

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, Circuit Court Judge

Appellate Case No.: 2013-0001885

Susan D. Tappeiner.....Petitioner,

v.

State of South Carolina.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to develop and employ a clear theory of defense.
- II. Whether there is probative evidence to support the PCR court's ruling that trial counsel's performance was deficient, but no prejudice resulted from counsel's failure to object to references throughout trial to the fact that the Petitioner was arrested and charged after a two-hour police interview.
- III. Whether there is probative evidence to support the PCR court's ruling that trial counsel's performance was deficient, but no prejudice resulted from counsel's failure to object to statements made by the State in closing arguments.

STATEMENT OF THE CASE

The Respondent adopts the procedural history presented by the Petitioner. This Brief of Respondent follows.

ARGUMENT

- I. There is probative evidence to support the PCR court's ruling that counsel was not ineffective for failing to develop and employ a clear theory of defense when counsel articulated a valid defense theory and argued his theory to the jury during trial.**

Petitioner asserts the PCR court erred by finding the Petitioner failed to carry her burden of proving Counsel was ineffective for failing to develop and employ a clear theory of defense during the Petitioner's trial. Respondent submits probative evidence exists to support the post-conviction relief court's findings that Petitioner failed to carry her burden of proving she received ineffective assistance of counsel.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 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, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant 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 Applicant 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. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 689, 104 S. Ct. at 2065 (internal citation omitted).

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "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, 122, 417 S.E.2d 529, 531 (1992).

"In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011).

The record reflects trial counsel stated during the Petitioner's evidentiary hearing that the defense's theory was to challenge the credibility of the victim's allegations against the Petitioner and to suggest that the incident "might have been completely different than the allegations in the

indictment; that truly, this young boy was the one who made the advance, not Mrs. Tappeiner.” Counsel further stated that his opening statement was reflective of his position that the “evidence might... show that [Petitioner] was the victim, not the perpetrator.” (App. 489:4-9. 490:5-20).

The Respondent submits it is also clear from trial counsel’s opening statement and closing argument that during the Petitioner’s trial, he intended to employ the theory of defense he articulated at the Petitioner’s evidentiary hearing. In his opening statement, Counsel argued the following in support of the Petitioner’s theory of defense:

“So there’s two phases to it, I would suggest to you. One of them: did it happen at all? And if you answer that, again, negatively, that is, no, it didn’t happen, that’s the end of it. You come back and you find Susan Tappeiner not guilty. On the other hand, if you say, yes, it did happen, then you have to go to phase two. And that is, who is truly the vulnerable thing here? And you might wind up with a conclusion that we’re in the wrong court trying the wrong person for the wrong thing.” (App. 151:5-14).

In closing argument, Counsel argued:

“I don’t know about you, but I can’t be convinced that someone the size of [victim] a boy, an active boy with no health problems, a hiker, couldn’t find some way to get out of—particularly when [Petitioner] disappears after this event starts as he says and goes in the kitchen for 5 minutes. I can’t—I can’t put those things together. And I don’t believe you can either. No one heard—no one heard anything, not even the dogs. So again, the question is: What if anything happened?” (App. p. 333:18-334: 3).

Counsel then asked the jury to find Petitioner not guilty. (App. 335:13-16).

Clearly, Counsel articulated a theory of defense at the Petitioner’s evidentiary hearing and his intention to employ this theory at trial is reflected in his opening statement and closing argument to the jury. The Respondent submits the Petitioner should not be allowed to second-guess trial counsel’s defense theory solely based on its lack of success at trial. See Strickland at 689, 104 S. Ct. at 2065; Whitehead at 122, 417 S.E.2d at 531. This Court should affirm the lower

court's finding that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to employ a clear theory of defense.

II. There is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel was not ineffective for failing to object to testimony regarding the fact that the Petitioner was arrested after a two-hour police interview when the Petitioner failed to prove resulting prejudice. As an additional sustaining ground, counsel's performance was not deficient for failing to object to references to the two-hour police interview when the testimony made no reference to the fact that the Petitioner made a statement or the contents of the Petitioner's inadmissible statements.

