STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-001857

David C. Carson.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective in his representation of Petitioner at trial for failing to make a motion to force the State to elect which theory of the case they were proceeding on, or alternatively, failing to make a motion to sever Petitioner's case from his co-defendant, Jones, when Petitioner failed to meet his burden of proof?

Did the PCR Court properly hold that Counsel was not ineffective in his representation of Petitioner at trial for failing to object to the jury instructions regarding "hand of one, hand of all," when Petitioner failed to meet his burden of proof?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Petitioner was indicted at the July 2009 term of the Court of General Sessions for Spartanburg County for murder and accessory after the fact to a felony[1] (2009-GS-42-3379(A)). He was represented by Andrew Johnston, Esquire. On March 15-17, 2010, the Petitioner proceeded to trial after which he was found guilty of murder. He was sentenced by the Honorable E.C. Burnett III, to confinement for a period of thirty (30) years.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal was perfected. Following the submission of a brief pursuant by Elizabeth A. Franklin-Best, Esquire, the South Carolina Court of Appeals affirmed Petitioner's sentence. State v. Carson, No. 2012-UP-243 (filed April 25, 2012). The Remittitur was issued on May 15, 2012.

The Petitioner filed a post-conviction relief application on November 28, 2012. The Respondent made its Return on or about October 3, 2013. An evidentiary hearing into the matter was convened on April 10, 2014, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. At the hearing, the Petitioner testified on his own behalf. Andrew Johnston, Esquire, testified on behalf of the State. The Honorable J. Derham Cole denied the PCR application by written Order dated July 25, 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.

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[1] This count was *nol prossed* after the trial concluded.

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 PCR Court properly held that Counsel was not ineffective in his representation of Petitioner at trial for failing to make a motion to force the State to elect which theory of the case they were proceeding on, or alternatively, failing to make a motion to sever Petitioner's case from his co-defendant, Jones, when Petitioner failed to meet his burden of proof.

Petitioner argues that Counsel was ineffective for failing to argue that the State should "elect" which theory they were proceeding on instead of charging Petitioner both with murder and accessory after the fact of murder. Alternatively, Petitioner argues that Counsel should have made a motion to sever the trial of Petitioner from his Jones.

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.

Petitioner testified that Counsel was ineffective for failing to make a pre-trial motion to sever Petitioner and his Jones's trials or alternatively, Counsel should have objected to the State proceeding on both offenses and requested they choose between the two. (App. p. 365). Petitioner claimed that the two offenses in his indictment were "misjoinders," later explaining that he believed there was no relationship between the two offenses he proceeded to trial for. (App. p. 365). Petitioner testified that he did not commit the murder, so he should not have been tried with the Jones. (App. p. 366). However, Petitioner never discussed the possibility of a severance with Counsel or the possibility of requiring the State to elect which charge they wished to proceed on. (App. p. 366; p. 370, lines 16-19; p. 372, lines 13-25; p. 373, line 1).

Petitioner testified that he was originally charged with murder, but did not find out about count 2, the accessory after the fact of murder, until the day of trial. (App. p. 367). Contradicting himself, Petitioner then testified that he informed Counsel during an hour long meeting thirty days before trial that he was willing to plead to accessory after the fact. (App. p. 368; p. 369,

lines 13-17; p. 370, 1-15; p. 380, lines 22-25; p. 381, line 1). Petitioner testified that during the one hour long meeting with Counsel he shared with Counsel his involvement with the murder, which included Petitioner cleaning the crime scene and disposing of the victim's body. (App. p. 369).

Petitioner acknowledged that Counsel made a directed verdict motion on his behalf arguing that the State failed to present evidence to show that Petitioner was directly responsible for the murder, but the motion was denied by the trial court. (App. p. 371). Petitioner testified Petitioner also acknowledged that Counsel successfully requested the jury be charged that they could find Petitioner guilty of either charge, but not of both. (App. p. 378, lines 2-6). Petitioner further testified that he did not, during his alleged only two meetings with Counsel, provide Counsel with any possible witnesses or defenses. (App. p. 380, lines 15-21).

