

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable William H. Seals Jr., Circuit Court Judge

Appellate Case No. 2013-002667

Donnell McFadden, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the post-conviction relief judge properly find appellate counsel was not ineffective in failing to argue the trial judge erred in denying a Batson motion where he would not have been successful on appeal because the State offered a racially neutral explanation for striking a potential juror and Petitioner failed to present any evidence to rebut this explanation.

STATEMENT OF THE CASE

In October 2008, the Florence County Grand Jury indicted Petitioner for distribution of cocaine base. (App. p. 244-45). On April 14, 2009, Petitioner proceeded to trial before the Honorable Thomas A. Russo (“the trial judge”) and a jury. (App. p. 1). Scott P. Floyd, Esquire (“trial counsel”), represented Petitioner. (App. p. 1). John C. Jepertinger (“the solicitor”) represented the State. (App. p. 1). On April 15, 2009, the jury found Petitioner guilty as indicted. (App. p. 158, line 20-p. 159, line 2). The trial judge sentenced Petitioner to twenty-two (22) years incarceration. (App. p. 172, lines 17-21).

Petitioner filed a timely notice of appeal, and Tricia A. Blanchette, Esquire (“appellate counsel”) perfected the appeal. State v. McFadden, 2012-UP-28 (S.C. Ct. App. filed Jan. 25, 2012). On January 25, 2012, the South Carolina Court of Appeals affirmed Petitioner’s conviction. Id.

Petitioner filed an application for post-conviction relief on July 10, 2012. (App. p. 174). Daryl J. Corbin, Esquire, represented Petitioner. (App. p. 194). The Honorable William H. Seals Jr. (“the post-conviction relief judge”) convened a hearing on the application on October 10, 2013. (App. p. 194). The post-conviction relief judge denied relief in an order filed December 11, 2013. (App. p. 233).

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding appellate counsel was not ineffective in failing to challenge the trial judge's denial of a Batson motion.

Petitioner asserts the post-conviction relief judge erred by finding appellate counsel was not ineffective, arguing he would have been successful on direct appeal if appellate counsel had briefed a Batson¹ issue. Specifically, he alleges the solicitor did not offer a plausible race neutral explanation for striking a single² juror, Ms. Simmons. However, Petitioner presented no evidence to rebut the solicitor's justification. Without more than mere conjecture about the solicitor's motivations, Applicant has not shown he would have been successful on appeal had appellate counsel briefed the issue. Therefore, the record supports the post-conviction relief judge's finding appellate counsel was not ineffective.

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 applicant alleges ineffective assistance of counsel as a ground for relief, he 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)).

¹ Baston v. Kentucky, 476 U.S. 79 (1986).

² Petitioner has not raised any issues regarding the strikes of the remaining jurors, effectively abandoning any challenge to the solicitor's use of strikes on those jurors. See Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 294-95, 278 S.E.2d 607, 612 (1981) ("Other exceptions were raised but since they were not argued in the briefs, they are deemed to have been abandoned for purposes of this appeal." (citations omitted)).

The proper measure of performance is whether counsel 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 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).

Concerning allegations of ineffective assistance of appellate counsel, the applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. 535, 537, 397 S.E.2d 523, 526 (1990); Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the Court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal.” Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Furthermore, the applicant must prove prejudice by showing “there is a reasonable probability he would have prevailed on appeal.” Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

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)).

This Court has set forth the following procedure when a party makes a Batson objection to a jury strike:

After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment.

State v. Ford, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999). The second step of the process, requiring a race-neutral explanation for the strike, “does not demand an explanation that is persuasive or even plausible.” State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006) (quoting Purkett v. Elem, 514 U.S. 765 (1995)). At step two, “the proponent of the strike does not carry ‘any burden of presenting reasonably specific, legitimate explanations for the strikes.’” Id. (quoting State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). “Therefore, ‘[u]nless a discriminatory intent is inherent’ in the explanation provided by the proponent of the strike, ‘the reason offered will be deemed race neutral’ and the trial court must proceed to the third step of the Batson process[,]” and require the moving party to prove pretext. Id. (quoting Purkett, 514 U.S. at 768). Whether the justification was merely pre-textual “must be determined by examining the totality of the facts and circumstances in the record surrounding the strike.” Ford, 334 S.C. at 65, 512 S.E.2d at 503. This Court gives great deference to the trial judge's findings regarding pre-text because these findings “rest largely on his evaluation of demeanor and credibility[.]” Id.; see also State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (“Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an ‘evaluation of the [attorney’s] mind lies peculiarly within a trial judge’s province.’” (quoting Hernandez v. New York, 500 U.S. 352 (1991))).