The PCR court found Counsel's performance was deficient when he failed to object to references made during trial to the fact that the Petitioner was arrested after a two-hour interview with police.¹ However, the PCR court found the Petitioner failed to carry her burden of proving counsel's performance affected the outcome of the proceeding. (App. 688). The Respondent submits the PCR court correctly held that Petitioner failed to carry her burden of proving counsel's performance affected the outcome of her proceeding. An error by Counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of Counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. The Respondent submits it is unlikely Officer Gonzales' testimony had such an effect on the Petitioner's trial that Counsel's failure to object undermined the reliability in the Petitioner's trial proceeding.

The Respondent notes the Petitioner argues counsel should have objected to **repeated references** throughout trial to the fact that the Petitioner was arrested after a two-hour interview by police, but in her brief fails to identify the location of these repeated references in the record.

As an additional sustaining ground, the Respondent submits the PCR court erred by finding Counsel's performance was deficient. At the conclusion of the Petitioner's Jackson v. Denno hearing, the Court concluded the Petitioner's statement to police was not voluntary and was inadmissible. (App. 138:3-8). The State elicited the following testimony from Officer Gonzales at trial regarding the Petitioner's arrest:

Q: Okay. And how long of a discussion did you have with the defendant?

A: Approximately 2 hours.

Q: Okay. At the end of your discussion with the defendant, what action did you take?

A: I placed her under arrest for criminal sexual conduct with a minor.

Q: How is that you were able to charge her with that in particular?

A: Based on the statements from [victim] and witnessing the Hope Haven interview, I placed her under arrest for criminal sexual conduct due to the fact that she is 42 years old and he is a 13 year old boy. (App. 280:21-281:8).

The Respondent submits the Petitioner failed to carry her burden of proving Officer Gonzales' testimony was objectionable. His testimony in no way referenced the Petitioner's statement to police. Officer Gonzales' testimony also does not suggest to the jury that he arrested the Petitioner after the interview because she made incriminating statements. He explicitly stated during his testimony that he charged her with the offense "based on the statements from [victim] and witnessing the Hope Haven interview." (App. 281:1-8). The Petitioner has failed to provide a legal basis for Counsel's objection to Officer Gonzales' testimony. The record is void of any indication that the State was trying to elicit testimony regarding the substance of the Petitioner's inadmissible statement. This Court should affirm the PCR court's finding that the Petitioner failed to carry her burden of proving Counsel provided ineffective assistance in this regard.

- III. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel's performance was ineffective for failing to object to statements made by the State in closing argument when the Petitioner failed to show counsel's performance affected the outcome of her trial. As an additional sustaining ground, trial counsel's performance was not deficient.**

The PCR court found Counsel's performance was deficient for failing to object to statements made by the State during closing arguments that were "calculated to imply the Petitioner confessed where her statement had been ruled admissible." The PCR court also found the Petitioner failed to carry her burden of proving Counsel's failure to object affected the outcome of her trial proceeding. "A closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. After all the evidence is in, counsel for the parties are in the position to present their respective versions of the case as a whole." Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550 (1975). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." *Id.* at 609-10, 602 S.E.2d at 744. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009).

The Respondent submits the PCR court properly found the Petitioner failed to carry her burden of proving Counsel's performance affected the outcome of her trial proceeding. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. *Id.* The solicitor's comments don't in any way appear to have infected the trial with unfairness as to make the Petitioner's conviction a denial of due process. The

Respondent also submits it is unlikely comments made by the solicitor during closing arguments affected the outcome of the Petitioner's trial since the solicitor reminded the jury at the start of his argument that "You know, she said when we talked about opening arguments, these are my opinions – the opinion of myself and Mr. Macloskie. Nothing that we say to you is evidence. Evidence is what was entered – and you have that to see and to review." (App. 326:20-25).

The Respondent submits as an additional sustaining ground the PCR court erred by finding Counsel's performance was deficient. The Respondent submits the State's reference during closing arguments to the fact that the Petitioner was charged with criminal sexual conduct after police interviewed both the victim and the Petitioner was not objectionable or improper. During closing argument, the State argued as follows:

"She came down the testimony I think said around 2:00 o'clock in the afternoon and talk to the police. That was her face to face, eye to eye. Victim had his turn. She had her turn. She was not under arrest. She was not under arrest. She voluntarily came in to speak. I want to make that clear. This was still an investigation. After the face to face, eye to eye a determination was made. She was charged that day with criminal sexual conduct second degree." (App. 342:6-16).

