

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. 2014-002708

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SC SUPREME COURT

Rishawn Lamar Reeder, #316370,..... Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Does the record support the PCR judge's finding that Counsel was not ineffective for failing to object to the trial judge's jury instruction that malice could be inferred from the use of a deadly weapon where he also instructed the jury on mere presence and Counsel testified his approach at trial was to show that Petitioner never had a gun that night?
2. Does the record support the PCR judge's finding the Counsel was not ineffective for failing to introduce a video from the hospital with a timestamp that was facially inconsistent with the timestamp from a video of the vehicles involved in the shooting where Counsel gave valid strategic reasons for not attempting to introduce the video?
3. Does the record support the PCR judge's finding that Counsel was not ineffective for failing to investigate or call a witness, Glenn Kelly, where Counsel testified it would have been inconsistent with Petitioner's defense at trial and that he discussed it with Petitioner prior to trial?

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 May 2010 term of the Spartanburg County Grand Jury for murder (2010-GS-42-2927) assault and battery with intent to kill (2010-GS-42-2928), and assault with intent to kill (2010-GS-42-2926). He was represented by Michael D. Brown, Esquire. On May 12, 2011, Petitioner proceeded to trial, with his co-defendant, where he was convicted of the charges by a jury. The Honorable Roger L. Couch sentenced Petitioner to confinement for life for murder, and concurrent terms of twenty years for assault and battery with intent to kill, and ten years for assault with intent to kill.

A timely notice of appeal was filed; however, the South Carolina Court of Appeals dismissed the appeal for failure to timely order the transcript and for failure to serve and file the initial Brief of Appellant. The Order of Dismissal was filed August 30, 2011. The Remittitur was returned on September 14, 2011.

Petitioner filed his application Post-Conviction Relief ("PCR") on January 21, 2012, and amended application on January 6, 2014. The State made its return on February 27, 2013. An evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse before the Honorable R. Keith Kelly. Petitioner was present and represented by J. Falkner Wilkes, Esquire. This Court notes that Wilkes was substituted as counsel. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, the Applicant testified on his own behalf. Kelly Glenn, Abel O. Gray, Esquire, and Michael D. Brown, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records

from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, and Applicant's Exhibits.

By Order dated December 5, 2014, and filed December 9, 2014, Judge Kelly denied and dismissed Petitioner's application for PCR with prejudice. On January 2, 2015, Applicant filed a pro se motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC, which was dated December 30, 2014. By Form Order, dated January 12, 2015, and filed January 13, 2015, Judge Kelly denied the motion.

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

- A. The record supports the PCR judge's finding that Counsel was not ineffective for failing to object to the trial judge's jury instruction that malice could be inferred from the use of a deadly weapon where he also instructed the jury on mere presence and Counsel testified his approach at trial was to show that Petitioner never had a gun that night.**

Sometime after midnight on March 14, 2009, Bryant Miller and his friends, Dwight Geter, "D.G." (the victim), and Marty, visited a nightclub called "Club Dreams" in Spartanburg. (App. pp. 85-88). There, Geter, D.G., and Marty, got into a fight with an individual they knew as Cathcart. (App. p. 87). Miller and his friends were thrown out of the club as a result of the fight, and from there, the group rode together in a Red Crown Victoria to Waffle House, where they sat in the parking lot for 30-45 minutes. (App. pp. 87-89). After leaving Waffle House, they stopped by Miller's house, and then left to take D.G. home. (App. pp. 89-91). Miller testified that on the way there, they pulled up at a four way stop and a dark green Nissan with tinted windows and rims pulled up behind them and started shooting. (App. p. 91). Dwight was driving, Marty was in the passenger seat, Miller was in the rear on the driver's side, and D.G. was in the rear passenger seat. (App. p. 122-23). Miller was shot in the neck and the bullet travelled straight through his neck and entered D.G.'s neck, ultimately killing him. (App. p. 93-97, 122). After the shooting, Dwight drove the Red Crown Victoria to his mother's house to tell her what happened and to let Marty out. (App. p. 117-21, 125). Hysterical, Ms. Geter told them to take D.G. to Mary Black hospital. (App pp. 138-39). There, D.G. was pronounced dead. (App. p. 140).

