

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-002696

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S.C. Supreme Court

Channack Keam, #328676, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Does the record contains ample evidence to support the PCR judge's findings that Petitioner failed to satisfy his burden of proving Counsel was ineffective for electing not to pursue a defense theory of third-party guilt at trial where Counsel testified the evidence was insufficient to present such a defense?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the January 2008 term of the Spartanburg County Grand Jury for murder (08-GS-42-0129). He was represented by John G. Reckenbeil, Esquire. On June 2, 2008, Petitioner proceeded to trial, where he was found guilty of the charge by a jury. The Honorable J. Derham Cole sentenced him to confinement for a period of thirty years.

A timely notice of appeal was filed on behalf of Petitioner. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Keam, Op. No. 2010-UP-264 (filed April 29, 2010). The Remittitur was returned on May 17, 2010.

Petitioner filed his application Post-Conviction Relief ("PCR") May 26, 2011. The State made its return on May 2, 2012. An evidentiary hearing into the matter was held on November 4, 2014, at the Spartanburg County Courthouse before the Honorable R. Keith Kelly. Petitioner was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. At the hearing, Samon Moeung, Amanda Condrey, and John G. Reckenbeil, Esquire, Petitioner's trial counsel, testified on Petitioner's behalf. By Order filed December 2, 2014, Judge Kelly denied and dismissed the application. A timely notice of appeal was served on December 19, 2014.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

The record contains ample evidence to support the PCR court's findings that Petitioner failed to satisfy his burden of proving Counsel was ineffective for electing not to pursue a defense theory of third-party guilt where Counsel testified the evidence was insufficient to present such a defense.

At trial, Petitioner was convicted of murdering his friend, Shane Easler. On the night of the murder, Petitioner and the victim, Shane Easler, consumed beer and Xanax before going to Red's Bar and Grill with two others, Tyler Vichith and Victoria Thongpane. (App. pp. 71-72, lines 25-1). Curtis Gosnell, a Red's employee, noticed Petitioner pulling beer out of his pocket. (App. p. 70 lines 3-5). Gosnell then asked Petitioner to throw the beer away, and when he refused, Gosnell and two other bar employees asked him to leave. (App. p. 72, lines 10-14). Petitioner then became argumentative and refused to leave. (App. p. 72, lines 18-22). During this confrontation, Easler tried to get Petitioner to calm down and leave, which they eventually did. (App. p. 73, lines 5-12); (App. p. 85, lines 16-18). From the door, Gosnell watched the group leave and saw and the three males walk out of the parking lot to the road the girl get in the car and drive towards them. (App. p. 73, liens 14-25). Gosnell heard gunshots fired two or three minutes after he watched the group leave. (App. p. 76, lines 15-16); (App. p. 86, lines 4-5). Gosnell testified that right after the he heard the last shot, "the car the girl had got in c[ame] back down the road." (App. p. 77, lines 4-6). Another Red's employee, Joshua Bailey, testified that a car went down the road and came back, (App. p. 89, lines 7-8), and on cross-examination stated it was a "dark car with rims." (App p. 91, lines 9-13).

That night, Teresa Bishop was driving by Red's right after the incident happened and happened upon the scene. (App. p. 94, line 10). She testified that as she was driving toward the scene, a car in the oncoming lane jerked towards her twice. (App. pp. 94-95). She testified the

car was a white truck. (App. p. 101). Bishop saw the body lying on the side of the road (App. p. 95, line 4), and stopped to try to assist. (App. p. 97, line 15). Petitioner told Bishop his that a car had come by and shot his friend. (App. p. 97, lines 6-7). Easler later died at hospital from blood loss resulting from a gunshot wound to his chest. (App. p. 56, lines 19-21).

Law enforcement arrived shortly after shots were fired and found Easler lying on ground. (App. p. 122, line 13). They found Petitioner to be intoxicated. (App. p. 181, line 12). Initially, Petitioner was presumed to be a witness to the shooting, not a suspect. (App. p. 110, lines 14-24). He indicated to the authorities that there was a drive-by, but when they pressed him for more details he gave vague, unclear answers and could not provide any description of a vehicle or who shot Easler. (App. p. 111, line 24-p. 112, line 3); (App. p. 118, lines 17-25). Patrick Cockrell, an officer at the scene, testified he placed Petitioner under arrest for public disorderly conduct and conducted a search incident to that arrest. (App. pp. 126-27). When he did so, he found a gun in Petitioner's right rear pants pocket. (App. p. 127, lines 6-7). "[Petitioner] immediately blurted out yeah, I shot him." (App. p. 128, line 10). Ten spent shell casings were found at the scene around Easler's body that matched the gun found in Petitioner's back pocket. (App. p. 157, lines 20-24). In a taped statement to police, Petitioner said his statement about a drive-by was a lie. (App. p. 231).