Here, Petitioner must show the trial judge erred in finding the solicitor struck Simmons for a race neutral reason. He simply cannot. The solicitor posited that he struck Simmons because she lived in the same town, Lake City, as Petitioner. (App. p. 25, lines 3-20). The trial judge also noted trial counsel is a resident of the same town. (App. p. 26, line 25-p. 27, line 5). The trial judge properly accepted the solicitor's explanation as race neutral because our court of appeals has previously held the area where a person lives constitutes a race neutral justification for striking a juror. See Arthur v. Sexton Dental Clinic, 368 S.C. 326, 336, 628 S.E.2d 894, 899-900 (Ct. App. 2006) ("Respondents struck one potential juror due to the residential area where he lived."). Numerous other courts across the country have also determined living in the same area as the defendant or the crime³ are sufficient explanations for exercising strikes in a race neutral manner. See, e.g., Winters v. State, 673 So. 2d 786, 790 (Ala. Crim. App. 1995) ("The Alabama Supreme Court has held that the fact that a veniremember lived near the defendant is a race-neutral reason under Batson." (citations omitted)); Crawford v. State, 470 S.E.2d 323, 325 (Ga. Ct. App. 1996) ("the juror lived in the same neighborhood on the very next street down from the incident"); People v. Nunn, 652 N.E.2d 1146, 1149 (Ill. App. Ct. 1995) ("venirepersons lived in the same general vicinity as the defendants"); State v. Ellis, 205 P.3d 791 (Kan. Ct. App. 2009) ("The State contended that it struck juror Q.T. because he lived "within a matter of blocks" of the last address the prosecution had for Ellis, and the juror lived in the neighborhood of where the incident took place."); State v. Heard, 40,284-KA, p. 9 (La. App. 2 Cir. 12/14/05), 917 So. 2d 658, 665 ("The concern that a prospective juror living near a defendant or a

³ The drug distribution in this case occurred in Lake City. (App. p. 69, lines 5-11).

defendant's family may consciously or unconsciously affect his deliberations, is a valid reason for excluding him from jury duty.”); Taitano v. Com., 358 S.E.2d 590, 593 (Va. Ct. 1987) (“With respect to each of the jurors struck, the Commonwealth attorney stated that he was concerned because they lived near the defendant or near the scene of the crime, or in areas of ‘high crime’ generally.”). Thus, the burden shifted to Petitioner to persuade the trial judge the solicitor’s reasoning was merely pre-text for racially driven motives.

Petitioner’s only argument for why these strikes were pre-textual is that Simmons indicated she had no prior relationship with Petitioner or trial counsel.⁴ The mere fact Simmons did not personally know Petitioner does not invalidate the solicitor’s concerns about the fact they were from the same area. The trial judge even noted Lake City is a small community, (App. p. 27, lines 1-2), so it was reasonable for the trial judge to accept the solicitor’s desire to avoid any bias or prejudice based on community ties.⁵ See Heard, 917 So. 2d at 665 (noting that “a prospective juror living near a defendant [...] may consciously or unconsciously affect his deliberations”). Although Simmons may not have been disqualified, the solicitor was still entitled to strike her based on this concern.

⁴ Respondent notes trial counsel also argued the State sat a white juror who also lived in Lake City. (App. p. 26, lines 1-3). However, Petitioner does not argue in his petition the solicitor sat a similarly situated juror, he only argues the solicitor’s explanation for striking Simmons is fundamentally implausible. (Pet. for Writ of Cert. p. 7). Accordingly, he has abandoned any argument regarding seating of similarly situated jurors. Todd, 276 S.C. at 294-95, 278 S.E.2d at 612 (trial objections not raised in initial brief are deemed abandoned). Regardless, Respondent submits the solicitor’s reason for sitting the similarly situated juror – that two remaining strikes were reserved for jurors who indicated a personal relationship with trial counsel – is “a clear, reasonably specific or legitimate reason” for striking Simmons that is not “the same as if no reason was given[.]” State v. Hicks, 330 S.C. 207, 212, 499 S.E.2d 209, 212 (1998).

⁵ Respondent notes these community ties could cut both ways. Simmons could be sympathetic towards Petitioner because they were from the same community. On the other hand, she could also be prejudiced against Petitioner because his lawless behavior tarnished the community reputation.

