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STATE OF SOUTH CAROLINA  
In The Supreme Court

S.C. Supreme Court

CERTIORARI TO THE COURT OF APPEALS  
Appeal From Greenville County  
The Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2014-UP-361 (S.C. Ct. App. filed Oct. 15, 2014)

Appellate Case No. 2011-186254

Russell W. Rice, Jr.,.....Petitioner,

v.

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

**BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

1. Whether the Court of Appeals was correct in holding trial counsel was not ineffective in failing to conduct an independent investigation of the alleged murder weapon found in the trunk of Petitioner's vehicle.

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the May 2003 term of General Sessions for trafficking cocaine (2003-GS-23-3612), unlawful carrying of a pistol (2003-GS-23-3614), and murder (2003-GS-23-3615) and at the December 2003 term for possession of a weapon during commission of a violent crime (2003-GS-23-8779). Steven W. Sumner, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On April 15, 2004, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of twenty-five years for trafficking cocaine, one year for unlawful carrying of a pistol, life imprisonment for murder, and five years for possession of a weapon during commission of a violent crime. (App.pp.589-90).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner. The court of appeals affirmed Petitioner's convictions and sentences on April 24, 2006. State v. Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006). (App.pp.592-96). This Court denied Petitioner's subsequent petition for writ of certiorari by order dated October 18, 2007.

Petitioner filed an application for post-conviction relief (PCR) on May 28, 2008 (2008-CP-23-3945). (App.pp.597-629). A hearing was convened at the Greenville County Courthouse on November 15, 2010.<sup>1</sup> (App.pp.642-67). Petitioner was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South

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<sup>1</sup> The record was left open for the deposition of Mr. Kelly Fite. (App.pp.669-83).

Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed February 18, 2011. (App.pp.690-97).

A notice of appeal was filed at this Court. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner. After a petition for writ of certiorari and return to petition for writ of certiorari were filed, the case was transferred to the South Carolina Court of Appeals. The court of appeals granted the petition for writ of certiorari by order filed October 23, 2013. After oral argument, the court of appeals affirmed the PCR judge's denial of relief. Rice v. State, Op. No. 2014-UP-314 (S.C. Ct. App. filed Oct. 15, 2014). Petitioner filed a Petition for Rehearing, which the court of appeals denied by order filed November 21, 2014.

## STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**The court of appeals did not err in affirming the PCR judge’s decision that Petitioner failed to meet his burden of proving trial counsel was ineffective in not hiring an expert witness.**

The court of appeals was correct in affirming the PCR judge’s denial of Petitioner’s claim that trial counsel was ineffective.

### A.

The victim in this case was found dead in a motel parking lot. (App.pp.92-93; pp.102-03; pp.110-13). The pathologist testified at trial that, after performing the autopsy, he concluded the victim died as the result of two gunshot wounds to the back and chest. (App.pp.119-30). While there were no eyewitnesses to the shooting, several individuals testified the victim had previously stolen Petitioner’s car. (App.pp.190-91; pp.211-13; p.226; pp.234-35). Investigator Fuller testified that, based on his investigation, he wanted to speak with Petitioner about the crime. (App.p.277). Investigator Fuller testified he located Petitioner’s vehicle at a motel and, after confirming with the clerk that Petitioner was a motel guest, decided to effect a traffic stop when Petitioner left the motel. (App.pp.279-83). Investigator Fuller testified the traffic

stop was predicated on the fact that Petitioner committed a traffic violation in not properly registering his vehicle. (App.p.282). Investigator Fuller testified he observed as Corporal Dempsey initiated the traffic stop. (App.pp.286-87; p.309). Investigator Fuller testified Petitioner was placed in custodial arrest for traffic violations and the car was to be towed. (App.pp.289-91; pp.312-16). During the inventory search of Petitioner's car, Corporal Dempsey removed a bag of shotgun or rifle parts from the trunk. (App.pp.295-97; pp.316-18). At trial, the State presented an expert witness in the field of firearms examination who testified he examined the seven rifle parts found in Petitioner's car and concluded that rifle was the murder weapon. (App.pp.370-80; pp.387-90).