Petitioner testified in his own defense at trial. (App. p. 218-48). He was cross-examined regarding his statements about the drive-by shooting (App. pp. 233-38). Solicitor Coler asked: "You lied until the point you could no longer maintain that lie, the lie about it being a drive-by shooting, because that served you best at the time?" and Petitioner ultimately replied "yes." (App. p. 237-38). Petitioner maintained that he did not remember what happened between the time that he consumed Xanax and the time he was standing over Easler's body after he had been

shot, (App. pp. 218-43), though he admitted he had a loaded gun in his car (App. p. 241, lines 12-19) and that the same gun was found in his pocket after Easler had been shot (App. p. 238, line 23-App. p. 245, line 15). Solicitor Coler also asked: "You're not saying somebody else shot and killed Shane Easler, are you?" and he replied "No, I, I can't say that either." (App. p. 248, lines 7-9).

At the PCR hearing, Petitioner called the following individuals to testify: Simone Moeung, Amanda Cordey, and Counsel. Moeung testified he was good friends with Petitioner and Easler. (App. p. 325). He testified at the time of the shooting, Easler was dating his sister, Sams. (App p. 326, line 7). Moeung testified that about a week or two before the murder, Easler "put his—his hands on my sister." (App. pp. 326, lines 20-22). However he testified he did not actually see it, but rather heard about the incident from his ex-wife, Amanda Condrey. (App. p. 330, lines 15-19). He testified Alan Kennedy, who is now married to Sams, was her "baby's father at the time[,] . . . [a]nd he was upset that [Easler] had put his hand on her." (App. pp. 326-327). He testified that "I did get word, that you know, they [were] hanging out and having a good time before that night—well, that night. And . . . [Kennedy] was there also when whatever was going on." (App. p. 327, lines 14-17). Moeung testified that Tyler Vichith "didn't really like Channack" and that they "would get into it after drinking a little—while they were drinking." (App p. 328, lines 17-21). Moeung also testified that two or three days after the shooting he saw Kennedy with a "Mexican guy" and they were driving a black Honda Civic. (App p. 329, lines 6-14). Moeung did not testify that he was present at Red's on the night of the shooting, nor did he testify he saw any of the individuals that evening. (App. pp. 325-31). Furthermore, Moeung testified that he never tried to contact Counsel to share this information with him. (App. p. 331, lines 12-14).

Amanda Condrey testified that about three or four days before the murder she witnessed a physical altercation between Sams and Easler and that Siena yelled "you're dead" at him. (App. p. 333, lines 1-2). She testified "[Kennedy] was upset after he found out about the physical assault." (App. p. 333, lines 21-22). Condrey also testified that "the night that I got off of work, after the incident actually happened at Red's . . . it was [Kennedy] at the house with another person . . . and the guy Marco, that drove the black Honda." (App p. 333 line 24-p. 334 line 1). Condrey testified she spoke to Counsel and that she informed him that a co-worker who was at Red's that night told her that the black Civic had been there. . . . And it had been [Vichith] and [Kennedy] in the Civic." (App. p. 335, lines 12-15). She also stated the same co-worker left before the incident. (App. p. 15-17). Condrey did not testify that she was at Red's on the night of the shooting. (App. pp. 333-36).

Counsel testified he did not think there was a drive-by shooting defense in Petitioner's case. (App p. 338, lines 22-23). Petitioner introduced as exhibits the statements of five individuals who did not testify at trial: (1) Darl Hammacher, (2) Michael Byars, (3) Anthony Miles, (4) Jeffery Benfield, and (5) Jolan Baulig. (App pp. 367-372). However, none of these individuals were called to testify at the PCR hearing. (App. pp. 322-58).

In a PCR action, the applicant has 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 applicant must show 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688.

The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . .

would have produced a different result." United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995).

To show prejudice, the applicant must affirmatively prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

This Court should affirm the PCR court's findings because there is ample evidence in the record to support the court's finding that Petitioner failed to satisfy his burden of showing Counsel was ineffective or that he was prejudiced by any alleged errors.

At the PCR hearing, Petitioner called only the following individuals to testify: Simone Moeung, Amanda Cordey, and Counsel. Neither Moeung nor Cordey were present at Red's on the night of the shooting. Petitioner also introduced written statements made by each of the following individuals: (1) Darl Hammacher, (2) Michael Byars, (3) Anthony Miles, (4) Jeffery Benfield, and (5) Jolan Baulig. Petitioner also introduced a letter from April Martin. None of these individuals were called to testify at the PCR hearing.

