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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Paula H. Thomas, Trial Judge
The Honorable Benjamin H. Culbertson, Post-Conviction Relief Judge

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Appellate Case No. 2014-~~002774~~ 002774

John B. Frazier, No. 264488, ... 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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ISSUE PRESENTED

I. Whether probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object and/or move for a mistrial when the solicitor, during closing argument, stated that petitioner "sinned" and also made disparaging remarks regarding defense attorneys.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In August 1999, the Horry County Grand Jury indicted Petitioner for murder, armed robbery, and criminal conspiracy (1999-GS-26-2249). These charges arose out of the murder of Brent Poole ("the victim"), which the State alleged was perpetrated by Petitioner and the victim's wife, Renee Poole ("Renee"). L. Morgan Martin, Esquire ("trial counsel"), represented Applicant along with Thomas C. Brittain, Esquire; Peter L. Hearn, Sr., Esquire; and Natasha M. Hanna, Esquire. Fifteenth Circuit Solicitor J. Gregory Hembree and Deputy Solicitor Francis A. Humphries, Jr., prosecuted the case for the State.

On February 14, 2000, Petitioner proceeded to trial before the Honorable Rodney C. Peeples and a jury. The jury found Petitioner guilty as indicted, and Judge Peeples sentenced Petitioner to life imprisonment for murder, thirty (30) years for armed robbery, and five (5) years for criminal conspiracy. However, the South Carolina Court of Appeals reversed Petitioner's conviction on January 5, 2004. State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (Ct. App. 2004).

Petitioner proceeded to a second trial on May 16, 2005, before the Honorable Paula H. Thomas and a jury. On May 20, 2005 the jury again found Petitioner guilty as indicted. Judge Thomas sentenced Petitioner to concurrent terms of thirty (30) years for murder, thirty (30) years for armed robbery, and five (5) years for criminal conspiracy.

Petitioner filed a timely notice of appeal. Aileen P. Clare, Esquire, and Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's murder conviction and reversed

Petitioner's armed robbery conviction on November 8, 2007. State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (Ct. App. 2007). Petitioner and the State filed petitions for writ of certiorari to the South Carolina Supreme Court and the Supreme Court granted both petitions. The Supreme Court affirmed the Court of Appeals as to the murder conviction; however, the Supreme Court reversed the Court of Appeals as to the armed robbery conviction and reinstated Petitioner's conviction on that charge. State v. Frazier, 386 S.C. 526, 689 S.E.2d 610 (2010). The remittitur was returned to the circuit court on March 4, 2010.

Petitioner filed an application for post-conviction relief (PCR) on September 26, 2011. (Case No.: 2011-CP-26-8038; App.pp. 1342-8) Amendments to the application were filed on April 23, 2013 (App. pp. 1357-72) Respondent filed a return and motion to dismiss dated December 1, 2011. (App.pp. 1374-7). An amended return was filed on December 9, 2011. (App.pp. 1378-81). An evidentiary hearing was held at the Horry County Courthouse on June 16, 2014. Petitioner was present and represented by Brana J. Williams, Esquire. Joshua Thomas, Esquire of the South Carolina Attorney General's Office represented Respondent. Petitioner presented the testimony of Christopher Hensley, Kahle Schettler, Courtney Fox, Sharon Haymaker Aldridge, and Jane Lovette. Testifying for Respondent were Morgan Martin, Esquire and Francis A. Humphries, Jr., Esquire. The Honorable Benjamin H. Culbertson denied relief in an order dated October 28, 2014 and filed November 5, 2014. (App.pp.1647-76) Petitioner filed a motion to reconsider/alter or amend the findings of the court and the order of dismissal on December 22, 2014. (App.pp. 1677-90) Respondent filed a return to applicant's motion for reconsideration and a motion to strike on January 6, 2015. (App.pp. 1691-9) Petitioner

filed a reply to Respondent's motion to strike on February 3, 2015. (App.pp. 1700-2) Neither the motion to strike nor the motion for reconsideration were disposed of in circuit court due to other motions taken up in this Court that essentially held the motion for reconsideration was untimely. (See order of this court dated July 13, 2015)

A notice of appeal was filed at this Court. Robert M. Pachak, Esquire represented Petitioner. Petitioner filed his petition for writ of certiorari on or about September 14, 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. Whether probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object and/or move for a mistrial when the solicitor, during closing argument, stated that petitioner sinned and also made disparaging remarks regarding defense attorneys.

