RECEIVED

MAY 18 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000925

Gerald Brown, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED[1]

1. Trial counsel was ineffective at Petitioner Brown's trial.
   a. Trial counsel was ineffective for failing to conduct meaningful pretrial investigation and preparation.
   b. Trial counsel was ineffective for failing to locate and call an exculpatory witness at Brown's trial.
   c. Trial counsel was ineffective for failing to discover and point out serious inconsistencies in the victim's testimony.
   d. Trial counsel was ineffective for failing to introduce critical evidence at Brown's trial.
2. Appellate counsel was ineffective for failing to raise a valid and preserved argument in Brown's direct appeal.

[1] Taken verbatim from the petition for writ of certiorari.

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the September 2007 term of General Sessions for possession of a weapon during commission of a violent crime (2007-GS-23-7600), assault and battery of a high and aggravated nature (ABHAN) (2007-GS-23-7602), impersonating law enforcement (2007-GS-23-7603), malicious injury to a police dog (2007-GS-23-7604), first-degree burglary (2007-GS-23-7605), armed robbery (2007-GS-23-7606), three counts of kidnapping (2007-GS-23-7622, counts 1-3), and resisting arrest (2007-GS-23-7633). (App.pp.457-58; pp.460-61; pp.463-64; pp.466-67; pp.469-70; pp.472-73; pp.475-76; pp.480-81). Randall L. Chambers, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On April 16, 2009, the Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 5 years for possession of a weapon during commission of a violent crime, 10 years for ABHAN, 1 year for impersonating law enforcement, 5 years for malicious injury to a police dog, life imprisonment without parole (LWOP) for first-degree burglary, LWOP for armed robbery, LWOP for each count of kidnapping, and 1 year for resisting arrest. (App.pp.454-55; p.459; p.462; p.465; p.468; p.471; p.474; pp.477-79; p.482).

A notice of appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.484-504). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Brown, Op. No. 2012-UP-262 (S.C. Ct. App. filed May 2, 2012). (App.pp.534-35).

Petitioner filed an application for post-conviction relief (PCR) on December 14, 2012 (2012-CP-23-7837) and an addendum on March 28, 2013. (App.pp.536-71; pp.572-75). A hearing was held at the Greenville County Courthouse on February 19, 2014. (App.pp.592-679). Petitioner was present and represented by James P. Craig, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order filed April 9, 2014. (App.pp.690-700).

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

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel did not conduct adequate pre-trial investigation and preparation.

Petitioner argues trial counsel did not spend enough time on this case to either build an attorney-client relationship with him or "properly discern the details" of a defense. (Pet. Cert., p.10). This argument is without merit.

At the PCR hearing, Petitioner stated he had a short meeting with trial counsel, who said they would go to trial in 1-1.5 years. (App.p.629). Petitioner stated he told trial counsel he was going to hire an attorney. (App.p.629). Petitioner stated he talked to trial

counsel again on a Wednesday (a month or two later) and learned the trial was scheduled to begin on Monday. (App.p.629). Petitioner stated he told the trial judge he wanted to fire trial counsel because "it was impossible for us to go to trial because we haven't even really discussed the case." (App.p.631). Petitioner stated he had talked about the case with trial counsel before the trial – including reviewing the State's evidence and his version of events – but that they "couldn't agree on what was supposed to be done." (App.p.633; p.651).

Trial counsel testified he was not the first attorney to represent Petitioner and that the prior attorney had filed discovery motions. (App.pp.657-58). Trial counsel testified he reviewed the discovery materials both independently and with Petitioner. (App.p.658). Trial counsel testified he had two brief meetings with Petitioner a few months before the trial. (App.pp.659-60). Trial counsel testified these meetings chiefly consisted of Petitioner saying he was going to hire another lawyer. (App.pp.659-60). Trial counsel testified this case was put on the trial docket very quickly and that he had more substantial meetings with Petitioner the week before the trial. (App.p.658; p.660). Trial counsel testified they spent several hours together reviewing the case. (App.p.662; p.670). Trial counsel testified, however, "most of that time was taken up by him telling me that he didn't want me to represent him. And there was a lot of hostility. So, you know, there was a limit to what we could do." (App.p.662). Trial counsel testified Petitioner "didn't want me to represent him. He had made that clear every time that I had talked to him, that he didn't want me to represent him." (App.p.663). Trial counsel testified he made this clear to the trial judge (both on and off the record). (App.p.663).