#### **B.**

At the PCR hearing, Petitioner argued the State presented a circumstantial evidence case at trial. (App.p.649). Petitioner argued the State's position was that the murder weapon in this case was the rifle that had been found in several pieces in the trunk of his car. (App.pp.649-50). Petitioner stated the weapon "looked like pieces of remains of a gun that had been destroyed." (App.p.650). Petitioner stated he did not recall talking to trial counsel about obtaining an expert to test the weapon. (App.p.651). Petitioner stated that, at the time of trial, he did not even consider whether an expert witness would be helpful. (App.p.651).

Trial counsel testified he reviewed the reports from the State's expert witness prior to trial. (App.p.662). Trial counsel testified he cross-examined the State's expert "pretty thoroughly on the gun issue" at trial. (App.p.658). Trial counsel testified he met with Petitioner several times before trial and that if the idea of hiring an expert witness

was discussed “it was mentioned briefly.” (App.p.663). Trial counsel testified there was never any serious discussion with Petitioner about hiring an expert. (App.p.663). Trial counsel testified that, at the time, he did not believe hiring an expert witness was necessary. (App.p.663). Trial counsel testified he believed that he “pretty extensively” cross-examined the State’s expert and felt he had addressed reasonable doubt through that witness. (App.pp.663-64).

Mr. Kelly Fite was deposed after the PCR hearing. Fite stated he was employed as a firearms examiner in the Georgia Investigation Crime Laboratory for thirty-one years and had often testified as an expert witness. (App.pp.672-74). Fite stated he examined the crime lab reports and trial testimony of the State’s expert witness and concluded it was unlikely one could positively identify the murder weapon from the rifle parts. (App.p.674-77). Fite admitted, however, that he did not speak to the State’s expert witness and did not actually view the physical evidence (the rifle parts). Fite also stated he assumed the State’s expert did not undertake a peer review process. (App.pp.677-79).

In denying the application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving trial counsel should have hired an expert witness to examine the pieces of the murder weapon. The PCR judge found trial counsel’s decision to attack the State’s witness and argue reasonable doubt was “a valid trial tactic.” The PCR judge found Fite’s testimony “unpersuasive, as he neither examined the evidence in question nor contacted the State’s expert witness to discuss the methodology of the original test.” (App.pp.695-96).

**C.**

The court of appeals affirmed the PCR judge's denial of Petitioner's claim that trial counsel was ineffective. In its unpublished per curiam opinion, the court of appeals cited case law for the proposition that "when trial counsel has a valid reason for employing a certain strategy, it is not deemed to be ineffective assistance of counsel"<sup>2</sup> and "counsel's failure to procure an expert witness was not unreasonable under prevailing professional norms where counsel vigorously cross-examined and attacked the accuracy of the evidence."<sup>3</sup> Rice v. State, Op. No. 2014-UP-314, at \*1 (S.C. Ct. App. filed Oct. 15, 2014).

**D.**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 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 trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668,

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<sup>2</sup> Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

<sup>3</sup> Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991).

104 S. Ct. 2052 (1984)).

**E.**

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective. Trial counsel did not err in his representation of Petitioner. Trial counsel testified he did not believe that hiring an independent firearms expert was necessary for Petitioner's defense. Trial counsel testified, rather, that he believed he would raise the issue of reasonable doubt through his cross-examination of the State's expert. Based upon the State's evidence, this was a valid trial strategy. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy will be reviewed under an objective standard of reasonableness.").

