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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

Certiorari to Williamsburg County
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

2010-CP-45-0389
Appellate Case No. 2015-000136

KEVIN C. BRADLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Whether probative evidence supports the PCR Court's finding that Petitioner knowingly and intelligently waived his right to a direct appeal.**
- II. Whether probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective in his representation of Petitioner on all the Batson related claims.**
- III. Whether Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective in failing to request a continuance due to Petitioner's indictment being amended to include a charge of criminal sexual conduct-first degree, where Petitioner was originally indicted for criminal sexual conduct-second degree.**
- IV. Whether probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective when objecting to Barbara Gregg's testimony and Trial Counsel was not ineffective for failing to object to the testimony of Trina Hamlet and Robin Tyler Griggs.**
 - a. Whether Trial Counsel was not ineffective when objecting to Barbara Gregg's testimony.**
 - b. Whether Trial Counsel was not ineffective for failing to object to Trina Hamlet's testimony.**
 - c. Whether Trial Counsel was not ineffective for failing to object to Robin Tyler Griggs' testimony, where Trial Counsel did object to Robin Tyler Griggs' testimony.**
- V. Whether probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for failing to object to testimony from forensic interviewer, Robin Tyler Griggs.**

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Applicant was true bill indicted at the January 2010 term of the Williamsburg County Grand Jury for Criminal Sexual Conduct with a Minor—First Degree and Criminal Sexual Conduct with a Minor—Second Degree (2009-GS-45-249). Richard Strobel, Esquire represented Applicant. Applicant proceeded to a jury trial before the Honorable Clifton Newman and on January 27, 2010, Applicant was found guilty. Judge Newman sentenced Applicant to twenty-five years imprisonment for Criminal Sexual Conduct with a Minor—First Degree and twenty years for Criminal Sexual Conduct with a Minor—Second Degree. The sentences were to run concurrently. Applicant did not appeal his conviction or his sentence.

Petitioner filed an application for post-conviction relief on September 29, 2010, and amended on February 25, 2013 and May 20, 2014. Respondent filed an amended return October 28, 2013. An evidentiary hearing into the matter was convened at the Sumter County Courthouse on May 27, 2014, before the Honorable R. Ferrell Cothran, Jr. Petitioner was present at the hearing and represented by Tara D. Shurling, Esquire. Judge Cothran dismissed Petitioner's post-conviction relief application by Order on August 19, 2014. Petitioner filed a Rule 59(e) motion to alter or amend judgment on or about October 15, 2014. Judge Cothran denied Petitioner's motion on November 24 2014. Petitioner filed his Petition for Certiorari on or about July 6, 2015.

This Return to the Petition for Writ of Certiorari follows.

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 court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief 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 an 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s 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, at 668. The petitioner 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. First, the 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." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR Court's finding that Petitioner knowingly and intelligently waived his right to direct appeal.

Petitioner argues the PCR court erred in finding the Petitioner knowingly and intelligently waived his right to a direct appeal. Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citation omitted) (Turner I); see also Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794 (2009) (finding counsel must inform criminal defendant found guilty of a crime after a trial about the possibility of an appeal) (Turner II). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).” Turner, 380 S.C. at 224, 670 S.E.2d at 374 (citation omitted).

In the instant case, the PCR Court found Trial Counsel credibly testified that he advised Petitioner of his right to file a direct appeal and Petitioner did not request Trial Counsel to file an appeal. (App. p. 537). Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (This Court gives great deference to a PCR judge's findings where matters of credibility are involved). Specifically, Trial Counsel stated that he advised Petitioner of right to appeal and that if Petitioner wanted to appeal then he needed to inform Trial Counsel within ten days. (App. p. 410 lines 10-25). Trial Counsel stated that Petitioner never requested an appeal be filed. (App. p. 421 lines 2-7). Based off of the foregoing, there is ample probative evidence to support the PCR Court's finding that Petitioner knowingly and intelligently waived his right to direct appeal.

II. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective in his representation of Petitioner on all the Batson related claims.

Petitioner argues that the PCR Court erred in finding that Trial Counsel was not ineffective in handling the Batson motion during jury selection. However, this claim is meritless, as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

This Court has consistently held that the process of jury selection inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999). In Palacio, this Court found defense counsel was not ineffective for failing to strike a juror as requested by the defendant. Id. at 516. This Court in Palacio further noted that “a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” Id. at 516. In the instant case, Petitioner argues Trial Counsel was ineffective for failing to fully articulate Petitioner's basis for striking various jurors.

However, Trial Counsel testified that it was Petitioner who requested the various jurors be struck. Trial Counsel stated that Petitioner requested the jurors be struck based on the way they dressed, looked, and acted, among other reasons. (App. p. 415 line 15—p. 416 line 1). Trial Counsel testified that he, acting as Petitioner's counsel, did not see a sufficient basis to strike the jurors. (App. p. 54 lines 7-10). Trial Counsel testified that he indulged Petitioner's request to strike the jurors and gave the explanation elicited from Petitioner as to why the jurors were struck. (App. p. 415 line 15—p. 416 line 19). Trial Counsel opined that he could not have argued or developed Petitioner's reasons for striking any better. (App. p. 416 line 23—p. 417 line 1). Trial Counsel noted that he did not have a basis to strike the jurors during the second

jury selection process. (App. p. 416 lines 11-15). Trial Counsel opined that Petitioner had a fair and impartial jury at trial. (App .p. 417 lines 2-4). The PCR Court properly found that Trial Counsel did not provide deficient representation during jury selection.