Petitioner argues Counsel was ineffective for failing to introduce evidence of animosity between Easler and Kennedy and between Petitioner and Vichith. The PCR judge correctly held Petitioner failed to meet this burden in this regard. "A defendant [can] introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence offered by the accused as to the commission of the crime by another person is limited to such facts as are

inconsistent with his own guilt and that raise a reasonable inference or presumption as to his own innocence.” Miller v. State, 379 S.C. 108, 114 n.2 (2008) (citing Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). Therefore, Petitioner was required to produce evidence at the PCR hearing that raises a reasonable inference or presumption as to his own innocence.

The only testimony at the PCR hearing about any animosity between Easler and Kennedy was that Easler allegedly "put his hands" on Kennedy's ex-girlfriend, that she told Easler he was "dead" and that Kennedy was "upset" about it. The only testimony at the PCR hearing about any animosity between Vichith and Petitioner is that Vichith "didn't really like" Petitioner.

The PCR judge held "the evidence was insufficient to present a legal defense of third party guilt" and that Petitioner "presented no evidence that would cause [the] [c]ourt to find that [such a defense] could have been utilized at trial." The court further dismissed Condrey's and Moeung's testimony as mere "rumors and possible inferences with the allegations of "bad blood." Moeung and Condrey's testimony does not raise a reasonable presumption of Petitioner's innocence. At most, all Moeung's and Condrey's testimony indicates is that these individuals were not fond of one another. Moreover, Moeung testified that he never told Counsel he had any information about the case. Therefore, the PCR judge correctly held that Petitioner failed to establish counsel was deficient in failing to call either of these witnesses to testify.

Petitioner additionally argues Counsel was ineffective for failing to introduce additional corroborating testimony about the possibility that the shots came from a "black Honda Civic." There was testimony presented at trial that there was some sort of dark or black car or Honda at the scene. The only testimony presented at the PCR hearing to link Kennedy to a black Honda Civic was Moeung's testimony. However, Moeung was not at Red's that night and he never

testified that Kennedy was the owner of the car; rather, he testified he saw him in a black Honda Civic two or three days after the shooting. Moreover, Moeung admitted he never reached out to Counsel before trial to share this information.

The testimony at trial also indicated that several cars were coming, going, or driving up and down the road in just the few minutes' timespan that it took the individuals left the bar to the last shot fired. Any additional statements that there was a dark or black car or Honda driving by or around the location would not have raised a reasonable inference or presumption as to Petitioner's innocence. Petitioner testified at trial. He testified that he lied about the drive by shooting because it served him best, and that he remembered nothing from the time he took the Xanax until after the shooting. Petitioner also gave "blurted out" that he shot Easler. One of the officers searched Petitioner at the scene and found a gun on him. The ten shell casings on the ground next to Easler matched that gun. Petitioner failed to call the individuals who gave these statements to testify at the PCR hearing, and he points to no evidence contained in the statements that would further a defense of third-party guilt. The record reflects that Counsel fully cross-examined Gosnell, Bishop, and Bailey. The record also reflects that Counsel did question individuals on cross-examination about Petitioner's claims that someone else shot Easler. Counsel testified at PCR that the fact Petitioner had a gun on him was a problem, (App. p. 339), and that there was testimony from SLED that . . . there was gun metal fragments that—that was found on his hand that could be consistent with —with a gun being fired." (App. p. 339, lines 10-13). Additionally, there were ten shell casings found around Easler's body that all matched Petitioner's weapon.

The PCR judge correctly held that none of the five statements include probative evidence of third party guilt, and therefore Petitioner failed to prove any deficiency in Counsel's

performance. The PCR judge correctly held that counsel was not ineffective for failing to call these five witnesses and that there is not a reasonable probability that had counsel called any of these five other individuals to testify the outcome of the trial would have been different. Petitioner testified at trial. He testified that he lied about the drive by shooting because it served him best, and that he remembered nothing from the time he took the Xanax until after the shooting. Petitioner also gave "blurted out" that he shot Easler. One of the officers searched Petitioner at the scene and found a gun on him. The ten shell casings on the ground next to Easler matched that gun.

Accordingly, there is ample evidence in the record to support the PCR judge's finding that the evidence was insufficient to present a legal defense of third-party guilt because the evidence presented at the PCR hearing through testimony and exhibits showed only that there "were merely rumors and possible inferences with the allegations of "bad blood" and sightings of a small black car near the scene."

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's 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: 
ATTORNEYS FOR RESPONDENT

November 20, 2015.

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2014-002696

CHANNACK KEAM,

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STATE OF SOUTH CAROLINA,

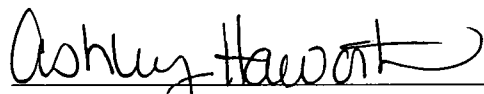
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

Katherine H. Hudgins, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 20th day of November, 2015


ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

November 20, 2015

RECEIVED
NOV 24 2015
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Channack Keam. v. State of South Carolina
Appellate Case No.: 2014-002696

Dear Ms. 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,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: Katherine H. Hudgins, Esquire