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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000072

Joseph Paugh,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS2

QUESTION PRESENTED

1. Whether Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated where the PCR court erroneously ruled that defense counsel offered a strategic reason for failing to move for a mistrial based upon the solicitor's deliberately inflammatory single question cross-examination of Petitioner when defense counsel could not recall why he did not move for a mistrial, thus, there was no evidence to support the ruling of the PCR court?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the June 2010 term of General Sessions for first-degree criminal sexual conduct with a minor (2009-GS-23-8144). (App.pp.374-75). Christopher D. Scalzo, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On October 14, 2010, the Honorable D. Garrison Hill sentenced Petitioner to 30 years imprisonment. (App.p.275).

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.277-92; pp.293-306). The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Paugh, Op. No. 2012-UP-659 (S.C. Ct. App. filed Dec. 19, 2012). (App.pp.318-19). The remittitur was sent on January 11, 2013. (App.p.320).

Petitioner filed an application for post-conviction relief (PCR) on January 13, 2013 (2013-CP-23-6153). (App.pp.321-37). A hearing was convened at the Greenville County Courthouse on October 22, 2014. (App.pp.344-61). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Letitia H. Verdin denied relief in an order filed December 19, 2014. (App.pp.363-73).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

Petitioner argues trial counsel failed to offer a strategic reason to not move for a mistrial based on the assistant solicitor's cross-examination of Petitioner. This argument is without merit.

At trial, the assistant solicitor asked Petitioner a single question during her cross-examination. The following exchange took place:

Q: How do you look at yourself in the mirror every day after what you did to your daughter?

Counsel: Objection, Your Honor.

The Court: Sustained.

Solicitor: I withdraw the question.
And I have no further questions.

Counsel: I don't have any redirect, Judge.

The Court: All right. You can step down, sir.
Thank you.

(App.p.220, lines 9-17).

At the beginning of the PCR hearing, counsel for Petitioner outlined various arguments, including that trial counsel "should have requested a mistrial after an inappropriate remark by the solicitor." (App.p.347, lines 23-24).

Trial counsel was asked on direct examination at the PCR hearing about the issue of the assistant solicitor's question of Petitioner during his trial. The following exchange took place:

Q: And do you recall when the Solicitor asked one question on the cross of your client?

A: Yeah, I remember that very well.

Q: The transcript reflects that you did object.

A: Yes, I did.

Q: And she withdrew the question?

A: Yes.

Q: At that point, why did you not take a further step? What was your kind of rationale behind not asking for mistrial, asking she be struck or whatnot?

A: I didn't ask for it to be struck because she withdrew the question. That was essentially the same thing in my mind. We were before the jury when that all took place. Even with the objection and the withdrawal of the question, the jury never went out. So in my mind, I was in front of the jury. I don't think I asked for a mistrial. I don't know why. I think I felt like it was resolved by her withdrawing the question. And she also sat down. That was the only. It's [sic] was obvious that was the only question she was going to ask. I just said, well, I'll leave it at that.

(App.p.359, line 13 – p.360, line 11).

In denying Petitioner's application for post-conviction relief, the PCR judge found "in this instance it is appropriate to defer to trial counsel's professional judgment." The PCR judge found Petitioner failed to overcome the presumption of effective assistance of counsel and found trial counsel employed reasonable trial strategy. (App.pp.367-68).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective. Petitioner did not demonstrate that trial counsel erred in not making a motion for a mistrial. Trial counsel explained why he did not request a mistrial after the assistant solicitor's question. Trial counsel stated "I think I felt it was resolved by her withdrawing the question. And she also sat down . . . It's [sic] was obvious that was the only question that she was going to ask. I just said, well, I'll leave it at that." (App.p.360). Trial counsel clearly articulated the reason that he did not make a

motion for a mistrial is that he felt the question was withdrawn and the matter was best left alone. The PCR judge was correct in determining this was a valid and reasonable trial strategy. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Based on this specific situation, trial counsel made a valid strategic decision to not make a motion for a mistrial. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). As such, the PCR judge was correct in finding trial counsel used reasonable trial strategy regarding this issue.

Even assuming arguendo that trial counsel's testimony could be read to mean that he did not articulate a reason that he did not move for a mistrial – because he initially stated he did not know why he did not do so – his trial strategy can be easily inferred. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841 (2010). The record can be read to support a

judge's factual determination of counsel's trial strategy. Id. at 301-02, 130 S. Ct. at 849-50. Immediately after stated he did not know why he did not move for a mistrial, trial counsel explained his thought process at the time. (App.p.360). Based upon the record, it is clear trial counsel articulated a strategic reason that he did not make a motion for a mistrial. As such, his trial strategy can be inferred and the PCR judge was correct in finding this trial strategy was reasonable.

Petitioner failed to demonstrate he was prejudiced because trial counsel did not move for a mistrial. In order to prove prejudice, Petitioner would have to show there is a "reasonable probability" the result of his trial would have been different if trial counsel had made a motion for a mistrial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. The assistant solicitor asked a single question and then sat down. There was no elaboration on the question and the subject matter of the question was not revisited by either party at any point during the remainder of Petitioner's trial. There is no reasonable probability a motion for mistrial would have been granted because trial counsel would not have been able to successfully demonstrate there was prejudice as the result of this single question. See, e.g., State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) ("In order to receive a mistrial, the defendant must show error and resulting prejudice."). As there is no reasonable probability a motion for mistrial would have been granted in this instance, Petitioner failed to meet his burden of proving he was prejudiced by trial counsel's representation.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional

norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial 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 foregoing reasons, Respondent submits this Court should deny the 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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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

John H. Strom, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 29th day of January, 2016.

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