The State recovered seven pieces of a rifle from the trunk of Petitioner's car. The State's expert witness described these pieces as "worn" and containing "corrosion and dirt." (App.p.371; pp.373-74). Further, as the rifle had been cut into various parts, it could not have been fired to perform a routine ballistics test. (App.p.389). Instead, the expert witness testified he made a cast of the rifle barrel and then pushed through both a lead slug and a .32 caliber projectile so the rifling markings on those items could be compared to the recovered jackets and/or projectiles. (App.pp.389-90). Based upon these facts, it was eminently reasonable for trial counsel to utilize a trial strategy of aggressively cross-examining the State's expert witness as to how he could possibly have

made a positive identification in this case under such unique circumstances. See Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2065 (“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”). And trial counsel did, in fact, thoroughly cross-examine the State’s expert witness on this point in an effort to raise reasonable doubt. Trial counsel thoroughly questioned the State’s expert witness about the fact that he was never able to fire a projectile to compare it with the one retrieved from the victim. Trial counsel questioned the expert witness about the impact that corrosion on the rifle parts would have upon his ability to examine the items. Trial counsel also questioned the State’s expert witness about the widespread popularity of the weapon in question. (App.pp.395-406). As such, trial counsel’s decision not to retain an expert witness cannot be deemed deficient. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing Frasier v. State, 306 S.C. at 160-61, 410 S.E.2d at 573) (“[C]ounsel’s failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State’s witnesses and attacked the accuracy of the evidence.”).

It is clear that, regardless of trial counsel’s legitimate and well-executed trial strategy, the jury simply chose to accept the State’s version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) (“The credibility of witnesses is for the triers of fact.”); see also Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001) (noting that, by its verdict, the jury clearly rejected the defendant’s account of what transpired). Guilty verdicts in this case do not equate to a finding of deficient

performance by trial counsel.

F.

Regardless, Petitioner failed to prove he was prejudiced by the lack of an independent firearms expert at trial. While Fite stated in his deposition that he believed the State's expert used improper techniques to develop his expert opinion, he also admitted he had neither viewed or examined the physical evidence in question (the seven rifle parts) nor spoken to the State's expert witness. While Fite stated he would have liked to be able to view the physical evidence, a discovery order had been signed which specifically gave Fite the ability to retrieve and test that evidence. (App.pp.640-41; p.678). The PCR judge found Fite's testimony to be "unpersuasive." (App.pp.695-96). As the PCR judge had the full record before him (including the transcript from Fite's deposition), this finding should be given great deference by this Court. See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993).

Petitioner failed to meet his burden of presenting any credible or compelling evidence that an independent expert would have examined the rifle parts and arrived at a different conclusion than the State's expert. The only evidence Petitioner presented in support of his assertion was Fite's deposition testimony. This testimony is highly suspect, however, because Fite never retrieved the rifle parts from storage to examine them and perform his own test. Fite also did not contact the State's expert witness in order to discuss his methodology and procedures in examining and testing the rifle parts for trial. Fite admitted his conclusions were drawn from reading both the report prepared

by the State's expert and the trial transcript. (App.pp.677-78). Fite also admitted he made an assumption there was no peer review in this case. (App.p.678). Fite's conclusions were purely hypothetical in nature. As such, discussion about whether Fite's findings would have had an impact upon the trial is completely speculative. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

Furthermore, Fite stated in his deposition that he believed the conclusions reached by the State's expert witness were unlikely because of the dirt and oxidation and because the rifle had been cut and could not be fired. (App.pp.675-77). As noted supra, however, trial counsel vigorously cross-examined the State's expert witness and attacked the accuracy of his findings. Included in this cross-examination were questions about the very issues Fite expressed concern about. Petitioner cannot demonstrate prejudice in this case not only because Fite did not examine the evidence and made a speculative conclusion but also because trial counsel thoroughly cross-examined the State's expert witness about the methodology of the firearms exam and the accuracy of the resulting conclusion. See Lorenzen v. State, 376 S.C. at 531, 657 S.E.2d at 777; see also Frasier v. State, 306 S.C. at 160-61, 410 S.E.2d at 573.

As such, Petitioner failed to meet his burden of proving an independent firearms expert would have changed the outcome of his trial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

**G.**

Accordingly, the court of appeals did not err in affirming the PCR judge's denial of Petitioner's claim that trial counsel was ineffective. Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application, and the court of appeals did not err in affirming that decision. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

**CONCLUSION**

For the reasons stated above, this Court should affirm the court of appeals' ruling.

Respectfully submitted,

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By:   
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May 4, 2015

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire  
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I further certify that all parties required by Rule to be served have been served.  
This 4th day of May, 2015.

  
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