Around the same time, Petitioner and Cathcart went to Spartanburg Regional Hospital with gunshot wounds. (App. pp. 145-46). Cathcart gave a statement that he drove himself and Petitioner to the hospital that night. (App. 154). A gunshot residue ("GSR") kit performed on

Petitioner at the hospital. (App. p. 326). The kit showed residue on the palm of Petitioner's left hand, along with particles on the back of the left hand, and GSR on the palm of the right hand. (App. p. 326, 344, 730-34). On cross-examination, Counsel asked the GSR expert whether it was possible "if the person touches, with the inside of the hand, an area that has [GSR], they can have that on their palms?" (p. 337-38). The expert also testified that about 65% of the GSR samples collected from individuals who have been shot will show GSR on their hands even if they never fired a gun. (App. p. 347). The State introduced a video at trial allegedly showing the vehicles involved in the accident. (App. p. 304). The vehicle alleged to have been involved in the shooting was found set on fire the next evening. (App. p. 277, 810).

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.

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.

At trial, the State presented testimony from victim Bryant Miller that he first saw a car beside him when the car began shooting at Miller and his friends. (App. p. 92). Miller testified that once he heard gunshots, he shot back at the dark green Nissan using a .40 caliber pistol. (App. pp. 92). Miller testified that all of the windows in the car he rode in were up and after they shattered from the initial gunshots, Miller knocked out the remainder of the window to shoot

back. (App. pp. 98-99). Miller testified that he was shot on the left side of his neck and the bullet exited from the right side of the neck. (App. pp. 122). Miller also testified that he was sitting in the backseat on the driver's side of the vehicle. (App. pp. 122-23).

Dwight Geter testified that a car "just pulled up beside us and started shooting." (App. p. 180). Geter testified that the car had its headlights off, pulled up on the left side of his car, and started shooting. (App. pp. 181, 184). Geter testified that Miller did start shooting back, but only after the other car shot first. (App. p. 186). Geter identified Cathcart, Petitioner's co-defendant, as involved in the altercation at the club. (App. pp. 189-90; 196).

Testimony was presented to show that Cathcart had a grazing injury to his right side. (App. p. 152). Cathcart's statements to police were introduced, which placed him driving a gray Nissan with Applicant and a guy named "Black," when a car drove up beside them near I-85 Business and shot at them. (App. p. 154, 159-60). Later, testimony was presented that Cathcart's car was found in flames, but with no apparent damage from gunshots. (App. p. 160, 168, 171).

Testimony was presented that showed the victim's car had ten impact marks from bullets, all on the driver's side of the car, including marks to the driver's side of the windshield, driver's door, and back door on the driver's side. (App. p. 240). The only evidence presented by Petitioner at trial was testimony from Officer Talanges, specifically regarding a crime scene sketch of the location of the shooting and initial interaction at the hospital with Peitioner and Cathcart. (App. pp. 385-90). Counsel questioned Talanges as to the location of shell casings, blood, and other unknown biological manner, and questioned as to whether those items were all tested. (App. p. 386). Counsel also questioned Talanges about locating Petitioner and Cathcart at

Spartanburg Regional and noting that Petitioner had a gunshot wound to his left wrist area. (App. p. 390).

Counsel requested a self-defense jury charge, arguing that because Petitioner had not been identified as participating in the fight at the club, Petitioner had no control over the vehicle and was not engaged in any prior difficulties. (App. pp. 395-97). The trial judge ruled that because there was no evidence Petitioner was involved in the initial altercation, he would have no duty to retreat and might not have brought on any of the difficulties. (App. pp. 399-400).

