

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas

S.C. Supreme Court

James R. Barber, III, Post-Conviction Relief Court Judge
G. Thomas Cooper, Jr., Trial Court Judge

Appellate Case No. ~~2013-000731~~ 2014-000447

JARVIS GIBBS,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. There is evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective in his response to testimony and closing argument references as to possible intimidation of State's witness Arthur Macklin?

STATEMENT OF THE CASE

The Kershaw County Grand Jury indicted Gibbs during the October 2008 term for kidnapping (2008-GS-28-01555), use of a firearm during a violent crime (2008-GS-28-01556) and during the November 2009 term for entering a bank with intent to steal (2009-GS-28-1548). All three charges arose out of the July 25, 2008, robbery of the First Palmetto Savings Bank in Camden, South Carolina. Samuel Ogburn, Esquire, represented Gibbs on all charges. Gibbs proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where the jury convicted him as indicted. On November 18, 2009, Judge Cooper sentenced Gibbs to eighteen years imprisonment for both kidnapping and entering a bank with intent to steal and five years imprisonment for use of a firearm during a violent crime, with all sentences to be served concurrently.

Gibbs filed a notice of appeal and an appeal was perfected on his behalf. The South Carolina Court of Appeals affirmed Gibbs's convictions and sentences after briefing. State v. Jarvis Gibbs, Op. No. 2011-UP-511 (S.C. Ct. App. filed December 19, 2011). The Remittitur was issued on December 19, 2011.

Thereafter, Gibbs filed an application for post-conviction relief on March 26, 2012. In his Application, Gibbs alleged he was being held in custody unlawfully based on the following grounds:

1. "Ineffective Assistance of Counsel—failure to call witnesses own [sic] my behalf";
2. "Failure to move to suppress line up identification evidence";
3. "Failure to question State witness, pro-trial [sic], and investigate"; and
4. "Under the compulsory process I the defendant my lawyer never moved to suppress a line up my lawyer never questioned the State witness"

The State made its Return on June 20, 2012, requesting an evidentiary hearing be held.

Thereafter, Gibbs, through his counsel, filed an amended application on June 3, 2013,

alleging the following grounds for relief:

1. Trial Counsel was ineffective for failing to impeach state witness Chad Moore concerning his own pending charges, his sentencing exposure on his charges, and his motivation to testify against the Applicant in hopes of earning a favorable deal with the State;
2. Trial Counsel provided the Applicant ineffective assistance of counsel in that they failed to seek to exclude the identification testimony of Melissa Roberts from evidence despite facts and circumstances which rendered her identification inherently unreliable;
3. Trial Counsel was ineffective for failing to cross-examine Melissa Roberts concerning her testimony on direct in which she stated, “when I *thought* I saw him prior”;
4. Trial Counsel was ineffective for failing to point out during closing argument that although Melissa Roberts claimed to be certain of her identification of the Applicant *in a mask* she acknowledged that she “thought” she saw him in the bank previously without a mask;
5. Trial Counsel was ineffective for failing to object the first and every time the State introduced testimony asserting the Applicant’s admission to the distribution of crack cocaine;
6. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel when they neglected to request an appropriate curative charge after their request for a mistrial, based upon the introduction of improper testimony concerning drugs, was denied;
7. Trial Counsel was ineffective [sic] for failing to object to a line of testimony in which a key witness for the prosecution, Arthur Macklin, was allowed to testify that he had been threatened and physically assaulted as a consequence of his cooperation with the Applicant’s prosecution thereby improperly bolstering the witnesses’ credibility and attacking the Applicant’s character where there was no evidence connection between the Applicant and the behavior in question;
8. Trial Counsel was ineffective for failing to object to testimony that the three-wheeler allegedly used in this robbery was stolen;
9. Trial Counsel was ineffective for failing to ask the jury to specifically observe multiple tattoos and scars [sic] on the Applicant’s arms where the eye witness testimony

presented at trial made no mention of these obvious physical traits;

