of the Respondent's trial.

The lower court erred by finding counsel's failure to obtain an expert prejudiced the Applicant's defense. The lower court found counsel's deficiency "prejudiced the Applicant's defense in the following particulars: A. Trial counsel testified that the testimony given by Dr. Mark Shuman would have assisted the defense in preparation of the testimony of the State's medical experts at trial; B. Trial counsel testified that the testimony given by Dr. Mark Shuman would have assisted the defense in mitigating the testimony of the State's medical experts at trial." (App. 498-499). The Petitioner submits the lower court erred by relying solely on trial counsel's hindsight testimony to support its finding of prejudice.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). "After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking

whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." Harrington v. Richter, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011).

It is clear from the record that at the time of trial, counsel was unable to locate an expert witness to advance the defense's theory of the case and counsel felt he could adequately challenge the State's medical evidence without the use of an expert. Counsel stated at the evidentiary hearing that at the time of trial he felt he was able to adequately challenge the testimony of the State's experts without the use of an expert witness. (App. 412:9-12). The Petitioner submits the lower court erred in finding prejudice solely on the basis of counsel's hindsight testimony.

The Petitioner submits the Respondent also failed to carry his burden of proving that there was reasonable probability Dr. Mark Shuman's testimony would have affected the outcome of his trial proceeding. In order to prove counsel's performance was ineffective, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694 (1984). 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. Id. at 693. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. 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.

The Petitioner submits that Dr. Shuman's testimony, if presented by trial counsel, would not have affected the outcome of the Respondent's trial. At the evidentiary hearing, the Respondent presented the testimony of Dr. Mark Shuman, a forensic pathologist from Miami, Florida. Dr. Shuman testified he did not agree with Dr. Presnell's conclusion that the victim's injuries could not be sustained from a simple trip and fall. (App. 441:15-21). Dr. Shuman testified further that he believed to a reasonable degree of medical certainty that the victim's death was accidental. (App. 446:25-447:2). The Petitioner notes the lower court made no findings regarding the credibility or believability of Dr. Shuman's testimony.

The Petitioner submits the incredible basis for Dr. Shuman's testimony makes it unlikely his testimony would have resulted in a favorable verdict for the Respondent. The theme of Dr. Shuman's testimony at the evidentiary hearing was essentially "[s]ince everything fits, that's what happened." (App. 454:6-14). During his testimony, Dr. Shuman repeatedly stated that one of the key bases for his conclusion that the victim's injuries were accidental and not abusive was the fact that the Respondent's story of the victim falling over a cord "fit" the injuries. After reviewing the Respondent's statement to police and concluding both were "credible" and "plausible" solely based on his review of the statement, Dr. Shuman testified his explanation differed from that of Dr. Presnell because he was "taking into account and not discounting his [the Respondent's] story because his story is plausible and that's what he said happened from the beginning before the child even was really –they didn't even know how badly injured the child was at the time when he first told the story… knowing that short falls like this can cause this and that it fits. Since everything fits, that's what happened." (App. 445:9-12, 454:6-14).

The Petitioner submits Dr. Shuman's testimony and conclusions were supported by very little medical knowledge or independent scientific research. His conclusions were also always

expressed in correlation to the Respondent's statement as opposed to any scientific research or medical experience. While it is possible Dr. Shuman's conclusions could have supported the Respondent's defense, the credibility of his testimony and conclusions would likely have been lessened in the eyes of the jury because his conclusions were based mainly on the fact that they "fit" with the Respondent's version of the facts. It is also possible the presentation of Dr. Shuman's testimony at trial would have opened up this potential defense witness to a level of cross-examination which could have reflected poorly on the Respondent at trial.

The Petitioner submits the lower court erred in finding counsel's failure to obtain an expert witness affected the outcome of the Respondent's trial. The Respondent failed to carry his burden of showing that had counsel presented the testimony of Dr. Shuman there was a reasonable probability that the outcome of the Respondent's trial would have been different. The Petitioner submits the Respondent failed to surmount Strickland's "high bar", therefore, this Court should grant this petition and reverse the lower court's granting of a new trial.

CONCLUSION

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

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: Ash R. Wilson
Ashleigh R. Wilson

November 13, 2014

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County

The Honorable James R. Barber, III, Circuit Court Judge

MELVIN DANIEL

Respondent,

vs.

STATE OF SOUTH CAROLINA

Petitioner.

PROOF OF SERVICE

I, Anne R. Henley, certify that I have served the Petition for Writ of Certiorari and Appendix on Appellant by delivering two copies of the same, addressed to:

Robert Dudek
PO Box 11589
Columbia, SC 29211

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

This 14th day of November, 2014

Anne R. Henley
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737