At the PCR hearing, Counsel testified that he did not believe that the jury charge regarding inference of malice was improper and he did not believe the inferred malice charge was inconsistent with his request for a self-defense charge. (App. pp. 586-87). Counsel testified at the PCR hearing that Petitioner gave him two different theories about his involvement in the shooting. (App. p. 599-600). Initially, Petitioner denied any involvement and told Counsel he had been robbed the same night, received a gunshot wound as a result of the robbery, and happened to be at Spartanburg Regional for treatment at the same time as his co-defendant. (App. p. 600). Counsel testified that the first theory would have involved alibi witnesses but that he investigated and "exhausted that" avenue. (App. pp. 600-05). Counsel testified that Petitioner subsequently informed him that he was in a car with his co-defendant the night of the shooting, but did not go in the club, did not participate in the altercation in the club, and never had a gun that night. (App. p. 600-05). Petitioner's story was that he was at a gas station near the club, which was where his co-defendant picked him up, and that shortly after leaving the gas station, someone pulled up to them and shot in the car and then he blacked out. (App. p. 600-05). The latter account was given to Counsel closer to trial and was the theory that he proceeded on at trial. (App. p. 603). Counsel testified that the theory of the case, from a factual standpoint was that Petitioner was an

"innocent rider." (App. p. 606). Moreover, at trial, Counsel requested a jury charge on mere presence and the judge charged it. (App p. 395-400, 444-45). Petitioner denied telling Counsel the second story. (App. p. 671). However, the PCR judge found Counsel's testimony to be most credible overall in regards to the allegation of ineffective assistance of counsel. (App. p. 847).

Petitioner argued that Counsel was ineffective for failing to object to the jury charge regarding inference of malice and for requesting a self-defense jury charge. There is ample evidence in the record to support the PCR judge's finding that Petitioner failed to show Counsel rendered deficient performance in failing to object to the malice charge or that such conduct prejudiced him. "A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." State v. Stanko, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013). The trial court gave the following charge at Petitioner's trial:

Inferred malice may arise when a deed is done by a person using a deadly weapon. A deadly weapon is any article or instruments or substance which is likely to cause death or great bodily harm. Now, whether an instrument is used as a deadly weapon is a question of fact for a jury to decide.

(App. p. 450).

The PCR judge found that had evidence been presented to "reduce, mitigate, excuse, or justify the homicide," the jury charges regarding an inference of malice would have been incorrect. However, the PCR judge found no evidence in the record which would fall in any of those four categories. (App. p. 833-34). Neither defendant presented testimony to indicate that they shot the victims in self-defense, and both Petitioner and Counsel testified at the PCR hearing that Petitioner denied shooting a gun at all that day. (App. pp. 600-05, 668).

This Court "give[s] great deference to a [PCR] judge's findings where matters of credibility are involved since [it] lack[s] the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citing S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct.App.1984)). The PCR judge found Counsel's testimony was most credible, therefore, this Court should give deference to that finding in determining whether to grant review.

Here, Counsel testified that the theory he proceeded on at trial was that Petitioner was an innocent rider and that he never fired a gun that evening. Additionally, Counsel requested and the judge charged the jury on the law of mere presence in addition to the self-defense charge. Counsel also testified that he did not see the malice instruction as inconsistent. Furthermore, erroneous jury instructions are subject to harmless error analysis. Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008). Accordingly, the record contains ample evidence supporting the PCR judge's finding that Counsel was not deficient for failing to object to the charge regarding the inference of malice by use of a deadly weapon where counsel's main strategy was to show that Petitioner was an innocent rider and that his presence in the car was not indicative of guilt.

B. The record supports the PCR judge's finding that Counsel was not ineffective for failing to introduce a video from the hospital with a timestamp that was facially inconsistent with the timestamp from a video of the vehicles involved in the shooting where Counsel gave valid strategic reasons for not attempting to introduce the video.

At the PCR hearing, Petitioner attempted to establish that a video taken of the entrance of the hospital, which included a timestamp, would have led jurors to the conclusion that Petitioner could not be in two places at once because the timestamp on the video of the vehicles involved in the shooting showed the shooting occurred one second before Petitioner arrived at the hospital.