10. Trial Counsel was ineffective for neglecting to object to an improper and highly inflammatory closing argument in which the State emphasized threats to witness Macklin where there was no evidence tying the Applicant to any such activity;
11. Trial Counsel was ineffective for failing to introduce testimony to refute the claim of witness Melissa Roberts that the Applicant and his family had been in a restaurant owned by her in-laws "at times" since she knew the Applicant at school;
12. Trial Counsel was ineffective for inaccurately repeating the testimony of Melissa Roberts during his closing argument in a manner [sic] which actually bolstered the testimony of this key State witness;
13. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecutor erroneously claimed that the witness Melissa Roberts has testified that the Applicant had been in her branch of the bank "a couple of days earlier" where the record did not support that claim;
14. Trial Counsel was ineffective for neglecting to object to a portion of the prosecutor's closing argument in which he erroneously claimed that witness Melissa Roberts had said that when she saw the Applicant at the bank, on a different date from the robbery, he was wearing what . . . could have been even the same white shirt";
15. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution erroneously argued that the Applicant's testimony wasn't credible because he claimed to have heard about the bank robbery before he left the barber shop at 11:00 a.m. when the robbery actually took place at 11:00 a.m.

An evidentiary hearing into the matter was convened on June 6, 2013, at the Richland County Courthouse before the Honorable James R. Barber, III. Gibbs was present at the hearing and was represented by counsel Tara D. Shurling, Esquire. The State was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Gibbs proceeded forward on the grounds as set forth in his amended application. Gibbs testified on his own behalf and presented

testimony from trial counsel, Samuel Ogburn, Esquire, and his half-sister, Jada Gibbs. Gibbs also presented an affidavit from Ronald W. Moak, the former Assistant Solicitor who prosecuted this case.

After a review of all materials presented, post-conviction relief court denied and dismissed Gibbs's application by written order signed January 14, 2014, and filed on January 17, 2014. Thereafter, Gibbs filed a "Rule 59 SCRCPC, Motion to Alter or Amend." The State filed a return to this motion on January 31, 2014. The post-conviction relief court denied and dismissed Gibbs's motion by written order filed February 11, 2014.

Gibbs filed a Notice of Appeal on March 4, 2014. Thereafter, Gibbs filed a Petition for Writ of Certiorari on January 7, 2015. The State submitted its Return to the Petition for Writ of Certiorari on May 8, 2015. On August 5, 2015, this Court granted certiorari as to Question I and denied certiorari as to Question II as set forth in the Petition for a Writ of Certiorari. Gibbs filed his Brief of Petitioner on September 4, 2015. This Brief of Respondent follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 applicant 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. 668. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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)).

These standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. There is evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective in his response to testimony and closing argument references as to possible intimidation of State's witness Arthur Macklin.

On July 25, 2008, a masked assailant robbed the Dusty Bend branch of the First Palmetto Savings Bank in Camden, South Carolina. (App. pp. 102, 103, 109-10). Based on surveillance footage and accounts from the four tellers working during the robbery, law enforcement knew the assailant was an African-America male over six feet tall wearing gloves, a short-sleeved white shirt and a ski mask. (App. pp. 103, 115, 117, 136, 194, 196). One of the tellers reported that the robber fled the bank on a bicycle. (App. p. 137). Law enforcement searched the area surrounding the bank and found an abandoned bicycle, which was placed into the trunk of a police cruiser. (App. pp. 189, 193, 166-67). Earlier that morning, Gibbs borrowed a bicycle from Arthur Macklin, a fellow resident of the Dusty Bend area. (App. pp. 162-63). Following the robbery, Macklin noticed the bicycle in the trunk of a police cruiser looked strikingly similar to his bike he had loaned Gibbs. (App. pp. 166-67). Macklin, through his attorney, contacted law enforcement regarding the bicycle and informed them Gibbs had borrowed the bicycle that morning. (App. pp. 166-67). Shortly thereafter, law enforcement located Gibbs on a park bench nearby and took him into custody. (App. pp. 314-17).