Furthermore, the PCR Court properly found that Petitioner presented no credible evidence that Trial Counsel's alleged failure to present various arguments to strike the jurors resulted in a violation of his right to a trial by a competent and impartial jury. Instead, Petitioner relies on mere speculation that a stricken juror would have had an inherit bias against him for being stricken previously. See Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004) (Finding respondent failed to present any evidence to support a finding that counsel's error resulting in a violation of respondent's right to a trial by a competent and impartial jury). Based off of the foregoing, there is ample evidence to support the PCR Court's finding that Trial Counsel was not ineffective in regards to jury selection.

III. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective in failing to request a continuance due to Petitioner's indictment being amended to include a charge of criminal sexual conduct-first degree, where Petitioner was originally indicted for criminal sexual conduct-second degree.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective for failing to request a continuance due to the State amending the indictment to include an enhanced charge of criminal sexual conduct with a minor in the first degree. However, this argument is without merit as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

The PCR Court found Trial Counsel credibly testified that he was prepared to defend Petitioner against the enhanced charge of criminal sexual conduct with a minor in the first degree. (App. p. 388 line 18—p. 389 line 10; p. 533). Drayton v. Evatt, 312 S.C. 4, 11, 430

S.E.2d 517, 521 (1993) (This Court gives great deference to a PCR judge's findings where matters of credibility are involved). Furthermore, Petitioner failed to present any credible arguments or evidence to show how additional preparation would have resulted in a different outcome. See Skeen v. State, 325 S.C. 210, 213–15, 481 S.E.2d 129, 131–32 (1997) (holding when a petitioner fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's incomplete preparation). Instead, Petitioner falls well below his burden of proof and relies solely on speculation that Trial Counsel could have explored various aspects of the case on cross-examination and could have introduced various items into evidence. Based off of the foregoing, there is ample evidence to support the PCR Court's finding that Trial Counsel was not ineffective in regards to this allegation.

IV. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective when objecting to Barbara Gregg's testimony and Trial Counsel was not ineffective for failing to object to the testimony of Trina Hamlet and Robin Tyler Griggs.¹

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective when objecting to Barbara Gregg's testimony, for failing to object to both Trina Hamlet's and Robin Tyler Griggs' testimony. However, this argument is without merit as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

a. Trial Counsel was not ineffective when objecting to Barbara Gregg's testimony.

¹ Respondent submits that these are three separate and distinct allegations of ineffective assistance of counsel. As a result, each allegation should have a separate analysis of deficiency and prejudice as required by Strickland.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective when objecting to Barbara Gregg's testimony. However, this argument is meritless as ample evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

Petitioner argues Trial Counsel failed to fully articulate his objection, failed to bring to the trial court's attention that some of Barbara Gregg's testimony was hearsay within hearsay, and failed to argue that the testimony's prejudicial effect outweighed the testimony's probative value. To the contrary, a review of the record reveals that Trial Counsel made timely objections to Barbara Gregg's testimony where appropriate. (App. p. 65 line 18-19; p. 66 line 20; p. 68 line 2; page 77-79). Trial Counsel argued against the State's assertion that the victim's statement to Barbara Gregg fell within Rule 803(2). Furthermore, it is apparent from the record that Trial Counsel was objecting to the hearsay testimony of Barbara Gregg. Trial Counsel opined that he articulated the proper objections to the best of his ability. The PCR Court found Trial Counsel properly preserved the objection for appellate review. See State v. Byers, 392 S.C. 439, 446, 710 S.E.2d 55 (2011). Furthermore, Petitioner failed to present any credible arguments or evidence to show how Trial Counsel's alleged deficiency was prejudicial.

b. Trial Counsel was not ineffective for failing to object to Trina Hamlet's testimony.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective for failing to object to Trina Hamlet's testimony. However, this argument is without merit as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

Petitioner argues that Trina Hamlet's testimony "went far beyond statements concerning time and place of sexual battery." (Br. p. 33). "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an

exception to the rule applies.” Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. *Id.*; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the time and place of the sexual assault. Dawkins, 346 S.C. at 156. Any other details or particulars, including the perpetrator's identity, must be excluded. *Id.* at 156. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984).

The PCR Court found Trial Counsel’s decision not to object was reasonable. Specifically, the PCR Court noted that Petitioner argued Trial Counsel should have objected to Hamlet’s testimony that Applicant “forced having sex with her” as corroborative and cumulative. However, the fact that Petitioner had sexual relations with victim was not in dispute. Additionally, the fact that Hamlet testified the sexual molestation began in the Summer of 2008 is appropriate testimony. See Dawkins, 346 S.C. at 156, 551 S.E.2d at 262.

