

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 4 2014

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2014-000176

Lewis E. Pipher, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

 I. Probative evidence supports the post-conviction relief judge’s finding
 trial counsel was not ineffective in failing to cross-examine witnesses
 regarding the time of the burglary3

CONCLUSION.....7

QUESTION PRESENTED

Did the post-conviction relief judge properly find trial counsel did not provide ineffective representation where Petitioner failed to demonstrate a further cross-examination of a witness would have successfully proven Petitioner burglarized the victim's home during the daylight hours?

STATEMENT OF THE CASE

In November 2009, the Horry County Grand Jury indicted Applicant for first degree burglary. (App. pp. 456-57) Bobby G. Frederick, Esquire, (“trial counsel”) represented Applicant. (App. p. 2). On June 15, 2010, Applicant proceeded to trial before the Honorable Larry B. Hyman Jr. and a jury. (App. p. 1). Judge Hyman directed a verdict as to the first degree burglary indictment and submitted the lesser included offenses of second and third degree burglary to the jury. (App. p. 219, lines 7-14; p. 221, lines 20-22). The jury found Applicant guilty of second degree burglary. (App. p. 368, lines 19-23). Judge Hyman sentenced Applicant to fifteen (15) years imprisonment, suspended upon the service of nine (9) years of incarceration and three (3) years of probation. (App. p. 392, line 21-p.393, line 1).

Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected Petitioner’s direct appeal, and the South Carolina Court of Appeals affirmed Applicant’s conviction on July 18, 2012. State v. Pipher, 2012-UP-424 (S.C. Ct. App. filed July 18, 2012).

Petitioner filed an application for post-conviction relief on August 20, 2012. (App. pp. 395-408). Jarrod M. McPherson, Esquire represented Petitioner. (App. p. 414). The Honorable Steven H. John (“the post-conviction relief judge”) convened an evidentiary hearing at the Horry County Courthouse on December 16, 2013. (App. p. 414). The post-conviction relief judge denied relief in an order filed January 10, 2014. (App. pp. 447-455).

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective in failing to cross-examine witnesses regarding the time of the burglary.

Petitioner asserts the post-conviction relief judge erred in finding Petitioner failed to carry his burden of proving trial counsel ineffective for failing to cross-examine certain witnesses regarding the time of the burglary. However, probative evidence supports the post-conviction relief judge's finding. Therefore, Respondent submits the post-conviction relief judge properly denied relief.

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 trial 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)).

Petitioner argues trial counsel could have further cross-examined a witness¹ about the actual time of the burglary. However, Petitioner entirely fails to present any evidence of what information further examination would have yielded. At the evidentiary hearing, he presented no evidence of the actual time of sunset the day of the burglary. Petitioner believes a cross-examination of the witness would have determined if she could see his face during the burglary (Pet. for Writ of Cert. p. 7), but he did not present the witness at the evidentiary hearing to ask the question of her. Because this information was not

¹ In his "Issues Presented," Petitioner indicates trial counsel was ineffective for failing to cross-examine two witnesses, Ms. Eolder and Officer Crews. (Pet. for Writ of Cert. p. 2) However, in his argument section, Petitioner only discusses what cross-examination should have been conducted of Ms. Eolder; he does not postulate how the cross-examination of Officer Crews was deficient. (Pet. for Writ of Cert. p. 7). Accordingly, Respondent submits any complaints about the conduct of Officer Crews's cross-examination have been abandoned. State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (conclusory arguments deemed abandoned (citing Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999))). Regardless, the above analysis regarding Petitioner's failure to carry his burden is equally applicable to either witness.

presented at the evidentiary hearing, the post-conviction relief judge could not and this Court cannot speculate as to how the witness would have responded to further cross-examination. Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) (Court will not “speculate whether a ‘better’ cross examination would have helped” a defendant’s case). Instead, the only information before the post-conviction relief judge was the witness’s trial testimony. There, she clearly indicates she witnessed the burglary during the nighttime. She recalled the burglary occurred between 9:00 PM and 9:30 PM. (App. p. 145, lines 23-25). She was blinded by truck lights, indicating it was otherwise dark outside. (App. p. 146, lines 2-3). She saw a male figure and heard talking and noises, but did see any further details – again indicating it was dark outside. (App. p. 146, lines 11-21; p. 147, lines 12-12-15). Based on the witness’s trial testimony, the post-conviction judge properly found it was unlikely further cross-examination would have caused her to admit it was daylight when she witnessed the burglary.

Furthermore, Petitioner presented no collateral evidence indicating it was daylight at the time the witness observed the burglary. He presented no official records of sunrise and sunset. He presented no records to corroborate the actual time of the 911 call to disprove the witness’s testimony. In short, Petitioner presented no evidence to show trial counsel could have successfully elicited testimony from any witness to prove the burglary occurred during the daylight. Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) (speculation about what a witness may have testified to is insufficient to prove prejudice (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995))); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing

in order to establish prejudice from the witness' failure to testify at trial.” (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover, supra; Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Jackson, supra). Accordingly, the post-conviction relief judge properly found Petitioner failed to meet his burden of showing trial counsel ineffective for failing to cross-examine witnesses.

The record contains no evidence, aside from Petitioner’s self-serving statements, to show the burglary occurred during daylight. Because of this paucity of evidence, the post-conviction relief judge did not err in denying the application for post-conviction relief.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

December 4, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable Steven H. John, Circuit Court Judge

LEWIS E. PIPHER,

Petitioner,

v.

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**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Lanelle C. Durant
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 4th day of December, 2014


NORMA BIGBEE
LEGAL ASSISTANT



RECEIVED

DEC 4 2014

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

December 4, 2014

VIA HAND DELIVERY

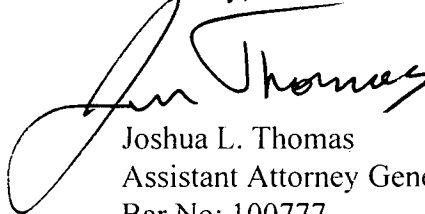
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Lewis E. Pipher v. State of South Carolina
Appellate Case No: 2014-000176

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Lanelle C. Durant, Esquire (2 copies)