Trial counsel testified he heard several things during Petitioner's PCR testimony that he had never heard before because Petitioner "was not forthcoming with those things with me." (App.p.663). Trial counsel noted Petitioner would not even put on street clothes the first day of trial[2] and remarked to the jury that he was not his lawyer.[3] (App.p.664). Trial counsel testified Petitioner gained confidence in his abilities as the trial progressed and "he started to share more details with me and then things evolved over time." (App.p.664).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel did not properly meet with him to discuss the case." The PCR judge found credible trial counsel's testimony that Petitioner was hostile and would not discuss the case with him. The PCR judge noted "trial counsel is a very experienced criminal defense attorney and had to contend with an uncooperative client." The PCR judge found "trial counsel adequately conferred with [Petitioner], conducted a proper investigation, and was thoroughly competent in his representation." The PCR judge further found Petitioner "failed to demonstrate what more trial counsel could have done in order to prepare his case for trial." (App.p.695).

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

---

[2] App.pp.15-19.
[3] App.p.22.

(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, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel did not adequately meet with him and prepare the case. Trial counsel testified Petitioner was hostile, uncooperative, and not forthcoming in their discussions. Trial counsel testified that, once the case was on the trial docket "from the discovery standpoint . . . I was pretty well prepared. But that is certainly not the same as if you have a client who is actively involved in assisting you in getting ready for trial. He was not of that mindset." (App.p.669). Trial counsel testified he did not have as much quality time to have prepared with Petitioner as he would have liked but that he would have had plenty of time to prepare if Petitioner had been cooperative. (App.p.672). Trial counsel testified he was able to develop the defense strategy as the trial progressed because Petitioner finally began to talk to him. (App.p.664). The PCR judge noted trial counsel was a "very experienced criminal defense attorney" and found his testimony was credible. (App.p.695). This Court must give this finding great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key

Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

"The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 381 (2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (1985)). To establish counsel was inadequately prepared, a Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Trial counsel testified he was well acquainted with the discovery materials when this case went to trial. Trial counsel testified, however, that Petitioner would not discuss the case with him and was not forthcoming. While trial counsel acknowledged the case was put on the trial docket sooner than expected, he did not testify he needed additional time to investigate or prepare the case. Trial counsel clearly would have preferred more time with Petitioner but, as Petitioner was hostile and uncooperative, it is unclear what additional meetings with Petitioner would have accomplished. Trial counsel prepared the case for trial as thoroughly as he could have done under the circumstances. Petitioner failed to present compelling evidence of what else trial counsel could have done to develop strategies or defenses in this case.

Accordingly, 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 his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. 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.").

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have called Andrell Terry as a witness at trial.

Petitioner argues trial counsel was ineffective in failing to call his cousin, Andrell Terry, as a witness at trial because Terry "could confirm he was at the victim's house to buy drugs, not rob the victim." (Pet. Cert., p.11). This argument is without merit.

At the PCR hearing, Petitioner stated he was not able to tell trial counsel about Terry until the weekend before trial. (App.p.634). Petitioner admitted, however, that he testified at trial that Terry was involved in this alleged drug deal and gave him the money in question. (App.p.651). Petitioner also admitted he testified at trial that he called Terry after he had been dropped off and it was Terry who told him to go into the woods. (App.p.655). Petitioner stated he lied to the jury about Terry's involvement. (App.p.652).

Terry stated he was Petitioner's first cousin. (App.p.597; p.608). Terry stated Petitioner called him on the night in question and asked Terry "to take him to a friend's house." (App.pp.600-01). Terry testified Petitioner showed him "a shopping bag of cash" and said he "was going to get some merchandise." (App.pp.602-03). Terry stated

Petitioner was wearing a white t-shirt and did not have any other items with him. (App.pp.604-06). Terry stated he did not know he dropped Petitioner off at the victims' residence until he saw the news report. (App.pp.601-02). Terry stated Petitioner did not call him after he was dropped off. (App.p.612). Terry stated he learned the next morning that Petitioner had been arrested but did not speak to him until after he had been sentenced. (App.p.598; p.609). Terry stated it took a few months for him to realize Petitioner had been arrested for something that happened right after Terry dropped him off. (App.p.609). Terry stated no one contacted him to testify at Petitioner's trial but admitted he never contacted either police or trial counsel to relay what he had seen. (App.p.607; p.610). Terry stated he did not give Petitioner the money in question and did not realize Petitioner testified at trial that he had done so. (App.p.611).