During Gibbs' trial, all four tellers working during the robbery testified. Melissa Roberts, one of the four tellers, had been a bank teller for over ten years and been employed at the Dusty Bend Branch of First Palmetto Savings Bank for more than five years. (App. p. 119). Roberts was the only teller who identified Gibbs as the robber. (App. pp. 126, 132, 138, 139, 141). Roberts testified she had gone to the same high

school as Gibbs, which contained students from seventh to twelfth grade. (App. pp. 120, 131, 133). She could not remember if she had any classes with Gibbs, but recalled attending school with him for at least one year and knew he had dropped out of school around ninth grade. (App. pp. 120, 133-34, 140). She testified she had also seen Gibbs and his family approximately five years earlier at a store owned by her mother-in-law. (App. pp. 134-35). Roberts testified she had also seen Gibbs in the bank shortly before the robbery, although she did not give a specific date. (App. pp. 120-22,131). She testified Gibbs had come in on a “very, very busy day” and she recalled it well because she thought it was peculiar Gibbs was there when he had no banking relationship with First Palmetto Savings Bank. (App. pp. 120-22). She testified that he never approached any tellers or conducted any business, but rather, appeared to leave after looking around the branch. (App. p. 121-22). She testified Gibbs had on a white shirt, which the assailant was also wearing. (App. pp. 122, 124).

Roberts provided law enforcement with a statement immediately after the robbery on Friday, but did not name Gibbs as the assailant until the following Monday. (App. pp. 137-38). However, Roberts testified her first thought after the robbery of Gibbs’ recent visit to the bank and that he was the assailant. (App. p. 126). She testified she was able to identify Gibbs as the assailant based on his size, mannerisms, and the shape of his head. (App. pp. 126, 132, 139).

Leah Bailey, another one of the tellers, also testified during Gibbs’s trial. Bailey testified she could not identify the robber, but described him as very tall and wearing a white shirt, blue surgical gloves, and a mask. (App. pp. 109-11). She testified earlier that same week, a suspicious individual came into the bank on a “very busy day.” (App. p.

111). She described the suspicious man as dressed in a shirt similar to the assailant. (App. p. 112).

Macklin also testified as a State's witness. (App. pp. 162-186). Macklin was clearly hesitant to testify, often uncooperative with both the prosecuting Assistant Solicitor and Gibbs's counsel, and attempted to invoke his Fifth Amendment right to silence in response to several questions. (App. pp. 162-186). Macklin testified unequivocally that Gibbs had borrowed his bicycle the morning of the robbery and it was never returned to him. (App. pp. 163, 182, 184) He testified definitively several times that the bicycle he saw in the police cruiser the day of the robbery was his bike. (App. pp. 164, 166, 167, 168, 182, 185). However, Macklin did express slight hesitancy in confirming the bike brought into the courtroom was his, noting a minor difference in the shocks, but eventually testified it was indeed his bicycle. (App. pp. 183-86).

During his direct examination, Macklin testified he did not want to have any involvement in the investigation, citing concern for his safety. (App. pp. 169-73). Macklin elaborated he had been assaulted by several men after his name appeared in a local newspaper article about the case. (App. pp. 170-71). He testified he did not know his attackers and they did not say anything or give any reason for the attack. (App. pp. 171-72). During cross examination, Gibbs's counsel asked Macklin if Gibbs had ever threatened him, to which Macklin replied "*No way at all.*" (App. p. 184) (emphasis added). Gibbs's counsel later asked Macklin if he had seen Gibbs since the robbery, and Macklin responded he had and Gibbs had not said anything to him. (App. p. 186). Macklin never testified Gibbs or anyone connected to Gibbs had assaulted him or threatened him in any way.

During its closing argument, the State mentioned Macklin's reluctance and uncooperative nature on the witness stand. (App. pp. 403-04). The prosecuting Assistant Solicitor attempted to explain Macklin's hesitancy and difficult nature by again citing to Macklin's safety concerns following his assault. (App. pp. 403-404). However, he never stated Gibbs had inflicted those injuries on Macklin or the attack was at Gibbs's order or direction.

Gibbs argues trial counsel was ineffective for failing to object to Macklin's testimony regarding the assault and his subsequent fears in cooperating with authorities. Gibbs also asserts trial counsel was ineffective for not objecting when the State referenced Macklin's assault and reluctance to testify during its closing argument. Gibbs contends the post-conviction relief court erred in finding that trial counsel was not ineffective and asserts this Court should reverse the lower court.

