STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No.: 2014-002162

ROGER RAYNARD PARKER,

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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PETITIONER'S ISSUES PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to request a jury instruction on the lesser included offense of voluntary manslaughter where there was evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation?

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to call Petitioner's mother, Virginia Johnson, as a witness at trial where Johnson witnessed the events leading up to the shooting and her testimony supported Petitioner's defense of self-defense and would have further supported a voluntary manslaughter jury instruction?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the March 2007 term of the Charleston County Grand Jury for murder (2007-GS-10-4293). Petitioner was represented by Andrew Grimes, Esquire.

Petitioner proceeded to a jury trial and was convicted on February 27, 2008. The Honorable R. Markley Dennis, Jr. sentenced Petitioner to confinement for a period of life without parole.

Petitioner filed a timely Notice of Appeal. The appeal was perfected by Robert Dudek, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Roger, Op. No. 2010-UP-378 (Ct. of App. August 2, 2010). Petitioner filed a Petition for Certiorari to the South Carolina Supreme Court which was denied by Order dated January 11, 2012. The Remittitur was issued February 3, 2012.

On November 14, 2012, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about July 5, 2013, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on May 19, 2014, in Charleston County before the Honorable Deadra L. Jefferson. Christopher L. Murphy. Esquire, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented Respondent. By an Order of Dismissal signed September 16, 2014 and filed September 18, 2014, the PCR Court denied and dismissed Petitioner's application with prejudice.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Petitioner's trial counsel (hereinafter "Counsel") ineffective where Counsel failed to request a jury instruction on the lesser included offense of voluntary manslaughter and failed to call Virginia Johnson to testify as a witness at trial. For the following reasons, Respondent contends that these arguments are without merit.

Relevant Law

In a PCR action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. Second, counsel's deficient performance must have prejudiced the

Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

This Court has held that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

I. There is evidence of probative value to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to request a jury instruction on the lesser included offense of manslaughter.

Petitioner argues that Counsel was ineffective for failing to request a jury instruction on the lesser included offense of voluntary manslaughter where there was evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation. Petitioner argues that Counsel's failure to request such a charge deprived him of the chance to avoid being convicted of murder. Respondent submits that because a charge on the lesser-included offense was incompatible with Counsel's strategy, Counsel had no reason to request such a charge.

How the Issue Was Raised

At trial, Counsel did not request the judge to charge the jury with the law on voluntary manslaughter as a lesser included offense of murder. At the PCR hearing Counsel testified that he had a brief discussion with Petitioner on certain charges he was going to request, including

self-defense, defense of others, and defense of habitation. (App. p. 883, ll. 14-16). Counsel explained that he was considered asking for voluntary manslaughter, but believed that the State would have a much harder time proving malice aforethought for the self-defense argument than proving that the killing was in a heat of passion with voluntary manslaughter. (App. p. 884, ll. 1-3). Counsel explained, "I figured that would pretty much guarantee a loss on a voluntary manslaughter if he had that charged." (App. p. 884, ll. 3-5). Counsel explained that he employed this strategy because he thought it would be best to go "all or nothing" on the murder charge and not give the jury the option of voluntary manslaughter, especially considering that he believed the jury could have an issue with the State proving malice on murder but not have a problem convicting him on voluntary manslaughter. (App. p. 883, ll. 23-24; p. 891, ll. 3-4).

In the Order of Dismissal, Judge Jefferson found that "[C]ounsel articulated a valid strategic basis for his decision not to request a Voluntary Manslaughter jury instruction." (App. p. 915). The PCR Court further found that "the strategy employed by Counsel was valid and did not result in any failure by Counsel to meet an objectionably reasonable standard of performance," and thus Petitioner failed to prove Counsel was ineffective in that regard. (App. p. 916).

Analysis

Petitioner's argument is without merit. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Furthermore, the decision to request instructions on lesser-included offenses is a type of strategic decision that is "beyond the realm of serious consideration on a claim of

ineffective assistance of counsel." Abney v. State, 408 S.C. 41, 47, 757 S.E.2d 544, 547 (Ct. App. 2014), cert. denied (Jan. 15, 2015) (quoting Havard v. State, 928 So.2d 771 (Miss. 2006)).

At the time of trial, Counsel reasonably believed that it was in Petitioner's best interest to proceed on a murder charge that Counsel believed Petitioner would prevail on rather than request a voluntary manslaughter charge that he believed would be a certain conviction for Petitioner. After all the evidence had been presented, Counsel believed that an "all or nothing" strategy concerning the murder charge was appropriate because the jury might find that the State did not prove the malice element of murder or that Petitioner was acting in self-defense, and thus Petitioner would be found not guilty. See State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), overruled on other grounds, 695 S.E.2d 750 (N.C. 2006) ("The record indicates defendants' counsel were employing an 'all or nothing' strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel."). The PCR Court correctly held that Counsel employed a valid strategy and that Petitioner did not meet his burden of proving ineffectiveness. See Abney, 408 S.C. at 46-47, 757 S.E.2d at 547 (holding trial counsel was not ineffective where he can articulate a valid strategic reason for failing to request a lesser offense jury instruction).

II. There is evidence of probative value to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to call Petitioner's mother as a witness.

Petitioner argues that Counsel was ineffective for failing to call Petitioner's mother as a witness. Petitioner claims that his mother witnessed the shooting and could help support the self-defense or voluntary manslaughter theory. Respondent submits that Counsel had a valid strategy in not calling Petitioner's mother because she was not present when the shooting took place and he did not think her testimony would assist in the defense.

How the Issue Was Raised

Aside from Petitioner, Counsel put up four witnesses at trial who were either eyewitnesses or ear-witnesses to the shooting. Counsel did not put up Petitioner's mother, Virginia Johnson, as a witness. At the PCR hearing, Counsel stated that although he could not recall if he discussed calling Mrs. Johnson as a witness, he was sure that he did because he talked to her before trial. (App. p. 884, ll. 22-25). Counsel elaborated, testifying that he did not call her as a witness because "she was upstairs when it happened and didn't see the incident." (App. p. 885, ll. 5-6). This is similar to Mr. Johnson's testimony during trial, where he testified that his wife was not present while he hit Mr. Grant with the bat leading up to the shooting, stating "[Virginia] didn't come outside, she went in the house." (App. p. 580, ll. 4-5). Counsel further testified at the PCR hearing, "I think [Virginia] saw some preliminary stuff to the incident when Mr. Grant came over and was making a scene. And given that we had his father and Mr. Green as witnesses I wasn't sure how much his mother would add to the facts of the case." (App. p. 885, ll. 7-11).

Mrs. Johnson testified at the PCR hearing about her husband arguing with the victim and provided context as to the cause of their argument. (App. p. 895, ll. 4-7). She testified about Petitioner arriving on the scene and testified that she heard the gunshots and ran and did not see the shots fired.[1] (App. p. 896, 10-14). On cross-examination, Mrs. Johnson again testified that she ran after hearing gunshots and did not say that she saw the shooting.[2] (App. p. 898, ll. 3-5).

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[1] App. p. 896, 10-14.
Q. Did you see the shots fired at all?
A. I ran.
Q. Okay. You didn't see who shot him you just heard and ran.
A. I didn't see it. Right.

[2] App. p. 898, ll. 3-5.
Q. Ms. Johnson, you didn't see the victim get shot is that correct?
A. I ran after I heard the gunshots.

In its Order of Dismissal, the PCR Court found that Counsel had made a strategic decision to not call Mrs. Johnson as a witness and that "[C]ounsel did not provide deficient performance when deciding not to call a witness whose testimony he did not think would be supportive of the [Petitioner's] defense." (App. p. 913-914). The PCR Court specifically found that after hearing Mrs. Johnson's testimony at the PCR hearing, "her testimony would not have added anything to [Petitioner's] version of the facts." (App. p. 914). Further, the PCR Court found that Mrs. Johnson's testimony "was particularly unhelpful to the defense since she was not present when the shooting occurred and did not witness the final interaction between the [Petitioner] and the victim, which became the basis for the Petitioner's self-defense claim at trial." (App. p. 914). Additionally, the PCR Court found that no prejudice resulted from Counsel's failure to call Mrs. Johnson because Petitioner testified on his own behalf at trial and any testimony from Mrs. Johnson would have been cumulative. (App. p. 914).

Analysis

Petitioner's argument is without merit. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead, 308 S.C. at 122, 417 S.E.2d at 531. Respondent submits that the PCR Court correctly held that Counsel was not ineffective in failing to call Mrs. Johnson to testify at trial when he did not think she would provide supportive testimony, especially in light of the fact that she did not witness the shooting. Furthermore, the PCR Court had the opportunity to hear Mrs. Johnson's testimony at the PCR hearing about what she witnessed the night of the incident and concluded that the testimony was "particularly unhelpful to the defense" and "cumulative." (App. p. 914). There is certainly evidence to support the PCR Court's findings after reviewing Mrs. Johnson's testimony.

Respondent contends Mrs. Johnson provided nothing that would have aided Petitioner's case, especially considering that Petitioner and three other witnesses testified for the defense who were more involved in the incident and witnessed much more than Mrs. Johnson. Accordingly, there is evidence of probative value to sustain the PCR Court's findings that Counsel employed a valid trial strategy and was not ineffective.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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September 14, 2015

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ROGER RAYNARD PARKER,

PETITIONER,

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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:

Lara M. Caudy, Esquire
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This 14th day of September, 2015.

ELIZABETH MCLELLAN
LEGAL ASSISTANT