Trial counsel testified Petitioner did not tell him about Terry until the week before trial. (App.p.672). Trial counsel testified Petitioner said he and Terry were going to the house to buy drugs. (App.p.661; p.664). Trial counsel testified Petitioner gave him a telephone number but his investigator reported the number did not work. Trial counsel testified his investigator made "independent efforts to try and find him and was not able to do that." (App.p.661). Trial counsel testified he relayed this to the trial judge. (App.p.661). Trial counsel confirmed Terry never contacted him. (App.p.661).

In denying Petitioner's application for post-conviction relief, the PCR judge found neither Petitioner nor Terry were credible witnesses, while finding trial counsel was credible. The PCR judge found it "improbable" that Terry would not have contacted trial counsel if he had helpful information about Petitioner's case. The PCR judge found

Petitioner failed to prove trial counsel was deficient and that "based upon the utter lack of credibility of Terry's story" he also failed to prove he suffered any prejudice. (App.pp.695-96).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was deficient in not calling Terry as a witness. Trial counsel testified he was not given Terry's name and telephone number until the week before trial and that he was unable to contact or locate him. While Petitioner and Terry were first cousins and Petitioner believed Terry's testimony would be helpful to his case, he never relayed this information to trial counsel until right before trial. Terry also failed to contact either the police or Petitioner's attorney in order to convey allegedly helpful information in Petitioner's very serious case. This is simply not credible. In fact, the PCR judge found trial counsel's testimony was credible but did not find Petitioner or Terry were credible witnesses. (App.p.696). This Court must give this finding great deference. See Drayton v. Evatt, 312 S.C. at 13, 430 S.E.2d at 522; see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. at 567, 629 S.E.2d at 696. Petitioner cannot demonstrate trial counsel was deficient. Petitioner was a hostile client who withheld information from him prior to trial. Trial counsel cannot be found to be ineffective based on Petitioner's delay in relaying Terry's information to him. See, e.g., United States v. Pellerito, 878 F.2d 1535, 1543 (5th Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping [counsel] in the dark, and then, by refusing to heed his advice. That is not the sort of 'ineffectiveness' for which relief can be granted.").

Petitioner also cannot demonstrate he was prejudiced because Terry did not testify at his trial. Terry did not testify Petitioner said he was going to buy drugs. Terry did not testify he saw anything that transpired after he dropped off Petitioner. Terry did not even know Petitioner was going to the victims' house that night. Terry's PCR testimony, in fact, stands in stark contrast to Petitioner's trial testimony (in which he testified Terry provided him the money to buy drugs from the adult victim that night). Further, it seems doubtful the defense case would have been aided by testimony that Petitioner went to the victims' house that night to engage in a drug transaction (especially as there was no testimony that any drugs were located inside the victims' house). There is no reasonable probability the outcome of Petitioner's trial would have been any different if Terry had testified. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Accordingly, 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 his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have highlighted inconsistencies in the victim's testimony.

Petitioner argues trial counsel should have questioned the adult victim (or called other witnesses) to demonstrate this victim knew Petitioner. (Pet. Cert., p.13). This argument is without merit.

At the PCR hearing, Petitioner stated he had known the adult victim for years and had gone there that night "to conduct a drug deal." (App.pp.616-18). Petitioner stated the adult victim was lying when he told police he did not know Petitioner. (App.p.620). Petitioner stated he had witnesses who could have disputed the adult victim's statement that he did not know Petitioner. (App.pp.636-37).