In its Order of Dismissal, the post-conviction relief court found Gibbs failed to satisfy his burden of proof under both prongs, deficiency of counsel and requisite prejudice, as to alleged witness intimidation of Macklin. The post-conviction relief court found counsel did not perform deficiently, noting trial counsel was able to successfully highlight to the jury to Gibbs had never hurt, attempted to hurt, or threatened Gibbs and that Gibbs was in no way involved with the assault on Macklin. (App. p. 701). The post-conviction relief court also found Gibbs was unable to establish any resulting prejudice, noting the testimony and closing comments were rather innocuous to Gibbs's case as Macklin unwaveringly affirmed that Gibbs was not involved in his attack and therefore Gibbs was not prejudiced. (App. p. 701). These findings are supported by ample evidence in the record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

At the evidentiary hearing, trial counsel testified he did not object to the line of questioning regarding Macklin's assault because Macklin was an unreliable witness who changed his story multiple times during his testimony, which he believes was conveyed to the jury. (App. pp. 541-44). He testified instead of objecting to this testimony, which could have highlighted it for the jury or implied that Gibbs was trying to hide something, he squarely addressed the issue during cross examination and elicited that Gibbs was in no way whatsoever involved in the attack. (App. pp. 602-03). Trial counsel also testified this was a strategic decision on his part, as Macklin was "sort of a loose cannon" on the witness stand. (App. p. 603).

Gibbs cites to various cases on witness intimidation to support his assertion that the post-conviction relief court erred. See State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914) (holding an unsigned letter sent to a witness with a coffin drawn on it was meant to intimidate but was inadmissible because State could not establish that the defendant was the source of the letter); Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994) (finding counsel's failure to object to prosecutor's closing comments suggesting witness intimidation led to false testimony constituted ineffective assistance of counsel); State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009) (holding witness intimidation admissible if linked to the defendant). See also United States v. Hayden, 85 F.3d 153 (4th Cir. 1995) (finding threatening letter and telephone calls to witnesses were admissible because sufficient connection to defendant was shown).

However, Gibbs's case is readily distinguishable from these cited cases, as Macklin freely and unequivocally declared that Gibbs was not the perpetrator of his attack and had not threatened him in any manner whatsoever. This is a crucial and important distinction separating the case at bar from those cited by Gibbs, as the jury was

affirmatively told that Gibbs was not responsible for Macklin's attack or his resulting hesitancy to testify. Therefore, the testimony of Macklin's attack and its use by the State in its closing argument had little if any impact on Gibbs case and certainly did not rise to the requisite level of prejudice (that the result of the proceeding would have been different but for counsel's error) to grant Gibbs a new trial. Furthermore, the State never argued that Gibbs inflicted those injuries on Macklin or the attack was at Gibbs's order or direction.

Based on the foregoing, it is clear that trial counsel made well-reasoned, thoughtful, and informed strategic decisions regarding the allegations of possible witness intimidation of Macklin. As counsels articulated valid strategic logic behind his decisions regarding Macklin's testimony, the post-conviction relief court correctly denied relief. These findings are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For all the foregoing reasons, Respondent submits that the post-conviction relief court's findings should be affirmed.

Respectfully submitted,

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Nov. 4th, 2015

STATE OF SOUTH CAROLINA
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CERTIORARI TO KERSHAW COUNTY
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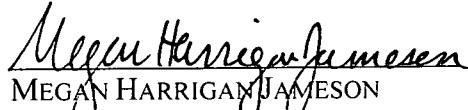
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

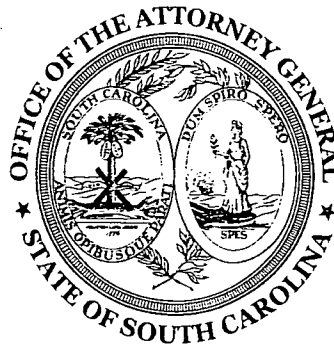
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I further certify that all parties required by Rule to be served have been served.

This 4th day of November, 2015.


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November 4, 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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Columbia, South Carolina 29211

Re: Jarvis Gibbs, #255871 v. State of South Carolina

Appellate Case No. ~~2013-000731~~ 2014-000447

Dear Mr. Shearouse:

Enclosed for filing are the original and thirteen (13) copies of Respondent's Brief of Respondent.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

MHJ/jcb
Enclosures

cc: John H. Strom, Esquire
Trisha Allen, Victim's Services