However, Counsel testified that the video showing Petitioner at the hospital was something that he and Petitioner "discuss[ed] as something [they] wanted to stay away from." (App. pp. 579-80). Counsel explained that this was because "with videos, with prior experience, it would be very easy for somebody to . . . explain the nature of the timestamp, if it had been off. . . ." (App. p. 580). Counsel further testified that the reason they did not want to introduce it was "most importantly" because of "the fact that [Petitioner] could have been easily identified appearing with his co-defendant on the hospital tape." (App. p. 580). Counsel additionally testified that there was another aspect of the video at the hospital showing the alleged vehicle that was involved in the accident, (App. pp. 580-81), and that the next shot showed Petitioner and his co-defendant, both having been shot, walking into the hospital together. (App. p. 584). Counsel further testified that based on his experience with videos containing timestamps, "it would have been very easy for someone to come and try to distinguish what was occurring with the timestamp, coupled with the medical records of actual admittance, the time the investigators came, hospital personnel, and actually when [Petitioner] was . . . seen, along with [his co-defendant]." (App. p. 585).

The courts "must be wary of second-guessing defense counsel's trial tactics," Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992)), and "where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance." Whitehead v. State, 308 S.C. at 122, 417 S.E.2d at 531 (citing Goodson v. United State, 564 F.2d 1071 (4th Cir. 1977)). Here, Counsel testified he reviewed the videos and discussed their contents with Petitioner and ultimately determined they would be more damaging than helpful to Petitioner's case because there was evidence, apart from the timestamp, that would have contradicted what the time stamp

showed. Accordingly, Counsel articulated valid strategic reasons for not offering the videos from Spartanburg Regional as evidence.

Further, 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. State v. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (citing Strickland, 466 U.S. 668). Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Id. Accordingly, the evidence in the record supports the PCR judge's finding that Petitioner failed to meet his burden of proof as to this claim.

C. The record supports the PCR judge's finding that Counsel was not ineffective for failing to investigate or call a witness, Glenn Kelly, where Counsel testified it would have been inconsistent with Petitioner's defense at trial and that he discussed it with Petitioner prior to trial.

Petitioner introduced a copy of a field investigation card as Exhibit #6 at the PCR hearing. (App p. 619). The card referenced an interview with witness Glenn Kelly, who indicated he saw a Ford Crown Victoria and a Ford Mustang that evening at the time of the shooting. (App. pp. 614-15). Petitioner testified that he was unaware of Kelly as a potential witness, but had received a copy of the investigation card while he was located in the county detention center. (App. p. 666). Petitioner testified that Counsel should have called Kelly as a witness because it would have caused doubt as to which car was involved in the shooting. (App. pp. 666-67).

Kelly testified at the PCR hearing that he saw "one car pull up with a headlight—with their headlights on. And, then, [he saw] a green Mustang or—or a green older car pull up behind

them." (App. p. 659). Kelly also testified that he had just gotten back from the club and had been constantly drinking all night. (App. pp. 659-60).

Counsel testified that he recalled having a discussion with Petitioner about the report of someone seeing a Mustang. (App. p. 617). However, Counsel testified that he never spoke with Glenn Kelly. (App. pp. 616-17). Counsel testified that the discussion with Petitioner about someone identifying a Mustang was at the same time that Petitioner was presenting the first theory involving his complete lack of involvement in the shooting, and that it "was not a consideration" after Petitioner placed himself in the car with his co-defendant. (App. p. 650).

The PCR judge found Counsel's testimony credible that he recalled discussing the fact that one of the cars had been identified as a Mustang with Petitioner. (App. p. 840). The record supports the PCR judge's finding that Petitioner failed to show Counsel was deficient for failing to interview or call Kelly as a witness. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Kelly initially testified at the PCR hearing that he saw "a green Mustang or –or a green older car." The record reflects that there is not a reasonable probability that such testimony would have undermined the outcome of Petitioner's trial, particularly where Miller testified it was a green Nissan Maxima and where a green Nissan Maxima associated with Petitioner's co-defendant was found on fire half a day following the shooting. Accordingly, the record reflects that the PCR judge correctly found that Petitioner failed to show Counsel's performance was deficient for failing to call Kelly as a

witness or how any additional investigation into this witness would have affected the outcome of the trial.

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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January 22, 2016.

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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:

**David Alexander, Esquire
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This 22th day of January, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT