



ALAN WILSON
ATTORNEY GENERAL

March 5, 2015

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MAR - 5 2015

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

S.C. Supreme Court

RE: Rodney Alexander Simmons v. State of South Carolina
Lower Court Case No: 2012-CP-42-0106
Appellate Case No. 2014-000676

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,

Suzanne H. White
Assistant Deputy Attorney General
SC Bar No. 78225

SHW/ah
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-000676

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S.C. Supreme Court

Rodney Alexander Simmons, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the lower court properly rule that Counsel was not ineffective for failing to object when Petitioner was impeached with a prior conviction, when Petitioner opened the door to the impeachment during his testimony?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Petitioner at the August 2008 term of General Sessions for criminal sexual conduct with a minor – 2nd degree (08-GS-42-4629). The Petitioner was represented by Richard H. Whelchel, Esquire. On November 30, 2010, the Petitioner proceeded to trial by jury and was convicted as indicted. The Honorable J. Derham Cole sentenced the Petitioner to confinement for a period of eighteen (18) years.

A timely Notice of Appeal was filed on behalf of the Petitioner. However, in an affidavit dated October 5, 2011, the Petitioner indicated his desire to withdraw the appeal. The Order of Dismissal and Remittitur were issued October 13, 2011.

This matter comes before this court by way of an application for post-conviction relief filed on January 10, 2012. The Respondent made its Return on or about August 24, 2012. An evidentiary hearing into the matter was convened on November 14, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Mark Nowell, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Following an evidentiary hearing, the Honorable Robin B. Stilwell denied the application by written Order dated March 5, 2014. A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **The lower court properly ruled that Counsel was not ineffective for failing to object when Petitioner was impeached with a prior conviction, when Petitioner opened the door to the impeachment during his testimony.**

On November 30, 2010, following a trial by jury, Petitioner was found guilty of criminal sexual conduct with a minor – 2nd degree. (App. p. 249-250). Petitioner was sentenced to serve a term of eighteen years in the South Carolina Department of Corrections. (App. p. 253). At the PCR hearing, Petitioner alleged he was prejudiced because Counsel failed to object to improper impeachment of Petitioner by the Solicitor with a prior conviction.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured 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 Petitioner 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

The impeachment issue arose when during the trial, Counsel asked Petitioner if he assaulted the victim in the victim's home during the summer of 2005. (App. p. 185, lines 17-18). Instead of answering Counsel's question directly with a yes or no answer, Petitioner's response was, "I want to say that I've never in my life assaulted anyone's kid." (App. p. 185, lines 19-20). As a result, during cross-examination, the Assistant Solicitor specifically asked Petitioner if, although he earlier claimed he had never assaulted anyone's child, he had been "convicted of assaulting a female." (App. p. 193, lines 21-25). Petitioner answered affirmatively and the questioning moved on to another topic. (App. p. 194, line 2). The only other mention of the assault on a female was during closing arguments, when the Assistant Solicitor pointed out the Petitioner's inconsistent statements when he said he had never assaulted anyone's child, but yet had been convicted of assaulting a female. (App. p. 229, lines 22-25).

Petitioner testified that he wanted to take the stand on his behalf and testify, but was advised by Counsel that the consequences included the State bringing in any prior record and

losing the ability to make the last argument. (App. p. 290-291). Petitioner testified that he wanted to take the risk. Petitioner testified that there was a discussion on the record regarding his prior assault on a female charge and the State indicated they would not mention it, but the State ended up impeaching him with a larceny, breaking and entering, and the charge of assaulting of female. (App. p. 292, lines 13-18; p. 293, lines 21-25; p. 294, lines 1-4). However, Petitioner also acknowledged that it was possible that he opened the door to that charge because of the references to his good character. (App. p. 295, lines 5-12). Petitioner testified that Counsel never objected to the improper impeachment of Petitioner's character or the State's mention of that charge in their closing argument. (App. p. 298, lines 1-8).

Counsel testified that he did not object at the time of the impeachment or during closing because he did not want to call any more attention to the assault charge. (App. p. 321, lines 10-14; p. 326, lines 10-12). Furthermore, Counsel testified that he did believe the State would argue that the impeachment of Petitioner was proper based upon Petitioner's testimony which opened the door, and Counsel wanted to move past that. (App. p. 326, lines 1-8).

The lower court ruled that Counsel's testimony was more credible than the testimony of Petitioner. (App. p. 337). The court also ruled that Counsel's failure to object to the questioning of the Petitioner regarding his prior conviction of assaulting a female was not deficient and would not have materially affected the outcome of the trial. (App. p. 338). The court found that the Petitioner's testimony on direct examination opened the door for the objectionable question, and it was a reasonable strategic decision by Counsel that an objection would simply draw more attention to the conviction. (App. p. 338).

This Court has held that once a defendant presents evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor is allowed to cross-

examine the defendant as to particular bad acts or conduct, including using extrinsic evidence of prior convictions. State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008). When Petitioner chose to answer Counsel's question regarding whether or not he assaulted the victim with the unresponsive answer of, "I've never in my life assaulted anyone's kid," Petitioner placed his character at issue, opening the door for the solicitor to impeach Petitioner with his prior assault conviction. Further, Counsel noted that he strategically chose to not object to the use of Petitioner's prior conviction because it would draw more attention to the charge and raise more questions in the mind of the jury. See Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." (citing Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992))).

There is probative evidence to support the lower court's ruling and this denial of post-conviction relief should be affirmed.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

By: 
ATTORNEYS FOR THE RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

March 5, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge
Appellate Case No. 2014-000676

RODNEY ALEXANDER SIMMONS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **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:

Lara M. Caudy, Esquire
SC Commission of Indigent Defense - Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 5th day of March, 2015



ASHLEY HAWORTH
LEGAL ASSISTANT