

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: 2015-000137

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DEC 30 2015

S.C. Supreme Court

ALONDA DESAUSSURE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

- I. Whether the PCR court erred in finding trial counsel effective where he failed to request funding for and obtain an eyewitness identification expert despite the necessity of such expert testimony to Petitioner's defense and the inadequacy of trial counsel to effectively defend the case without professional assistance?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Petitioner was indicted at the April 2011 term of the Charleston County Grand Jury for assault and battery-first degree (2011-GS-10-2048) and armed robbery (2011-GS-10-2047). He was represented by Aaron Mayer, Esquire.

On July 8-10, 2013, Petitioner proceeded to trial and was found guilty as indicted. The Honorable Stephanie McDonald sentenced Petitioner to ten (10) years for assault and battery and life without parole for armed robbery. The sentences are to be served concurrently. Petitioner did not appeal his convictions or sentences.

On September 24, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on September 11, 2014, in Charleston County before the Honorable G. Thomas Cooper. James Falk, Esquire, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented Respondent. Petitioner proceeded solely on the allegation of ineffective assistance of counsel for counsel's failure to request funding for and obtain an eyewitness identification expert to testify at trial. Petitioner's trial counsel testified at the hearing. Also testifying were Dr. Lori Van Wallendael; Mary Ford, Esquire; Ashley Pennington, Esquire; and Aaron Mayer, Esquire (Mr. Mayer is hereinafter referred to as "Counsel"). By an Order of Dismissal signed December 11, 2014 and filed December 15, 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 plea counsel (hereinafter "Counsel") ineffective where Counsel failed to request funding and obtain an eyewitness identification expert. For the following reasons, Respondent contends that this argument is 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 question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citing Strickland 466 U.S., at 690, 104 S.Ct. 2052).

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.

I. There is evidence of probative value to support the post-conviction relief court's ruling that Petitioner did not meet his burden of proving that trial counsel was ineffective for failing to obtain funds for and hire an eyewitness identification expert.

Petitioner argues that Counsel was ineffective for failing to obtain an eyewitness identification expert. Respondent submits that the PCR Court correctly found that Counsel was not ineffective.

At the PCR hearing, Petitioner alleged that Counsel was ineffective for failing to obtain an eyewitness identification expert. Counsel testified that he was retained after Petitioner relieved his public defender. He testified that Petitioner was aware that his prior public defender had retained her own expert, but also testified that at no time during his representation did he ever express to Petitioner that he would be hiring an expert witness for Petitioner unless Petitioner was willing to pay for one. (App. 411:18-25). Counsel further testified that Petitioner never gave him any indication that he did not have the means to pay for the expert witness. (App. 412:17-23). He testified that he did not ask for funding from the Office of Indigent Defense because he was unsuccessful in doing so during a previous case where he was retained as counsel. (App. 416:5-8). Counsel testified that ultimately Petitioner was unable to provide the money to hire an expert witness, but Counsel still felt he was ready for trial without an expert. (App. 421:1-15). Counsel testified that he told Petitioner that he felt an expert would be helpful but that as retained Counsel, he would not have the resources of a public defender and Petitioner would have to pay for an outside expert. (App. 411:11-25, 412:11-13). Counsel testified that he

heavily researched the reliability of eyewitness identifications prior to trial and "made the decision to go forward without an expert." (App. 422:15-16; App. 430:1-5).

In the Order of Dismissal, the PCR Court found that Counsel was not deficient for failing to obtain an eyewitness identification expert to testify on behalf of the defense at trial. The PCR Court found that Counsel articulated a valid strategic basis for his decision to proceed to trial without an expert witness, explaining that "Counsel provided credible testimony that after researching the reliability of eyewitness identification and the factors which tended to make identifications less reliable, he made a strategic decision to challenge the State's eyewitness identification testimony at trial without the use of an expert witness." (App. 507).

The PCR Court further explained its rationale, finding that Counsel "adequately cross-examined the State's witnesses, objected, and attacked the accuracy of the identification evidence without the support of an expert witness." (App. 507). The PCR Court found that Counsel vigorously challenged the eyewitness identifications without using an expert by moving before trial to preclude any in-court identifications by State witnesses who had not made out-of-court identification and arguing the many factors that would make the in-court identification prejudicial. (App. 508, citing App. 54:19-55:8, 95:24-96:22). The PCR Court further found that Counsel elicited testimony from the victim regarding the many factors that negatively affected his accuracy in identifying Petitioner.¹ (App. 508). The PCR Court also found that Counsel challenged the eyewitness identification evidence in his opening statement and closing argument,

¹ Specifically, the PCR Court found that "Counsel elicited testimony from the victim about the following: his poor vision at the time of the assault and robbery (App. 129:21-130:6), his vague description of the clothing of the assailant (App. 130:18-25), the fact that he never saw a weapon (App. 13 1:2-3), the fact that he never mentioned a white plastic bag in his description of the assailant's bike (App. 132:3-12), and the fact that he was never asked to identify [Petitioner] prior to trial (App. 133:24-134:2). Trial counsel also cross-examined Stephen Silcott, who identified [Petitioner] shortly after the incident, on the effect [Petitioner's] distinguishing features and change of clothing had on his identification of [Petitioner]. (App. 209:5-18, 210:12-14)."

again bringing up the factors that would negatively affect the witnesses accuracy in identification. (App. 509).