Petitioner argues the PCR Court erred in finding that trial counsel was not ineffective when he did not object to the solicitor's allegedly harmful statements in closing argument. However, this argument is meritless as ample evidence supports the PCR Court's finding that trial counsel was not ineffective.

The PCR Court found that Petitioner/Applicant failed to meet his burden of proof to show trial counsel ineffective in failing to object to the statements made by the solicitor during closing argument. The record indicates trial counsel objected to numerous parts of the Solicitor's closing. He objected to statements about the legality of a search (App.pp. 1284:25-1285:4); testimony of a witness (App.pp. 1285:17-1286:3; 1286:18); Petitioner's conversations with police (App.pp. 1290:25); experts' testimony (App.pp. 1297:11-19); and the impact on the victim's daughter (App.pp. 1305:11-23). Trial counsel's multiple objections to these statements indicate he understood the boundaries between proper and improper jury arguments.

Regarding the statements pertaining to Petitioner's "sins," Petitioner's argument in his petition relies on cases that pertain to solicitors vouching for the credibility of witnesses to a degree that amounted to unfairness and denial of due process. He further argues that a solicitor cannot "appeal to personal bias of a juror" or attempt to "arouse his passion or prejudice." State v. Lindler, 276 S.C. 304, 278 S.E.2d 335 (1981). It is

reasonable to argue that the term "sin" may arouse a type of passion in a juror; however, it is also reasonable to argue that "sin" is a synonym for "crime," "charge," or "misdeed" – all words that are routinely used without objection in closing arguments. Trial counsel made a calculated decision not to object to the solicitor's use of the word "sin" and, though Petitioner disagrees with this decision, he has not provided any evidence that an objection by trial counsel would have changed the outcome of the case.

Similarly, Petitioner alleges that trial counsel should have objected to the solicitor's comparison of defense counsel to the fictional character of Billy Flynn from the musical "Chicago" because it cast all defense counsel in a poor light. For this proposition, Petitioner reaches to the rules of professional conduct and its broad proposition that lawyers should demonstrate respect for the legal system and other lawyers. He then makes the leap to argue that these statements by solicitor amounted to a denial of due process. This is clearly overreaching by Petitioner, as no specific connections are drawn between the statements and how they denied Petitioner due process. Furthermore, there is no connection between trial counsel's actions or lack of actions and these arguments. If anything, these arguments may support a claim of prosecutorial misconduct, but that is not the issue here. There has been no suggestion or finding or prosecutorial misconduct and, therefore, this line of argument simply fails to attack trial counsel's reasonable lack of objection.

Petitioner relies on Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), for the proposition that "counsel must articulate a valid reason for employing a certain strategy to avoid finding of ineffectiveness." There is nothing in this opinion to discredit trial counsel's statement that he did not object to the language regarding Petitioner's

"sins" because he had no valid strategic reason to do so. In fact, this logic is bolstered by Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992), which holds that counsel's foregoing of actions that are not of value to a case cannot be considered ineffective assistance of counsel, and also reiterates that, "[i]f there is any probative evidence in the record to support the PCR judge's decision, his ruling must be affirmed." Id. 308 S.C. at 548, 419 S.E.2d at 779.

Furthermore, Judge Thomas provided repeated instructions to the jury that arguments by counsel were not to be considered as evidence. (App.pp. 120:15-22; 1204:10-16; 1285:23-1286:3; 1309:5-8; 1321:15-17). See State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989) (judge's instruction sufficient to cure error from improper arguments). At the PCR hearing, trial counsel testified that it is not his practice to move for a mistrial if a judge has issued curative instructions to a jury after he has objected. (App.pp. 1606:1-4) Based on the totality of information, especially as held in the order of dismissal by Judge Culbertson, there is simply not enough evidence to show that Petitioner satisfied the burden presented by the Strickland test. More specifically, there is no evidence to show that the outcome would have been any different if trial counsel had made the objections suggested by Petitioner. For these reasons, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons stated above, 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,

ALAN WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar # 77889

By: _____
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v.

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:

Robert M. Pachak, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 30th day of December, 2015.

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

December 30, 2015

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

RE: **John B. Frazier v. State of South Carolina**
Appellate Case No: 2014-002774

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,

Jessica E. Kinard
Assistant Attorney General
Bar No: 77889

JEK/nb
Enclosures

cc: Robert M. Pachak, Esquire (2 copies)