Trial counsel testified Petitioner told him that he had known the adult victim for years. (App.p.661). Trial counsel testified, however, Petitioner may not have told him this until during the trial. (App.pp.674-75). Trial counsel testified that "given the circumstances of the case, it didn't really matter how long they knew each other." (App.p.662).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have contacted witnesses in order to refute the adult victim's contention that he did not know him." The PCR judge agreed with trial counsel that this was not a big issue in this case, especially in light of "the State's presentation of overwhelming evidence of [Petitioner]'s guilt." The PCR judge noted "as these potential witnesses did not testify at the PCR hearing, [he] could not speculate as to what they would have testified to at trial." (App.p.697).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have questioned witnesses about whether he and the adult victim knew each other. As noted by the PCR judge, this Court cannot speculate as to whether witnesses (other than Terry) would have testified to a prior relationship between Petitioner and the adult victim because these alleged witnesses did not testify at the PCR

hearing. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme 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.") (emphasis in original). Further, to the extent that Petitioner is arguing trial counsel should have questioned the adult victim about whether they knew each other, this allegation is without merit. Petitioner failed to demonstrate how eliciting this potential testimony would have changed the outcome of the case. None of the three victims identified Petitioner as the individual who restrained them within their own home, tasered the adult victim, and threatened the juvenile victims. There is no reasonable probability the result of Petitioner's trial would have been different if trial counsel had asked the adult victim whether he knew Petitioner. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

Accordingly, 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 his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

IV. The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have introduced his t-shirt into evidence at trial.

Petitioner argues trial counsel should have introduced into evidence the white t-

shirt he was wearing when he was arrested because it "would have made a far more compelling point in favor of the defense theory." (Pet. Cert., p.15). This argument is without merit.

At trial, the adult victim stated the home intruder was wearing a shirt that said "police" and the juvenile victim testified this person was wearing (1) a shirt that said "sheriff or police" on the front and (2) a vest. (App.p.90; p.94; p.106). Master Deputy Acord testified he arrived at the scene while the intruder was in the house and could see he was wearing a "police issued bullet proof type vest and he had a shirt on, which appeared to have police written on it." (App.p.140). Master Deputy Acord testified an individual fled the home (with the same clothing description) and entered the woods. (App.pp.142-43). Master Deputy Acord testified he saw Petitioner in the woods – without his mask but wearing the same clothing. (App.p.144). Officer Porter testified an individual wearing a vest ran into the woods outside the victims' home and he found Petitioner struggling with several police officers and a police dog inside the woods. (App.pp.168-72). Officer Porter testified that, Petitioner was rolled over, he could see "body armor laying underneath him" and that "[h]e also had on a shirt or remnants of a shirt that had the word police written across the front in yellow letters." (App.p.173). Officer Bryan testified an individual wearing a vest and a shirt with "the letters police under the vest" ran into the woods. (App.pp.197-98). Officer Bryan testified – once they finally subdued him – Petitioner was wearing "the torn shirt" and was atop one of the body armor panels. (App.p.202). Officer Bryan testified Petitioner was wearing a torn white shirt while he was being treated by EMS and he "believe[d] they were removing the

other stuff off of him." (App.p.209). K-9 Officer Harris testified someone wearing "a T-shirt that said police on it" ran from the house to the woods, and he and his police dog were in pursuit. (App.pp.286-88). Officer Harris testified Petitioner was wearing a dark shirt when he was apprehended. (App.p.291). The blue police shirt and bulletproof vest were admitted into evidence at trial. (App.pp.175-76).

At the PCR hearing, Petitioner stated he was wearing a white t-shirt when he was arrested and that "[i]t mas messed up. Blood all over it, soaked." (App.p.627). Petitioner stated he discussed the t-shirt with trial counsel but did not recall trial counsel "saying anything about it." (App.p.638; p.640). Petitioner stated the t-shirt was important because if he also "had on a bulletproof vest and the blue t-shirt, they would have had some blood on them, as well." (App.p.638).

Trial counsel testified he did not recall why he did not offer Petitioner's white t-shirt into evidence. (App.pp.664-65). Trial counsel testified, however, that there was testimony that "his t-shirt was very bloody." (App.p.675).

In denying Petitioner's application for post-conviction relief, the PCR judge found not introducing the t-shirt into evidence "was not deficient in light of the fact that [Petitioner] was hostile with trial counsel during trial preparation and the trial itself." The PCR judge found Petitioner could not prove prejudice because (1) trial counsel argued in closing statements that the police shirt would have been bloody and (2) the State presented "overwhelming evidence of [Petitioner]'s guilt." (App.pp.696-97).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel should have moved the white t-shirt into evidence. Petitioner did

not prove trial counsel was deficient. Petitioner failed to articulate how introduction of the white t-shirt would have somehow invalidated the officers' testimony that he was seen wearing the blue police shirt in the woods. Further, one can clearly infer a strategic reason trial counsel did not enter the white t-shirt into evidence. Trial counsel argued to the jury in closing statements that neither the blue police shirt nor the vest had blood on them but that Petitioner was bleeding and taken to the hospital. (App.p.389). Trial counsel also noted to the jury that the State had not offered Petitioner's bloody, white t-shirt into evidence. (App.p.389). Trial counsel argued if Petitioner had been wearing the blue police shirt and vest, "it would have bled through." (App.p.390). A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841 (2010). Regardless, Petitioner also failed to demonstrate he was prejudiced by the lack of the white t-shirt in evidence because the State presented overwhelming evidence of his guilt.[4] See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the

