

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 16 2016

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2015-000377

Joshua Ray Greer, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO AUSTIN PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar #102089

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....	3
STATEMENT OF THE CASE.....	4
STANDARD OF REVIEW	6
ARGUMENT	
The record contains ample evidence to support the PCR judge's findings that Counsel was not ineffective for electing not to pursue a defense theory of third-party guilt where Counsel gave a valid strategic reason for doing so and where there was insufficient evidence of third party guilt.....	7
CONCLUSION.....	14

QUESTION PRESENTED

Does the record contain ample evidence to support the PCR judge's findings that Counsel was not ineffective for electing not to pursue a defense theory of third-party guilt where Counsel gave a valid strategic reason for doing so and where there was insufficient evidence of third party guilt?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Correction pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the November 2002 term of the Spartanburg County Grand Jury for Murder (2002-GS-42-5209). He was later indicted at the June 2003 term of the Spartanburg County Grand Jury for Armed Robbery (2003-GS-42-2201). Jason Chehoski, Esquire, represented Petitioner. On September 20, 2005, Petitioner proceeded to trial before the Honorable Wyatt T. Saunders and a jury. The jury found him guilty of both charges. Judge Saunders sentenced him to confinement for a period of thirty years for Murder and a consecutive term of twenty years for Armed Robbery.

A timely notice of appeal was filed on Petitioner's behalf and Joseph L. Savitz, III, Esquire, perfected the appeal. The Court of Appeals affirmed the conviction on November 7, 2007. State v. Greer, No. 2007-UP-512 (S.C. Ct. App. November 7, 2007). The remittitur was issued on November 27, 2007.

Petitioner subsequently filed an application for post-conviction relief ("PCR") on August 21, 2008. The State filed its Return on February 20, 2009. An evidentiary hearing was convened on May 26, 2009, at the Spartanburg County Courthouse, at which Petitioner was present and represented by Franklin Milton Mann, Jr., Esquire. The Honorable J. Mark Hayes, II denied and dismissed Petitioner's application by written Order on July 24, 2009. Petitioner did not appeal the denial of his PCR application. Petitioner did file a *pro se* notice of appeal with the Spartanburg County Clerk of Court.

Petitioner filed a second application for post-conviction relief (PCR) filed March 12, 2012. Respondent made its Return and Motion to Dismiss on or about June 13, 2013. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the court issued a Conditional Order of Dismissal. In response, Petitioner filed a

document captioned, “Applicant’s Sufficient Legal Cause Shown to PCR Case Matter, etc.,” in which he alleged that he informed PCR Counsel Franklin Milton Mann, Esquire, that he wished to appeal the denial of relief. An evidentiary hearing was held on September 16, 2014, at the Spartanburg County Courthouse before the Honorable Roger L. Couch. Petitioner was present and testified on his own behalf. He was represented by J. Brandt Rucker, Esquire. Respondent was represented by J. Clayton Mitchell, Esquire. Petitioner's prior PCR Counsel Mann also testified at the hearing.

Judge Couch found Petitioner did not voluntarily waive his right to appeal the PCR court’s denial and dismissal of his application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Therefore, the Court denied and dismissed the application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

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

The record contains ample evidence to support the PCR court's findings Counsel was not ineffective for electing not to pursue a defense theory of third-party guilt where Counsel gave a valid strategic reason for doing so and where there was insufficient evidence of third party guilt.

The victim was bludgeoned with a hammer, left for dead in his home, and died in the hospital eleven days later, having never regained consciousness. (App. p. 288). Petitioner gave two statements to authorities, and in one he confessed to the murder. (App. p. 8). Counsel made a pre-trial motion to suppress the statements. (App. p. 8; pp. 8-105). Following a Jackson v. Denno hearing, the Court ultimately admitted the statements. (App. p. 105).

Petitioner confessed that he had been at the victim's house and that "it just happened." He explained that he had gone back to the victim's house to use the phone or get a ride. (App. p. 262-75). He ultimately called his cousin, Mark Greer, who was at a bar, to get a ride. (App. p. 275). Petitioner told authorities that he also asked the victim if he could borrow \$20 and told him he would repay him with cigarettes, but the victim told him he could pay him back by performing oral sex on him. (App. pp. 275-77). Petitioner stated that the victim then came towards him with a butcher knife or shears and that Petitioner reached down and felt an object and swung the object at the victim. (App. p. 277). A hammer was recovered on a woodpile next to the victim's house. (App. p. 270). A carving knife was found in the victim's home but did not fit the description that Petitioner had given. (App. p. 290). Petitioner also testified that afterwards he took more money from the victim's wallet. (App. p. 280).