See Hernandez, 500 U.S. at 375 (“Batson does not require that a prosecutor justify a jury strike at the level of a for-cause challenge.”).

Furthermore, the record indicates the solicitor did not strike every black juror presented. See Ford, 334 S.C. at 65, 512 S.E.2d at 503 (“The composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination.”). Instead, he sat or attempted to seat a black male (App. p. 12, lines 19-22) and a black female (App. p. 13, lines 17-20) before striking Simmons. Furthermore, the solicitor sat a black female (App. p. 16, lines 17-20) and a black male (App. p. 16, line 25-p. 17, line 3) while reserving strikes for the two jurors who indicated a personal relationship with trial counsel. If the solicitor were acting with racial animus, he would have struck any of these jurors while he had strikes remaining. Because he did not, the record supports the trial judge’s determination that the solicitor’s strikes were not discriminatory. See State v. Johnson, 302 S.C. 243, 246, 395 S.E.2d 167, 169 (1990) (citing U.S. v. Lane, 866 F.2d 103 (4th Cir.1989)); Ford, 334 S.C. at 66, 512 S.E.2d at 504 (“Although appellant exercised most of his strikes against white jurors, he did not strike every white juror.”).

Giving due deference to the trial judge, who was in a better position to judge the solicitor’s intent, the “totality of the facts and circumstances[,]” Ford, 334 S.C. at 65, 512 S.E.2d at 503, indicate the solicitor struck Simmons for a valid, race neutral reason. Petitioner has presented no evidence to support his claim the solicitor’s justification for striking Simmons was pre-textual. He presents no evidence to rebut the solicitor’s race neutral explanation other than stating Simmons was black. This unsupported statement does not satisfy Petitioner’s burden of persuasion. See State v. Inman, 409 S.C. 19, 28, 760 S.E.2d 105, 109 (2014), reh'g denied (July 24, 2014) (“In light of the facially race-

neutral explanation for striking Juror 60, the State's conclusory statement that striking Juror 60 was pretextual failed to carry its burden of persuasion.”).

The record demonstrates Petitioner did not meet his burden at trial to prove the solicitor acted with discriminatory intent. Because he has not met that burden, he has not demonstrated he would have been successful on appeal had appellate counsel challenged the trial judge's ruling on his Batson motion. Accordingly, the post-conviction relief judge properly found Petitioner failed to meet his burden to prove appellate counsel ineffective for failing to brief the Batson issue.

II. This Court should also affirm the post-conviction relief judge's denial of relief because the record indicates Petitioner failed to meet his burden to show appellate counsel deficient.

The post-conviction relief judge specifically ruled on the prejudice prong of the Strickland analysis. However, because this Court must entertain a “‘strong presumption’ that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect[,]’” Harrington v. Richter, 562 U.S. 86, 109 (2011), Respondent submits the trial judge also could have properly found Petitioner failed to meet his burden to overcome the presumption appellate counsel made a strategic decision to forgo briefing the Batson issue. Petitioner bore the burden to show appellate counsel's decision was not reasonable, yet he presented no testimony from appellate counsel. See, e.g., Collins v. State, 686 S.E.2d 305, 308 (Ga. 2009) (“[D]uring the hearing, Collins's appellate counsel did not ask trial counsel about the decision not to call Malcom as a witness, ‘and the decision not to do so is therefore presumed to be a strategic one that does not amount to ineffective assistance.’” (citations omitted)). His mere allegation of ineffectiveness is not sufficient to carry his burden of proof. Cf. Dawkins v. Fields, 354 S.C. 58, 70-71, 580 S.E.2d 433, 439 (2003) (“Respondents are not permitted to simply rest on the allegations in their complaint, especially where, as here, the majority of the factual allegations are conclusory in nature.”). Therefore, Respondent would ask this Court to sustain the post-conviction relief judge's ruling on the additional ground that Petitioner failed to prove appellate counsel deficient. On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000) (noting that Rule 220(c), SCACR, allows the Court to “affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.”).

CONCLUSION

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

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

March 11, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

The Honorable William H. Seals, Jr., Circuit Court Judge

DONNELL MCFADDEN,

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:

Benjamin J. Tripp, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 11th day of March, 2015.


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 11 2015
S.C. Supreme Court

March 11, 2015

VIA HAND DELIVERY

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

RE: Donnell McFadden v. State of South Carolina
Appellate Case No: 2013-002667

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: Benjamin J. Tripp, Esquire (2 copies)