STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Thomas W. Cooper, Jr., Trial Judge
The Honorable Kristi Lea Harrington, Post-Conviction Relief Judge

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Appellate Case No. 2014-000098

Crystal Turner, No. 342796, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
SC Bar #77889

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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 call Petitioner's co-defendant, Paige Furniss, who would have testified that Petitioner was not involved in the robbery and did not know that the co-defendants borrowed her car to carry out the robbery and subsequent murder?

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 May 2009, the Horry County Grand Jury indicted Petitioner for Accessory Before the Fact to a Felony (2009-GS-26-2174). R. Scott Joye, Esquire, represented Petitioner. On September 16, 2010, a jury found Petitioner guilty as indicted. The Honorable Thomas W. Cooper Jr. sentenced Petitioner to sixteen (16) years for Accessory Before the Fact to a Felony, Armed Robbery.

Petitioner filed a timely notice of appeal. Breen Richard Stevens, Esquire, of the Office of Appellate Defense, represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on October 24, 2012. State v. Turner, Op. No. 2012-UP-562 (S.C. Ct. App. filed October 24, 2012). The remittitur was returned to the circuit court on November 19, 2012.

Petitioner filed an application for post-conviction relief (PCR) on June 26, 2013. (Case No.: 2013-CP-26-04528; App.pp. 767-772) An evidentiary hearing was held at the Georgetown County Courthouse on August 28, 2014. Petitioner was present and represented by T. Kirk Truslow, Esquire. Joshua Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner presented her own testimony, as well as that of Paige Furniss. Testifying for Respondent was Petitioner's trial counsel, R. Scott Joye, Esquire. The Honorable Kristi Lea Harrington denied relief in an order dated November 3, 2014 and filed November 19, 2014. (App.pp.859-866)

A notice of appeal was filed at this Court. John Strom, Esquire represented Petitioner. Petitioner filed her petition for writ of certiorari on or about August 27, 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 call Petitioner's co-defendant, Paige Furniss, who would have testified that Petitioner was not involved in the robbery and did not know that the co-defendants borrowed her car to carry out the robbery and subsequent murder?

Petitioner argues the PCR Court erred in finding that trial counsel was not ineffective when he did not subpoena and call Petitioner's co-defendant, Paige Furniss, to provide exculpatory testimony. 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 her burden of proof to show trial counsel ineffective in failing to subpoena and call the Petitioner's co-defendant. There is simply no basis for finding ineffective assistance of counsel on this accusation. In order for trial counsel to be ineffective, he must have been clairvoyant or provided with information that no one else in the proceeding had. Furniss's statements to law enforcement all indicated Petitioner's involvement in planning the armed robbery of the victim. This was the only information about Furniss's potential testimony available to trial counsel. It was never refuted by Petitioner[1], and trial counsel never received any indication that it would change. The evidence provided to trial counsel and reviewed with Petitioner was almost exclusively witness statements, and ended up being very consistent

[1] Petitioner testified at the PCR hearing that she told trial counsel that Ms. Furniss "knew that I wasn't responsible or knew anything about the incident." (App.pp. 797:18-19) The PCR Court found trial counsel's testimony regarding his reasoning for not calling Furniss to be more credible. (App.pp.864)

to what was elicited through testimony at trial. When there were inconsistencies, trial counsel testified and the PCR court found that he properly cross-examined the witnesses regarding these issues. This still left no reason for him to believe that Furniss's testimony would be any different.

Trial counsel also testified that he had spoken regularly with Furniss's counsel about the case. At no point in time did her counsel indicate that Furniss would testify inconsistently with her statement during the investigation. Furthermore, there was a negative issue regarding an unpaid power bill of Petitioner's that Furniss could corroborate. This provided further incentive for trial counsel *not* to call Furniss at trial.

Furniss's testimony at the PCR hearing provides no reasonable basis for trial counsel to have called Furniss at the trial. The case law that Petitioner cites provides no support for her arguments and, in fact, attempts to change the burden of a PCR action. When reviewing Loundes v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), one finds the discussion regarding failure to call a witness and how that relates to trial strategy. The attorney in Loundes thought that the witnesses he did not call "would not add anything to the defense case," which he stated to the trial court. Id. 380 S.C. at 462, 670 S.E.2d at 650. In the instant case, however, trial counsel articulated a valid reason to abstain from calling the witness, which can certainly be described as a reasonable trial strategy. This satisfies the requirements of Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002), which is the leading case on acceptability of trial strategy for purposes of determining ineffective assistance of counsel.

Petitioner also implies that it was trial counsel's duty "to demonstrate how his professed trial strategy was objectively reasonable 'under prevailing professional

norms.'" This quote is followed by citations to Strickland at 466 U.S. 687-8 and Cherry at 300 S.C. 115, 386 S.E.2d 624. Neither of these cases require the practitioner to affirmatively state a trial strategy in order to prevent the granting of a PCR application. Neither of the cases move the burden away from the Applicant and his or her burden to prove ineffectiveness. In this matter, trial counsel articulated several valid and reasonable factors that prevented him from calling Ms. Furniss as a witness. These constitute a trial strategy that has not been proven to fall below professional norms.

Trial counsel's performance was not deficient, nor was it prejudicial. Petitioner's arguments regarding prejudice rely on the fact that the jury was, essentially, "not allowed" to hear Furniss's testimony twice – once during testimony and once when the jury asked to rehear portions of testimony during deliberations. These arguments fail for the same reason as the ones regarding deficiency. Trial counsel had absolutely no way of knowing that Furniss would reverse the statement she gave during investigation. No information regarding this possibility was given to him by his client, the discovery, or Furniss's own counsel. Therefore, trial counsel made the best decision possible for his client by not calling Furniss – he prevented two different potentially harmful pieces of information from being presented at trial.

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. Stokes also cites Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) for the proposition that, "Where, as here, counsel

articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." This precisely refutes Petitioner's argument.

If trial counsel had any way of knowing that Furniss would testify in completely opposition to her provided statement, this may be a different issue. As it stands now, trial counsel simply cannot be faulted for failing to subpoena or call her to testify. Petitioner failed to show at the PCR hearing how introducing Furniss's testimony would have aided her defense, as her version of events, which Furniss would also provide, were established through other witnesses. See Jackson v. State, 329 S.C. 345, 351, 495, S.E.2d 768, 771 (1998). His actions were reasonable, valid trial strategy. He did not state during the PCR hearing that "it never occurred to him to call Furniss as a witness once the State failed to call her during their case and he had no strategic reason for doing so," as the Petitioner alleges in her petition.[2] If he candidly states anything, it is that "I was concerned that [Furniss's] statement was going to go the other way, that it would hurt and not help." (App.p. 826:17-19) Quite simply, there is substantial probative evidence for the PCR court to have based its judgment upon, and that judgment should be maintained. For these reasons, the petition for writ of certiorari should be denied.

[2] A statement similar to this is not found on page 826 of the Appendix, to which the Petitioner cites, or on any other page of the PCR hearing transcript.

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: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 18, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable Thomas W. Cooper, Jr., Circuit Court Judge
The Honorable Kristi Lea Harrington, Post-Conviction Relief Judge

CRYSTAL TURNER,

Petitioner,

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:

John Strom, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 13th day of January, 2016.

NORMA BIGBEE
LEGAL ASSISTANT