[4] Petitioner suggested one of the jury's questions led him to believe they were focusing on a discrepancy between the blue police shirt and white t-shirt. (App.p.643). This suggestion, however, is pure speculation and unsupported by either the trial record or any evidence or testimony presented at the PCR hearing. See Jackson v. State, 329 S.C. at 349, 495 S.E.2d. at 770 (finding "[m]ere speculation and conjecture on the part of [the applicant] is insufficient" to substantiate an allegation).

defendant's guilt).

Accordingly, 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 his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

V. The PCR judge did not err in finding Petitioner failed to meet his burden of proving appellate counsel was ineffective.

Petitioner argues appellate counsel was ineffective because the issue of the accomplice liability jury charge was not raised on appeal. (Pet. Cert., p.15). This argument is without merit.

At the PCR hearing, Petitioner stated the trial judge's hand of one is hand of all jury charge "put a phantom accomplice there." (App.pp.645-46). Petitioner stated appellate counsel should have raised the issue of the jury charge on appeal. (App.p.645; p.648).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of finding appellate counsel was ineffective. The PCR judge found Petitioner failed to prove appellate counsel as deficient. Further, the PCR judge concluded the proposed argument would not have been successful on appeal. (App.pp.698-99).

A defendant is constitutionally entitled to effective assistance of appellate counsel.

Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). Appellate counsel is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765; Bennett v. State, 383 S.C. at 309, 680 S.E.2d at 276. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). "To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving appellate counsel was ineffective. Petitioner did not pass the difficult threshold of proving appellate counsel was incompetent merely because he did not raise the issue of the accomplice liability jury charge. See id. This issue would have been meritless on appeal because the trial judge was correct in charging the jury with accomplice liability. The juvenile victim testified at trial the intruder called someone while he was in their house. The juvenile victim stated:

> So he called someone on the cell phone. He was like he's not giving us the right money.

(App.p.82).

The adult victim stated he told the intruder there was some money in the attic and that he could hear the intruder go into the attic. The adult victim stated:

> And he came back and he made a phone call. Because he got the money, he made a phone call and he called someone and said – he said, He's acting like all he's got is 20,000 or something he said. So he stayed on the phone maybe 15, 20 seconds and he came back and he asked me, you know, where is the real money?

(App.p.98). The State requested the accomplice liability charge be given to the jury and the trial judge agreed (over trial counsel's objection). (App.pp.366-68). This jury charge was supported by the evidence. In State v. Kelsey, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76 (1998), the supreme court approved a broad accomplice liability charge that stated, "... if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both." As the testimony adduced at trial supported an accomplice liability charge, the trial judge had a duty to issue this charge.

State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) (holding a trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence). As such, this issue would not have been successful on appeal. Petitioner cannot demonstrate he was prejudiced as a result of the jury charge issue not being raised on appeal because he cannot establish this issue would have changed the outcome of his appeal. See United States v. Mason, 2012 WL 5845807 at *1.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that appellate 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 appellate counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of appellate counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

May 18, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000925

Gerald Brown, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

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

Joshua S. Kendrick, Esquire
Christopher S. Leonard, Esquire
Kendrick & Leonard, P.C.
Post Office Box 6938
Greenville, South Carolina 29606

I further certify that all parties required by Rule to be served have been served. This 18th day of May, 2015.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

May 18, 2015

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

RE: Gerald Brown v. State
Appellate Case No. 2014-000925

Dear Mr. Shearouse,

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case.

I would also note that, contrary to the procedure set forth in the April 15, 2014 order from this Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings," the Appendix contains numerous unredacted personal data identifiers.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

Enclosures

cc: Joshua S. Kendrick, Esquire
Christopher S. Leonard, Esquire
Trisha Allen, Victim Services