

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-002302

RECEIVED

AUG 27 2015

S.C. Supreme Court

Reginald Antonio Nance, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Did trial counsel err in eliciting testimony from a police officer about information referencing petitioner's involvement in an additional burglary and another grand larceny that were arguably crimes unrelated to the burglary and grand larceny charges for which petitioner was on trial because this opened the door for the jury to consider prejudicial prior bad acts evidence in the case, which in turn violated petitioner's right to a fair trial?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the March 2010 term of General Sessions for grand larceny (2010-GS-39-0354), petit larceny (2010-GS-39-0355), two counts of second-degree burglary (2010-GS-39-0356, -0357), possession of a weapon during the commission of a crime (2010-GS-39-0358), and malicious injury to real property (2010-GS-39-0360). (App.pp.880-91). John W. DeJong, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On April 30, 2010, the Honorable G. Edward Welmaker sentenced Petitioner to concurrent terms of 30 days for petit larceny, 11 years for one count of second-degree burglary,¹ 5 years for possession of a weapon during the commission of a crime, and 5 years for malicious injury to real property. Judge Welmaker levied consecutive sentences of 5 years for grand larceny and 11 years for the second count of second-degree burglary. (App.pp.802-03).

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. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Nance, Op. No. 2013-UP-215 (S.C. Ct. App. filed May 22, 2013). The remittitur was sent June 14, 2013.

Petitioner filed an application for post-conviction relief (PCR) on June 19, 2013 (2013-CP-39-0789). (App.pp.805-12). A hearing was held at the Pickens County

¹ 2010-GS-39-0356.

Courthouse on August 25, 2014. (App.pp.819-69). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable James R. Barber, III denied relief in an order filed October 17, 2014. (App.pp.871-79). Judge Barber denied Petitioner's motion to alter or amend judgment by order filed December 16, 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 PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

Petitioner argues trial counsel erred because he "opened the door" to prior bad act evidence when he "elicited testimony from a police officer about information referencing [his] involvement in an additional burglary and another grand larceny." (Cert. Pet., p.2; p.4). This argument is without merit.

A.

At approximately 11:00 p.m. on January 27, 2009, police responded to a burglary alarm in Pickens, South Carolina and determined two stores had been robbed. Police

noted a light blue Mercury Sable was parked and running in the parking lot. (App.pp.77-82). Numerous items from the burglarized stores were found in the Sable. (App.pp.302-05). Also found in the Sable were two phones and a wallet containing cards and licenses of Petitioner and his co-defendant (Johnny Parks). (App.pp.223-26; p.242). K-9 officers tracked the suspects from the Sable to a steep drop-off in the nearby woods but were unable to pick up the scent when they went to the bottom of the drop-off. (App.p.157; pp.161-66; pp.192-94).

It was determined Petitioner purchased the Sable earlier that day and received two sets of keys for that car. (App.pp.125-30). Petitioner's girlfriend confirmed the purchase but stated she only knew about one set of keys. (App.pp.344-49). Petitioner's girlfriend testified she locked the Sable before she went to bed that night and did not see either Petitioner's phone or wallet inside at that time. (App.p.352). Petitioner's girlfriend reported the Sable stolen on the morning of January 28, 2009. (App.p.349). The Laurens police officer who responded to the stolen vehicle report testified Petitioner's girlfriend "was nervous, kind of jittery, normal for a stolen vehicle, but somewhat suspicious." (App.pp.403-05). The Laurens officer put the Sable's VIN into NCIC and was quickly alerted the car was in Pickens. (App.pp.406-07). The Pickens investigator spoke to Petitioner's girlfriend, who gave them Petitioner's phone number. (App.p.434-35). The Pickens investigator testified his deputy called this number and one of the phones recovered from the Sable rang. (App.p.421; p.435).

Upon cross-examining the Pickens investigator, trial counsel asked if he was confusing the Sable with a Ford Taurus that was stolen in Pickens and the investigator

said he was not. (App.p.445). Over trial counsel's objection, the assistant solicitor recalled the Pickens deputy who stated a Taurus was stolen in the nighttime hours of January 27-28, 2009 from a body shop two miles from the crime scene and later recovered in Clinton, South Carolina. (App.p.471-74).