The Respondent submits the solicitor's comment was not an improper attempt to put before the jury the Petitioner's inadmissible statement as the Petitioner claims, but rather the State's version of the case as a whole. Additionally, these comments were not made to arouse any of the jurors' passions or prejudices.

Further, contrary to Petitioner's assertions, none of the solicitor's statements made any improper comments on any witnesses' credibility. Vouching occurs when a Solicitor attempts to bolster the credibility of a witness by "placing the government's prestige behind a witness by making explicit personal assurances of a witness' veracity," or "implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Gilchrist v.

State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002), quoting State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). At no time during the closing argument did the solicitor make personal assurances of any witnesses' veracity. The statements made by the solicitor were comments on the facts or the reasonable inferences therefrom. The solicitor's statement during closing arguments concerning Ms. Hefner is proper, as she personally interviewed the victim, and the solicitor was simply commenting on what a forensic examiner's job is. (App. 341:18-22) Petitioner's assertion that this information was not before the jury is simply not accurate. (App. 202:24-203:3). As such, the solicitor was not allowing the jury to draw an inference from evidence not in the record; thus, Counsel had no basis on which to object.

As to the comment on Mr. Tappeiner's credibility, it is a big stretch to say that the solicitor commented on this issue in his closing. (App. 344:1-12). The solicitor was simply making an argument based on Mr. Tappeiner's demeanor while stressing that the judge would instruct the jury concerning the credibility of the witnesses. Further, the judge's jury instructions eliminated any resulting prejudice by emphasizing that the jurors were the sole judges of the witnesses' credibility and demeanor. (App. 351:18-352:9; 354:2-20 (emphasis on p. 354 lines 19-20)). Additionally, the solicitor was well within the confines of the evidence when commenting on Mr. Tappeiner's previous issues with alcohol as Mr. Tappeiner admitted during his testimony that he had a prior DUI. (App. 307:3-5). Again, the solicitor was not allowing the jury to draw an inference from evidence not in the record; thus, Counsel had no basis on which to object.

As far as the comment made by the solicitor that the jury should "think about the eye to eye, face to face interviews that [victim] had with law enforcement and the experts. You think about the evidence," the solicitor was merely asking the jury to consider all of the evidence presented at trial. (App. 346:17-19). Petitioner attempted to elicit one potential mistake by the solicitor by

highlighting that he said experts instead of expert. However, this one possible mistake cannot be read in isolation. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003) (jury instructions should be examined in their entirety and not in isolation). In this case, the victim had multiple interviews with investigators as well as with Ms. Hefner; thus, the solicitor was correct in stating that the jury should consider all of this testimony as evidence. The solicitor was not allowing the jury to draw an inference from evidence not in the record or vouching for anyone's credibility; thus, Counsel had no basis on which to object.

Lastly, as to the questions posed by the solicitor as to whether the jurors would let Petitioner babysit their children, solicitor was purely emphasizing why the jury should find her guilty as evidenced by the following statement that "I think the answer to that is why you should find [Petitioner] guilty." (App. 346:23-24). As stated above, this one comment cannot be taken in isolation from the entirety of solicitor's closing argument. When read as a whole, Counsel did not have a basis on which to object. Even assuming *arguendo* that Counsel had a basis to object to the one statement (which the PCR court did not find Counsel to be deficient in his performance), the PCR court correctly found that Petitioner "failed to carry her burden in proving...that she was prejudiced by her counsel's ineffective performance...by a preponderance of the evidence the result of the trial would have been different." (App. 849).

The Respondent submits this Court should affirm the lower court's ruling that the Petitioner failed to carry her burden of proving Counsel's failure to object to the solicitor's closing argument affected the outcome of her trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Brief of Petitioner should be denied.

Respectfully submitted,

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Susan D. Tappeiner,.....Petitioner,

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State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copies in the United States mail, postage prepaid, addressed to the Petitioner's counsel:

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This 20th day of January, 2016.


for J. RUTLEDGE JOHNSON
ATTORNEY FOR RESPONDENT

SWORN to before me this 20th day of January, 2016.


Notary Public for South Carolina.
My Commission Expires: 9/27/2019