William "Butch" Green lived in a trailer right behind the victim's house (App. p. 712). Butch testified he had been at the victim's house on the night he was struck with the hammer. (App. p. 713). Joseph Blackwell and Mark Greer, Petitioner's cousins, testified that they, Petitioner and Butch had all been at the victim's house earlier in the evening. (App. p. 426, 439).

In his statement Petitioner also admitted he, Mark Greer, Blackwell, and Butch had all been at the victim's house that night. (App. p. 230). Butch testified he left the victim's home around 9:30 that night. (App. p. 714). The State asked Green on direct examination if investigators had looked into him as a suspect. (App. p. 723). He testified: "I didn't realize it at the time, sir, but I guess I was one of the, I was the prime suspect at that time because of my history and because of my record, I was the prime suspect." (App. p. 722). Green testified that he went into the victim's house the morning that Loyd Kirby found him but thought that he was sleeping and did not realize he had been injured. He admitted that he did not tell that to the investigator's first. (App. p. 717-719). He further testified that there was an outstanding warrant for him in Colorado for manufacture of methamphetamine. (App. p. 720-21). Green testified investigators took his jeans and his sheets and talked to him for a long time, but that they ultimately let him go. (App. p. 723).

At the beginning of the trial, the court made the following ruling on the State's motion following opening statements:

The defense will be prohibited from casting doubt upon the guilt of his client simply by pointing to third party guilt by such inferences or presumptions that may arise out of the evidence but *that only cause a suspicion by conjecture or speculation that the commission of the crime was by another person.*

(App. p. 216)(emphasis added).

At the PCR hearing, Counsel testified that in his opening statement he "said to the jury that there are two people who know what happened. . . and neither one of them are in [the] courtroom." (App. p. 869). Counsel testified the State made a preemptive objection based on that statement to exclude evidence of third party guilt. (App. p. 870). He also testified that he knew of Butch Green (App. p. 870) and that his purpose in his opening statement "was not to suggest third party guilt, [but] rather to point to [Petitioner's] innocence[.]" (App. p. 874). Counsel

testified: "I think the best evidence would be the trial of blood leading out the back door from the victim's trailer which was the opposite direction where the hammer was found or the murder weapon." (App. p. 875). However, Counsel did not remember that evidence coming in at trial. (App. p. 876). Additionally, Counsel testified:

[M]y strategy at that time was not to touch on third party guilt because that wasn't my—that wasn't the theme of my case. . . . that had nothing to do with the theory that I was presenting which was that none of this evidence. . . . pointed to [Petitioner] being guilty of this crime.

(App. p. 876).

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).

Petitioner argues Counsel was ineffective for failing to seek to introduce evidence of third party guilt. The PCR judge found that Petitioner failed to satisfy his burden of proving counsel should have argued third-party guilt, finding Counsel made a strategic decision not to argue third-party guilt and instead argue the Applicant was innocent of the crimes. This Court should deny review because there is ample evidence in the record to support the PCR judge's findings. “Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)). Furthermore, “a

defendant [can] introduce evidence of third-party guilt . . . [where the evidence] is limited to such facts as are inconsistent with his own guilt *and that raise a reasonable inference or presumption as to his own innocence.*" Miller v. State, 379 S.C. 108, 114 n.2 (2008) (citing Holmes v. South Carolina, 547 U.S. 319 (2006)) (emphasis added).

Petitioner did not introduce any exhibits at the PCR hearing. Counsel testified he was simply trying to show that Petitioner was innocent and that he did not think that the evidence pointed to Petitioner. He specifically stated that he was third-party guilt was not the theory he was proceeding under. The evidence with respect to third party guilt introduced at trial and at the PCR hearing simply was not enough to support an inference of Petitioner's innocence. Further, Counsel testified that he was aware of Green and Petitioner testified he had discussed the possibility of Green's guilt with Counsel. The record supports the judge's finding that Counsel articulated a valid strategic reason for not seeking to introduce third party guilt and that Petitioner failed to satisfy his burden of proving that Counsel's performance was deficient in this regard.

Furthermore, there is ample evidence in the record to support the PCR judge's finding that Petitioner failed to show he was prejudiced by any alleged error of Counsel. Even if Counsel had attempted to introduce evidence of third party guilt, there simply was no evidence at trial and no evidence produced at the PCR hearing that would raise more than a mere speculation as to Green's guilt. The South Carolina Court of Appeals held in Burgess:

"[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts,

disconnected and outside the crime itself, cannot be separately proved for such a purpose.