Parks testified Petitioner picked him up "to do a lick." (App.pp.480-81). Parks identified the Sable as the car Petitioner was driving and noted Petitioner said he had purchased it that day. (App.pp.484-85). Parks testified they broke into the businesses and robbed them. (App.pp.591-92). Parks testified they fled by running towards the tree line and jumping down a drop-off. (App.pp.503-07). Parks testified they ran for a while and then stole a Taurus from a body shop. (App.pp.508-13). Parks testified they planned for Petitioner to tell his girlfriend to report the Sable was stolen. (App.p.515).

B.

At the PCR hearing, Petitioner argued trial counsel opened the door to testimony about the stolen Taurus while cross-examining Lieutenant Byers. Petitioner argued this bolstered Parks' credibility and implicated him in an additional theft (of the Taurus). (App.pp.831-34).

Trial counsel testified his recollection was that he received information about the vehicle found in Laurens County (the Taurus) later in his representation. (App.p.859; p.863). Trial counsel testified he went into this at trial "[n]ot to show that [Petitioner] had committed another crime, but certainly to try and get away from this particular crime." (App.p.863). Trial counsel testified there were no forensics in the Taurus that matched to Petitioner. (App.p.868). Trial counsel testified the information about the

Taurus was used during cross-examination because he was “certainly having my shot at [Lieutenant] Byers on cross examination, I had to take it when I could.” (App.p.868).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner did not meet his burden of proving trial counsel improperly handled the issue of the Taurus. The PCR judge found trial counsel did not improperly open the door and instead “used a valid trial tactic in asking Byers whether there was confusion about the stolen vehicle, as this could have created uncertainty about this facet of the State’s case.” The PCR judge found Petitioner could not prove he was prejudiced by this testimony, as the co-defendant subsequently testified they stole the Taurus. (App.pp.876-77).

C.

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

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel's performance was deficient. Trial counsel testified he wanted to "hav[e] my shot" at the investigator. It was clear this was an attempt to highlight potential confusion between the stolen Sable and the stolen Taurus. The PCR judge found this was a valid strategy. This Court has found that, where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). While trial counsel may not have specifically articulated his strategy at the PCR hearing, a reading of the record clearly indicates trial counsel was attempting to inject some confusion into law enforcement's investigation into the chain of events. See Wood v. Allen, 558 U.S. 290, 301-02, 130 S. Ct. 841, 849-50 (2010) (holding the record can be read to support a judge's factual determination of counsel's trial strategy). As such, Petitioner failed to demonstrate trial counsel's performance was deficient.

E.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced by trial counsel's representation. Even assuming arguendo

that trial counsel's performance was deficient, Petitioner cannot demonstrate he suffered any resulting prejudice because testimony about the stolen Taurus would have been introduced when Parks testified. The theft of the Taurus would have been admissible testimony because it was part of the res gestae of the crime and established the chain of events that occurred after Petitioner and Parks fled the crime scene. See Rule 404(b), SCRE; State v. Preslar, 364 S.C. 466, 473-74, 613 S.E.2d 381, 385 (Ct. App. 2005) ("The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.") (citations omitted). Testimony about the theft of the Taurus was necessary to explain both that Petitioner and Parks left the Sable at the crime scene and that the Taurus was later found in Laurens County (where Petitioner's girlfriend lived).

Regardless, Petitioner cannot demonstrate he suffered any resulting prejudice because the State presented overwhelming evidence of his guilt at trial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Petitioner was given two sets of keys when he purchased the Sable on the morning of the robbery, but only gave one set to his girlfriend. Petitioner's girlfriend reported the Sable was missing from her house the morning after the robbery. The Sable recovered at the crime scene had a VIN that matched the Sable that Petitioner purchased earlier that day. Petitioner's cell phone and various forms of identification were found in the Sable. Various items stolen from the

businesses were found in the Sable. The testimony of the K-9 officers corroborated Parks' testimony about the path he and Petitioner took when they fled the crime scene. Parks testified he and Petitioner set out that night "to do a lick" (commit a crime) and that they broke into those businesses and robbed them and then fled from the scene. Based upon the strong evidence presented at trial, the State established Petitioner's overwhelming guilt and he cannot demonstrate he was prejudiced by trial counsel's single question during his cross-examination of the Pickens investigator. See id.; see also 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).

F.

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.").

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 issue discussed above.

Respectfully submitted,

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By: 
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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 interagency mail, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 27th day of August, 2015.


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