In addition, Applicant cannot show any resulting prejudice as a result of Counsel’s alleged deficiency as there is overwhelming evidence of guilt. Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). The record reveals Petitioner readily admitted to the fact that he engaged in sexual intercourse with the Victim. (App. p. 244—p. 254). Petitioner admitted that he “felt terrible” and what he did was “wrong.” (App. p.

247). Petitioner admitted to raping this Victim on the couch in an apartment. (App. p. 251). Furthermore, DNA evidence proved that Victim became pregnant with Petitioner's child. (App. p. 212). Petitioner further admitted to raping the Victim during this evidentiary hearing. Petitioner only disputed whether he raped the Victim when she was ten years old. As a result, there is clear evidence of overwhelming guilt based on a review of the entire record and the testimony and evidence presented during the PCR hearing. As such, Petitioner cannot show any resulting prejudice from Trial Counsel's alleged deficiency.

c. Trial Counsel was not ineffective for failing to object to Robin Tyler Griggs' testimony, where Trial Counsel did object to Robin Tyler Griggs' testimony.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective for failing to object to Robin Tyler Griggs' testimony. However, this argument is without merit as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

Respondent notes that Trial Counsel did object to Robin Griggs testifying as to the content of the forensic interview. (App. p. 164 line 23—p. line 16). Because Trial Counsel properly objected to Robin Griggs testifying to the contents of the forensic interview, Respondent submits that Petitioner can show no deficient performance.

Additionally, Respondent submits that Petitioner can show no prejudice as a result of Robin Griggs testifying to the content of the forensic interview. The record reveals Petitioner readily admitted to the fact that he engaged in sexual intercourse with the Victim. (App. p. 244—p. 254). Petitioner admitted that he "felt terrible" and what he did was "wrong." (App. p. 247). Petitioner admitted to raping this Victim on the couch in an apartment. (App. p. 251).

Furthermore, DNA evidence proved that Victim became pregnant with Petitioner's child. (App. p. 212). Petitioner further admitted to raping the Victim during this PCR evidentiary hearing.

The instant case is clearly distinguishable from cases relied on by Petitioner. The cases relied on by Petitioner involve situations where the defendant disputed whether a sexual battery occurred. In the instant case, there is no disputing that a sexual battery occurred on the victim while she was at least eleven years old. The sole dispute in this case was when the sexual battery began. This Court is well aware that the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the *time* and place of the sexual assault. (emphasis added) Dawkins, 346 S.C. at 156, 551 S.E.2d at 262. As a result any hearsay testimony corroborating the victim's statement that the sexual battery occurred in the Summer 2008 while she was ten years old was clearly admissible. As a result, Petitioner can show no prejudice. Furthermore, any testimony elicited from Robin Tyler Griggs about the forensic interview would have been cumulative in nature because the jury had viewed the forensic interview immediately prior to Robin Tyler Griggs' testimony. (App. p. 161 lines 14-17; p. 162 line 24—p. 170 line 20).

V. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs.

Petitioner argues that the PCR Court erred in finding that Trial Counsel was not ineffective for failing to object when Robin Tyler Griggs testified that victim was competent.

However, this argument is without merit as ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

Respondent submits that Petitioner can show no prejudice due to Trial Counsel's failure to object to Robin Tyler Griggs' testimony that victim was "competent" at the time of her interview. The record reveals Petitioner readily admitted to the fact that he engaged in sexual intercourse with the Victim. (App. p. 244—p. 254). Petitioner admitted that he "felt terrible" and what he did was "wrong." (App. p. 247). Petitioner admitted to raping this Victim on the couch in an apartment. (App. p. 251). Furthermore, DNA evidence proved that Victim became pregnant with Petitioner's child. (App. p. 212). Petitioner further admitted to raping the Victim during this evidentiary hearing.

Respondent acknowledges that this Court has consistently held that Forensic Interviewers should not testify about the credibility of victims. However, this case is clearly distinguishable from cases cited by Petitioner because the issue of whether a sexual battery occurred is not in dispute. Therefore, any potential bolstering of victim's credibility is negated by the Petitioner's own admission of guilt during the trial. The sole issue in dispute was when the sexual battery occurred. As this Court is aware the time and place of the sexual assault is proper testimony. Rule 801(d)(1)(D), SCRE. Therefore, any testimony regarding the time the sexual battery occurred is properly admissible. As a result, Petitioner suffered no prejudice due to Trial Counsel failure to object to the forensic expert commenting on the competency of the victim, where the sexual battery was not in dispute.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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STATE OF SOUTH CAROLINA
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The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

KEVIN C. BRADLEY,

PETITIONER,

v.

THE 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:

**Tara Dawn Shurling, Esquire
Law Ofc. Of Tara Dawn Shurling, PA
3614 Landmark Drive, Suite A
Columbia, SC 29204**

This 16th day of November, 2015



CAROLINE COLLINS
LEGAL ASSISTANT



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NOV 16 2015

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

November 16, 2015

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

Re: Kevin C. Bradley v. State of South Carolina
Lower Court Case No. 2010-CP-45-389
Appellate Case No. 2015-000136

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Tara D. Shurling, Esquire (2 copies)