Counsel testified that the Counsel testified that the Petitioner was aware of count 2 - accessory after the fact, prior to the trial. In fact, Counsel testified that according to the record, Petitioner was directly indicted for both murder and accessory after the fact in July 2009 and the trial was in March 2010. (App. p. 398-9). Counsel testified that the trial strategy was to show that Petitioner was guilty of accessory after the fact, not of murder. (App. p. 383, lines 22-25; p. 384, lines 1-23; p. 387, lines 17-25; p. 388, lines 1-5). Because Jones made several statements to others claiming he killed the victim and none of the evidence for murder pointed to Petitioner, but rather Jones, Counsel made the strategic decision to proceed with the joint trial. (App. p. 384). However, Counsel testified that Petitioner informed him that he had the victim in his car driving around immediately prior to victim's death, but did not take the victim to the hospital or call police, but instead took the victim's body to Union County and disposed of it. (App. p. 383, lines 7-21).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The lower court properly found that Counsel articulated valid strategic reasons for not making a motion to sever the trials and proceeding with the strategy of arguing to the jury that Petitioner was only guilty of accessory after the fact and Petitioner failed to show that Counsel was deficient in that choice of tactics. (App. p. 410). Petitioner also failed to provide any evidence, testimony, or legal basis to support his claim that the outcome of his trial would be any different had Counsel moved to have the State elect which charge to proceed on, or alternatively, move to sever Petitioner's case from Jones'. In fact, in a case very similar to the factual scenario of Petitioner's case, the Supreme Court of South Carolina found error when the trial court refused to charge that a defendant could be found guilty of an accessory after the fact to murder charge when charged with murder, when the charge was presented as to the co-defendant. State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989).

The lower court had probative evidence to support the finding that Petitioner failed to meet his required burden of proof and the ruling should be affirmed.

II. The PCR Court properly held that Counsel was not ineffective in his representation of Petitioner at trial for failing to object to the jury instructions regarding "hand of one, hand of all," when Petitioner failed to meet his burden of proof.

Petitioner also alleged that Counsel was ineffective for failing to object to the jury charge regarding the "hands of one, hands of all."

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.

Petitioner testified that he felt that Counsel should have objected to the jury instruction regarding "hands of one, hands of all." (App. p. 374.) Petitioner testified that because of Counsel's earlier directed verdict motion arguing that there was no evidence presented to show Petitioner was directly responsible for or acted in concert with another to cause the death of the victim, Petitioner believed that Counsel should have objected to the charge. (App. p. 375). However, Petitioner acknowledged that he never addressed that issue with Counsel. (App. p. 375, lines 8-14).

Counsel testified that he did not believe there was any direct evidence warranting the "hands of one, hands of all" charge, but there was circumstantial evidence that led to the State's theory of murder. (App. p. 393, lines 2-25; p. 394, lines 1-10). Counsel testified that he believed the charge was a correct statement of law at the time and did not find the charge objectionable based upon the fact that there was circumstantial evidence presented which placed Jones and the Petitioner with the victim directly prior to his disappearance and murder. (App. p. 394, lines 1-10).

Petitioner provided three statements to law enforcement, including one in which he claimed he left the victim at a club and one in which the victim was robbed by an unknown assailant. Petitioner told law enforcement that after the robbery and after the victim *had been shot*, he attempted to take the victim to the hospital but was unable to do so, because the hospital doors were closed. (App. p. 147-150). At trial, the case detective testified that the emergency room at Spartanburg Regional Hospital, where Petitioner claimed he took the victim, is never closed. (App. p. 156, lines 11-13). Petitioner also stated to law enforcement when he could not get into the emergency room, he then fell asleep in his car with the victim's body in the front seat with him. (App. p. 150). He told police he eventually decided to dispose of the body because he did not believe anyone would believe his story that he had been the victim of a robbery. (App. p. 156). He told police he disposed on the body in Union County. (App. p. 153). Police attempted to locate the victim's body. However, Police could not locate the body even though Petitioner accompanied them to Union County on approximately ten (10) occasions to show them where he believed he had hidden the body. (App. p. 153). Clearly, there was substantial circumstantial evidence to allow the jury charge of "hand of one, hand of all," in this case.

The lower court properly found that Petitioner failed to meet his burden of proof of establishing that Counsel was ineffective for failing to object to the jury charge as there was no legal basis to object. (App. p. 411). "If any evidence supports a requested jury charge, the trial court should grant the request." State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007). Just as in Petitioner's case, Ward involved a theory supported by evidence at trial that Ward and his co-defendant joined together to accomplish an illegal purpose; therefore, the Court of Appeals found that "it was appropriate for the trial court to instruct the jury that if it found such a joint endeavor existed, each defendant was liable criminally for everything done by his confederate incidental to the execution of that endeavor." State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007).

The court also found that Petitioner failed to establish any deficient behavior on Counsel's behalf, failing to meet the first prong of establishing ineffective assistance of counsel. (App. p. 411). There was probative evidence to support the lower court's ruling and it 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,

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By: _____
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April 30, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2014-001857

DAVID CARSON, 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:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 30th day of April, 2015

Ashley Haworth
ASHLEY HAWORTH
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 30 2015
S.C. Supreme Court

April 30, 2015

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

RE: **David Carson v. State of South Carolina**
Lower Court Case No: 2012-CP-42-4880
Appellate Case No.: 2014-001857

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: Wanda H. Carter, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)