Furthermore, the PCR Court found that Counsel was not deficient in failing to request funding from the Office of Indigent Defense to hire an expert witness because he simply chose an alternative means of challenging the State's eyewitness identification evidence. The PCR Court also noted Petitioner's prior public defender's testimony at the PCR hearing that although she retained an expert, she could have easily attacked it on her own. (App. 509).

The PCR Court found that Petitioner failed to prove that he was prejudiced because he failed to show that the result of his trial would have been different. Most notably, the PCR Court found that the eyewitness identification expert presented at the PCR hearing "testified there were factors and circumstances present in [Petitioner's] case which tended to *decrease* the accuracy of the eyewitness identifications" and "testified that there were factors and circumstances present in [Petitioner's] case which tended to *increase* the accuracy of the eyewitness identifications." (App. 510) (emphasis in original). Thus, the PCR Court found that the nature of the expert testimony does not suggest a reasonable probability that it would have affected the outcome.

Further, the PCR Court found that Petitioner was not prejudiced by Counsel's failure to obtain an eyewitness identification expert since the jury was given an identification jury instruction that highlighted potential factors that affect the accuracy of eyewitness identification evidence. (App. 510, citing App 343:4-16). Lastly, the PCR Court found that Petitioner was not prejudiced by Counsel's failure to obtain funding from the Office of Indigent Defense because he failed to provide any testimony or evidence to show that the request would have been granted. (App. 511).

Analysis

Petitioner's argument is without merit. First, the PCR Court found that Counsel provided credible testimony. This Court must give great deference to the PCR judge's determinations of witness credibility. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Additionally, the PCR Court found that Counsel articulated a valid strategic basis for his decision to proceed without an expert. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

There is certainly probative evidence to support the PCR Court's rulings. First, Counsel made it clear that his agreement with Petitioner did not include calling an expert witness unless Petitioner paid for it. Counsel testified that he was always under the impression that Petitioner could pay for such an expert until Petitioner informed him right before trial that he could not. The PCR Court correctly found that Counsel then developed a strategy to research eyewitness identification issues and attack the State's evidence with a pre-trial motion and during his

opening statement, closing argument, and cross-examination of the State's eyewitnesses.² See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (finding trial counsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence).

The PCR Court properly found that Counsel elicited testimony from the victim that showed the jury many factors that would negatively affect the accuracy of the victim's eyewitness identification. Counsel's actions were reasonable under professional norms as he believed he could effectively represent Petitioner without using an expert witness. Even Petitioner's prior public defender, who hired an expert witness, admitted to the PCR Court that "there was enough that the I.D. lacked so much in credibility that I could have easily attacked it on my own because a lot of other things didn't match up and I think I could have easily done that." (App. 451).

Additionally, the PCR Court correctly found that Petitioner failed to prove that he was prejudiced by Counsel's failure to hire an expert witness. Specifically, the PCR Court found that Dr. Wallendael (Petitioner's eyewitness identification expert at the PCR hearing) testified as to factors in Petitioner's case that decrease the accuracy of the identifications present in Petitioner's case, but also testified to factors which increase the accuracy of the identifications present in

² See App. 508-509, "The record reflects further counsel challenged the State's eyewitness identification evidence in both opening and closing statement. In his opening statement, counsel highlighted to the jury the shortcomings of the State's eyewitness identification evidence. (App. 79:5-80:14). In closing statement, counsel reiterated the shortcomings of the evidence and told the jury that Silcott's identification of [Petitioner] was cross-racial which may have affected the accuracy of the identification. (App. 322:25-323:20)."

Petitioner's case, such as the witness's exposure time to the suspect (App. 474:1-5); the suspect's distinguishing features (App. 474:17-475:6); and the amount of time between the witness's view of the suspect and the identification (App. 476:11-16). Given the favorable and unfavorable testimony from Petitioner's expert witness, it is clear that the PCR Court was correct in ruling that the outcome of Petitioner's trial would not have been different had such an expert been utilized at trial. The PCR Court also correctly found that Petitioner was not prejudiced because the eyewitness identification jury instruction highlighted many potential factors that affect eyewitness accuracy, including several factors that Dr. Wallendael testified to at the PCR hearing. (App. 510, citing App. 343:4-16).

The PCR Court also found that Petitioner was not prejudiced by Counsel's failure to request funding from the Office of Indigent Defense because Petitioner failed to show that such a request would have been granted. The PCR Court correctly stated it would not speculate as to whether Petitioner's case would have fallen into the category of rare cases where retained counsel successfully obtains funding from the Office of Indigent Defense. (App. 511).

Accordingly, Petitioner has failed to prove both prongs of the Strickland test – that his Counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by Counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of 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 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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JUSTIN J. HUNTER
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S.C. Bar # 101254

By: 
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12/30, 2015

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ALONDA B. DESAUSSURE,

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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:

**Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201**

This 30th day of December, 2015.



ELIZABETH MCLELLAN
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

December 30, 2015

RECEIVED

DEC 30 2015

S.C. Supreme Court

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

Re: Alonda B. Desaussure v. State of South Carolina
Appellate Case No. 2015-000137
Lower Court Case No. 2013-CP-10-5614

Dear Mr. 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,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/em
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Victim Services