State v. Burgess, 391 S.C. 15, 22-23, 703 S.E.2d 512, 516 (Ct. App. 2010) (quoting State v. Gregory, 198 S.C. at 104–05, 16 S.E.2d at 534–35 (internal citations omitted)).

The purpose of the rule established in Gregory was "to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Holmes v. S. Carolina, 547 U.S. 319, 330 (2006) (citing State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 535 (1941). Where evidence proffered has no effect other than "to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, [it] is not admissible." State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) (citing 22 C.J.S., Criminal Law, § 622). A court may exclude evidence of third party guilt "were it does not sufficiently connect the other person to the crime, [such as], where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." Holmes v. S. Carolina, 547 U.S. 319, 327 (2006) (quoting 40A Am. Jur. 2d, Homicide § 286, pp. 136–138 (1999)).

Here, Petitioner failed to produce evidence at the PCR hearing that sufficiently connected Green to the crime. Only Counsel and Petitioner testified at the PCR hearing. The only testimony at the PCR hearing from Counsel in this regard was that the evidence he could have proffered in support of third party guilt was a blood trail coming from the trailer. No exhibits were introduced. Therefore, the only evidence in the record purporting to connect Green to the crime is merely speculative or remote. Petitioner points to no other evidence that would further a defense of third-party guilt. The record reflects that Counsel fully cross-examined Green. Additionally, Green even testified that he was initially investigated for the murder and he admitted that he initially gave a statement in which he did not explain that he had gone into the victim's house

earlier in the day before Kirby found the victim. He also testified that he was initially investigated and that his jeans and bedsheets were seized and tested. Petitioner failed to show that even if Counsel had proffered any evidence of third party guilt that evidence would be admissible. The evidence allegedly pointing to Green would have done nothing more than to "cast a bare suspicion upon [him], or to raise a conjectural inference" that he was responsible for the murder.

Accordingly, the record contains ample evidence to support the PCR judge's ruling that Petitioner failed to satisfy his burden of proving that the alleged deficient performance by Counsel in choosing not to pursue a defense of third-party guilt prejudiced him.

Petitioner also argues in his Petition that Counsel failed to preserve the issue of third party guilt for appellate review. Respondent submits this argument is not preserved because the PCR judge did not rule on counsel's failure to preserve the issue. An issue must be raised and ruled upon below to preserve the issue for appellate review. See, e.g. State v. Moore, 357 S.C. 458, 464-65, 593 S.E.2d 608, 612 (2004). Regardless, for the same reasons above, Petitioner failed to show that Counsel was deficient in not objecting to the Court's ruling that the defense could not introduce third party guilt, or that he was prejudiced by such alleged deficiency. Petitioner has produced no evidence that he would have been successful on appeal had the argument been preserved. 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." Cherry at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690).

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,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
S.C. Bar No. 102089

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

By: 
ATTORNEYS FOR RESPONDENT

February 10, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Certiorari to Spartanburg County
Court of Common Pleas

FEB 16 2016

The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2015-000377

S.C. SUPREME COURT

JOSHUA RAY GREER, #311472,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

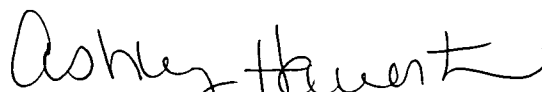
RESPONDENT

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:

**Kathrine H. Hudgins, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 10th day of February, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 10, 2016

RECEIVED

FEB 16 2016

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Joshua Ray Greer v. State of South Carolina
Appellate Case No.: 2015-000377

Dear Ms. 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,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: Kathrine H. Hudgins, Esquire

P

COMMERCIAL BASE PRICING

USPS PRIORITY MAIL

OFFICE OF THE ATTORNEY GENERAL
SOUTH CAROLINA ATTORNEY GENERAL
1000 ASSEMBLY STREET
COLUMBIA SC 29201

SHIP HONORABLE DANIEL E. SHEAROUSE
TO: P.O. BOX 11330
COLUMBIA SC 29211

USPS TRACKING #



9205 5901 5329 5500 0000 0229 87

ELECTRONIC RATE APPROVED #901532955

BOX 1 OF 1
Priority Mail is a registered trademark of the U.S. Postal Service



SC Attorney General's Office
Post Office Box 11549
Columbia, SC 29211

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

