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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox Jr., Circuit Court Judge

Appellate Case No. 2014-000651

Michael Adam Bailey, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

I. Did the post-conviction relief judge properly find appellate counsel was not ineffective in declining to argue the trial judge erred in denying a motion for a continuance where Petitioner failed to rebut the presumption appellate counsel made a strategic decision to not brief the issue; where such an issue was not properly preserved for appeal; and where the issue would not have warranted reversal?

II. Did the post-conviction relief judge properly find appellate counsel was not ineffective in declining to argue the trial judge erred in denying a motion for a severance where Petitioner failed to rebut the presumption appellate counsel made a strategic decision to not brief the issue; where such an issue was not properly preserved for appeal; and where the issue would not have warranted reversal?

STATEMENT OF THE CASE

In July 2005, the Horry County Grand Jury indicted Petitioner for murder. (App. pp. 851-52) William I. Diggs, Esquire ("trial counsel"), represented Petitioner. (App. p. 1) On July 23, 2007, Petitioner, along with his co-defendant, proceeded to trial before the Honorable James E. Lockemy ("the trial judge") and a jury. (App. p. 1). On July 26, 2007, the jury found Petitioner guilty as indicted. (App. p. 732, line 25-p. 733, line 2). On August 16, 2007, the trial judge sentenced Petitioner to thirty years incarceration. (App. p. 853).

A notice of appeal was timely filed, and Joseph L. Savitz III, ("appellate counsel") perfected Petitioner's appeal. (App. p. 745) The South Carolina Court of Appeals affirmed the conviction on June 10, 2010. State v. Bailey, Op. No. 2010-UP-306 (S.C. Ct App. filed June 10, 2010).

Petitioner filed an application for post-conviction relief on June 10, 2011. (App. p. 757). J. Marshall Biddle, Esquire, represented Petitioner. The Honorable J. Cordell Maddox Jr. ("the post-conviction relief judge") convened an evidentiary hearing at the Horry County Courthouse on August 26, 2013. (App. p. 773). The post-conviction relief judge denied relief in an order dated January 30, 2014, and filed February 3, 2014. (App. p. 839).

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding appellate counsel was not ineffective.

Petitioner asserts the post-conviction relief judge erred in finding appellate counsel was not ineffective for declining to argue the trial judge "abused [his] discretion in refusing to grant Petitioner a continuance so as to allow Petitioner sufficient opportunity to determine if the indictment of record was properly obtained from the Grand Jury." (Pet. for Cert. p. 5). Petitioner further asserts the post-conviction relief judge erred in finding appellate counsel was not ineffective in declining to argue "the trial [judge] abused [his] discretion in refusing to sever Petitioner's trial from [the co-defendant's trial] where there existed a substantial possibility that the indictment and the testimony of [the co-defendant] would prevent the jury from making a reliable [judgement] about Petitioner's innocence or guilt." (Pet. for Writ of Cert. p. 19). Petitioner bases much of these arguments on his unsubstantiated conspiracy theory that the State fraudulently procured a second indictment against him that more closely resembled the facts it intended to present at trial. However, these arguments were presented to the trial judge in a motion to quash the indictment. Because these arguments about Petitioner's indictment were not presented in the context of a motion for a continuance or a motion to sever, they could not have been presented on appeal. Furthermore, issues relating to the indictment and the severance were presented to appellate counsel, and his decision to not brief them is presumed reasonable. Accordingly, Respondent submits probative evidence supports the post-conviction relief judge's finding appellate counsel was not ineffective.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

Petitioner must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland v. Washington, 466 U.S. 668, 687 (1984). 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). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Furthermore, Petitioner 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 post-conviction relief judge's denial of relief when there is probative evidence to support his findings. 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)).

A. Appellate counsel was not ineffective in declining to brief an issue relating to a motion for a continuance.

"The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant." Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) (citing State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989); State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977)).

1. The record supports an inference appellate counsel made a valid strategic decision to forego briefing this issue.

Respondent initially submits the record supports the post-conviction relief judge's finding that appellate counsel made a "reasonable professional judgment" to not raise this issue. (App. p. 845). Trial counsel testified he provided an affidavit to appellate counsel regarding this case. (App. p. 818, line 25-p. 819, line 7). He testified he included issues related to the indictment in his affidavit to appellate counsel. (App. p. 820, lines 4-24). Applicant's mother testified she spoke to appellate counsel and raised the indictment issue with him. (App. p. 829, line 15-p. 830, line 18).

Because the record clearly indicates appellate counsel was aware of the issue relating to the indictment, the post-conviction relief judge properly presumed appellate counsel made a strategic decision to forego briefing this issue. See Harrington v. Richter, 562 U.S. 86, 109 (2011) ("There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" (citing Yarborough v. Gentry, 540 U.S. 1 (2003))); see also Strickland, 466 U.S. at 690

("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]"); Meyer v. Branker, 506 F.3d 358, 374 (4th Cir. 2007) ("[L]egal judgments based on thorough investigation are virtually unassailable on collateral review."). Accordingly, the record supports the post-conviction relief judge's finding appellate counsel was not deficient in this regard.[1]

2. Petitioner would not have been successful on appeal if appellate counsel had chosen to brief this issue.

Regardless of the above analysis, Respondent submits Petitioner cannot show, for a number of reasons, that he would have been successful on appeal even if appellate counsel had argued the trial judge erred in denying the continuance motion.

First, no such motion for a continuance was ever made. The trial judge stated after a lunch break that there was a motion "to continue the case" before him. (App. p. 75, lines 6-7). He then apologized, and stated there was a motion to sever the trials before him. It appears the trial judge misspoke when he used the phrase "to continue the case," and instead intended to say "to sever the trials." At no point in the record does Petitioner request a continuance. Thus, appellate counsel could not have argued the trial judge erred in denying the motion. Cf. Duncan v. Hampton Cnty. Sch. Dist. No. 2, 335 S.C. 535, 545 n.6, 517 S.E.2d 449, 454 n.6 (Ct. App. 1999) (failure to explicitly make motion on specific ground renders it not preserved (citing Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951))).

[1] Respondent also notes Petitioner presented no testimony from appellate counsel to rebut the presumption of effectiveness. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative"); 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."); see also 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)).

Second, even if Petitioner did move for a continuance, it was not on the grounds that he needed more time to investigate the origin of the indictment. At no point in the record did trial counsel indicate he needed more time to investigate the indictment. Although trial counsel stated he received a copy of the indictment on the morning of trial, (App. p. 59, lines 22-23), he did not indicate there was any element of surprise involved or that he needed more time to prepare.[2] Because trial counsel never stated he needed more time to investigate the indictment, appellate counsel could not have made this argument on appeal. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (issue must be "raised to the trial court with sufficient specificity" to be preserved for review (quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002))).

Third, the trial judge never specifically ruled on any motion for continuance. Trial counsel made his motions clear for the record at the conclusion of the pre-trial hearings. At that time, he moved to strike the indictment and to sever the trials. (App. p. 97, lines 9-10). The trial judge denied those motions. (App. p. 99, lines 12-13). Trial counsel did not ask for a ruling on any motion for a continuance and the trial judge never ruled on one. Thus, appellate counsel could not have successfully raised this issue on appeal. Id. At 183, 603 S.E.2d at 912-13 (issues must be "ruled upon by the trial court" to be preserved (citations omitted)).

[2] Respondent notes trial counsel testified at the evidentiary hearing he had a copy of the indictment prior to the trial (App. p. 797, lines 10-25) and fully explained the State's theory of the case to Petitioner (App. p. 815, lines 16-p. 816, line 4). See State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005) (holding that an indictment is notice document and must merely: (1) state the offense with "sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer" and (2) apprise defendant of the elements of the offense. (citations omitted)).

Fourth, and finally, the record is clear the indictment was available to trial counsel prior to trial. The trial judge procured the original indictment from the clerk's file.[3] (App. p. 64, line 19-p. 65, line 8; p. 75, line 24-p. 76, line 17). The original was available to trial counsel to review at any time prior to the trial.[4] Furthermore, trial counsel was fully aware of the extent and nature of the charges against Applicant. Therefore, the trial judge would not have abused his discretion in denying a motion for a continuance if trial counsel had asked for more time to investigate the indictment. State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 571 (1968) ("Counsel for the appellant and the other defendants had adequate notice of the conspiracy charge and sufficient time to prepare their defense to all of the charges prior to the term at which the defendants were tried, even though they were tried under a new indictment."). Because the trial judge would not have abused his discretion, Petitioner cannot show he would have been successful on appeal had appellate counsel briefed this issue.

B. Appellate counsel was not ineffective in declining to brief an issue regarding a motion for a severance.

"A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002). "Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173,

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[3] Petitioner devotes much discussion in his petition to his wild conspiracy theory that the State falsified an indictment against him to make it easier to prove its case. However, the record clearly indicates the original indictment on file with the clerk is the indictment eventually provided to counsel and the indictment the State proceeded on at trial. Thus, the post-conviction relief judge properly found Petitioner failed to present any credible evidence he was not properly indicted. See Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (presumption of regularity attaches to grand jury proceedings); Gentry, 363 S.C. at 102, 610 S.E.2d at 500 (indictment is notice document).

[4] Again, Respondent notes trial counsel admitted at the evidentiary hearing that he received a copy of the indictment prior to trial.

176 (1999). "[S]everance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. Id. at 282, 523 S.E.2d at 176.

1. The record supports an inference appellate counsel made a valid strategic decision to forego briefing these issues.

Respondent initially submits the record supports the post-conviction relief judge's finding that appellate counsel made a "reasonable professional judgment" to not raise this issue. (App. p. 845). Trial counsel testified he spoke to appellate counsel regarding this case. (App. p. 798, line 21-p. 799, line 12). He testified he felt the severance issue was important. (App. p. 801, lines 9-12; p. 820, lines 6-9). Because trial counsel's testimony indicates he discussed the severance issue with appellate counsel, the post-conviction relief judge properly presumed appellate counsel made a strategic decision to forego briefing this issue. Harrington, 562 U.S. at 109; Strickland, 466 U.S. at 690; Meyer, 506 F.3d at 374. Accordingly, the record supports the post-conviction relief judge's finding appellate counsel was not deficient in this regard.[5]

2. Petitioner would not have been successful on appeal if appellate counsel had chosen to brief this issue.

Regardless of the above analysis, Respondent submits Petitioner cannot show he would have been successful on appeal even if appellate counsel had argued the trial judge erred in denying the motion to sever.

Petitioner appears to argue a joint trial precluded the jury from making a reliable judgement of his guilt because the co-defendant's testimony was not credible. (Pet. for Writ of Cert. p. 20). Respondent submits this ground for severance was not presented at

[5] Respondent again notes Petitioner presented no testimony from appellate counsel to rebut the presumption of effectiveness. Dempsey, 363 S.C. at 370, 610 S.E.2d at 815; Dawkins, 354 S.C. at 70-71, 580 S.E.2d at 439; Collins, 686 S.E.2d at 308.

trial. At trial, trial counsel initially moved for a severance on the ground that the co-defendant was going to offer perjured testimony. (App. p. 45, line 8-p. 48, line 6). Subsequently, trial counsel learned the co-defendant would not be testifying in that manner, and withdrew his motion on that ground. (App. p. 48, line 23-p. 49, line 2). Trail counsel then changed his ground for a severance to the fact that the jury might enter a compromise verdict and convict both defendants because the co-defendant was black and Petitioner was white. (App. p. 49, lines 3-23). The co-defendant then moved for a severance because the two defendants would present antagonistic defenses. (App. p. 51, lines 23-24). In the light most favorable to Petitioner, it appears trial counsel joined in this motion by arguing the co-defendant was now going to "point the finger" at Petitioner. (App. p. 50, lines 14-p. 51, line 20).

At trial, Petitioner initially argued the co-defendant's perjured testimony would prejudice his client. However, he later abandoned that argument in favor of arguments about the race of Petitioner and co-defendant tainting the jury's verdict. Thus, trail counsel never advanced a theory at trial that the co-defendant's lack of credibility would prejudice Petitioner. Because this theory was not advanced at trial, appellate counsel could not have raised it on appeal. Rogers, 361 S.C. at 183, 603 S.E.2d at 913.

Regardless, the issue of the co-defendant's credibility would not have been grounds for a severance even if Petitioner had raised it to the trial judge. The mere fact a jury may find a co-defendant not credible is not sufficient to warrant a severance. See, e.g., State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 410 (Ct. App. 2001) ("[W]e reject the argument asserted by several of the appellants that the joint trial resulted in a 'spill-over effect' from evidence admitted against other co-defendants."); State v. Crowe,

258 S.C. 258, 267, 188 S.E.2d 379, 383 (1972) (rejecting appellant's argument that "proof of the guilt of his codefendant would establish such a heinous crime as to inflame the passions of the jurors and make it impossible for him to receive a fair and just consideration by the jury of the facts applicable to him."). The trial judge also issued instruction to the jury to consider the charges against each defendant separately and to make an independent decision as to each defendant. (App. p. 145, lines 5-19). He also instructed the jury that their verdicts for each defendant could be different. (App. p. 722, line 16-p. 724, line 15). These instructions are sufficient to "protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." Stuckey, 347 S.C. at 498, 556 S.E.2d at 410 (citations omitted). Accordingly, this issue would not have been successful even if preserved for appeal.

Petitioner also appears to argue the indictment in this case, when compared to the co-defendant's indictment, somehow prejudiced Petitioner. Respondent notes all of trial counsel's arguments at trial relating to the indictment were in the context of his motion to quash the indictment. (App. p. 59, line 17-p. 64, line 5; p. 94, line 17-p. 99, line 13). The arguments presented at trial regarding the confusion from the different wording of the indictments came from co-defendant's attorney, James Galmore. (App. p. 76, line 24-p.82, line 9). These arguments from Mr. Galmore were not adopted by Petitioner and could not be raised on appeal. State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) ("[A]ppellant may not utilize the objection of another defendant to gain review." (citing 4 C.J.S. Appeal and Error § 251 (1957))). As Petitioner never moved for a

severance on any grounds relating to the indictment, appellate counsel could not have raised that issue on appeal. Rogers, 361 S.C. at 183, 603 S.E.2d at 913.[6]

Even if properly preserved, this issue would not have required reversal if raised on appeal. The trial judge instructed the jury the indictments were not evidence. (App. p. 7, lines 11-15; p. 144, line 18-p. 145, line 1; p. 724, line 2-3). He further instructed the jury to determine the verdict for each defendant independent of the other (App. p. 145, lines 5-19; p. 722, line 16-p. 724, line 15). These cautionary instructions were sufficient to protect Petitioner's rights. Stuckey, 347 S.C. at 498, 556 S.E.2d at 410.

[6] Respondent notes Petitioner's two preserved grounds for severance, antagonistic defenses and the race of the defendants, would also not have justified reversal if raised on appeal. Dennis, 337 S.C. at 282, 523 S.E.2d at 176 (antagonistic defenses do not mandate severance); State v. Vincent, 908 P.2d 619, 623 (Kan. 1995) (rejecting argument that defendant's "association as a white female with four black codefendants should require severance").

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

June 18, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

MICHAEL ADAM BAILEY,

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:

Appellate Defender John H. Strom
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 18th day of June, 2015

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 18 2015
S.C. Supreme Court

June 18, 2015

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

RE: **Michael Adam Bailey v. State of South Carolina**
Appellate Case No: 2014-000651

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: John H. Strom, Esquire (2 copies)