

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC SUPREME COURT

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2015-000949

Mark Allen Elliott, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether trial counsel was ineffective when he did not enter cell phone records into evidence after complainant testified to their contents.

STATEMENT OF THE CASE

In July 2009, the Horry County Grand Jury indicted Petitioner for kidnapping.¹ (App. p. 1234.) On November 15, 2010, Petitioner proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. (App. p. 1). Ronald W. Hazzard, Esquire and Melinda Knowles, Esquire (“trial counsel”), represented Petitioner.² Applicant was found guilty of kidnapping (App. p. 1112, lines 22-24). Judge Hyman sentenced Petitioner to thirty (30) years’ imprisonment. (App. p. 1158, lines 13-16).

Petitioner filed a timely notice of appeal. Breen R. Stevens, Esquire, of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant’s conviction and sentence. State v. Mark Elliott, Op. No. 2013-UP-112 (S.C. Ct. App. filed March 13, 2013). The Remittitur was returned on April 3, 2013.

Petitioner filed an application for post-conviction relief on March 27, 2013. (App. p. 1162-1171). Respondent (“the State”) filed a return on or about October 24, 2013. (App. p. 1172-1177) The Honorable John C. Hayes, III (“the post-conviction relief judge”) convened an evidentiary hearing on the application at the Horry County Courthouse on October 27, 2014. (App. p. 1226.) Petitioner was present and represented by Daniel A. Selwa, II, Esquire. (App. p. 1226). The post-conviction relief judge denied relief in an order signed November 18, 2014 and filed November 24, 2014. (App. p. 1226; p. 1232.). The Petitioner filed a notice of appeal on March 12, 2015. Respondent-Petitioner filed a notice of cross appeal on April 22, 2015. Petitioner filed a Petition for Writ of Certiorari on or about October 29, 2015, to which the State now files its return.

¹ Other charges were involved during this trial, but only the kidnapping was pled in the PCR Application, as it is the only one of which Petitioner was found guilty.

² The term “trial counsel” will refer primarily to Mr. Hazzard and use a male pronoun, as Mr. Hazzard was involved with eliciting the testimony and using the evidence at issue, as well as the closing argument.

STANDARD OF REVIEW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove trial 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. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Trial counsel did not provide ineffective assistance when he did not enter the phone records into evidence, particularly after the victim testified to their contents.

The post-conviction relief judge found trial counsel did not provide ineffective assistance of counsel when he did not offer the victim's cell phone records into evidence. Specifically, the post-conviction relief judge found that the records served only to substantiate the victim's testimony at trial. The post-conviction relief judge rested on the analysis of whether evidence of phone calls was provided to the jury during trial; in other words, whether trial counsel effectively presented the evidence to the jury for its consideration. The post-conviction relief judge found that "[t]he victim's trial testimony, direct and cross examination, established all the phone records would show. Additionally, the phone records would not reflect on the victim's credibility as they are consistent with her testimony." (App. p. 1231.)

Petitioner places great weight on the idea that, because the records were in possession of trial counsel and able to be placed into evidence, they should have been. Respondent submits that this arose as a concern and potential allegation for post-conviction relief only in hindsight because the jury requested to review the actual records during deliberations. (p.1102, line 20-p.1104, line 16.) Strickland v. Washington, *supra*, speaks to this point directly:

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." See Michel v. Louisiana, *supra*, 350 U.S., at 101, 76 S.Ct., at 164.

In attempting “to reconstruct the circumstances of counsel’s challenged conduct,” this Court must turn to the transcript, review the lengthy testimony of the victim and, in particular, review the extensive cross-examination and direct examination as a hostile witness by trial counsel. Trial counsel spent copious time and effort attacking the recall and credibility of a teenage girl who was fourteen (14) years old at the time of the incident.³ This is a task that requires sensitivity and sincerity for the victim, attention to the mood and reaction of the jury, and the myriad other considerations of a defense attorney in a trial situation. Trial counsel’s examinations (including cross, re-cross, and direct as a hostile witness) constitute approximately fifty-four (54) pages of the transcript, of which approximately six (6) pages of this are specific and detailed discussion of the records, as well as other instances of texting and calling that are referenced multiple times throughout testimony. To say that the events and communications of the night of the incident were quite thoroughly discussed by trial counsel and the victim would be an understatement. Even co-counsel, Ms. Knowles, speaks at the post-conviction relief hearing about the thoroughness of trial counsel’s examination of the victim, particularly in terms of whether the phone records were properly discussed and exhaustively covered during testimony. (App. p. 1198, line 3 – p.1199, line 11.)

Petitioner alleges that the victim “fail[ed] to explain the apparent discrepancy in the timelines when trial counsel read times from the phone records allowed [*sic*],” and suggests that it is unclear whether this is due to victim’s “foggy memory” or “trial counsel’s imprecise reading of the records.” (PWC, p.18-19.) During the post-conviction relief hearing, trial counsel spoke at length about the significance of the phone records; however, he also testified about the potential for confusion in providing them to the jury.

³ Respondent vehemently objects to Petitioner’s characterization of the victim contained on the top of page 17 of the Petition for Writ of Certiorari. These statements are wholly unsupported by any testimony or other evidence, and are merely unnecessarily inflammatory remarks of counsel.

(App. p. 1207, line 23-p.1208, line 8.) Although he admitted that he “should” have introduced them as evidence, he made this admission while noting that the records were “obviously the thing that they honed in on, those phone records.” (App. p.1208, lines 7-9.) This is trial counsel’s not giving himself the benefit of the effects of hindsight and saying, essentially, that only as an abundance of caution should the records have gone into evidence.

Respondent does not refute Petitioner’s assertion that the underlying case is one that turned on the credibility of the parties involved; however, credibility is established through testimony under examination, and is weighed by the jury.⁴ It is apparent that trial counsel’s examinations of the witnesses in this matter provided enough challenge to the victim’s credibility for them to acquit Petitioner of the other charges that he faced. There is simply no evidence to support the idea that allowing the jury to examine the actual phone records would have change the outcome of the trial.

Reflection upon the standard of review in post-conviction relief allows no ground for relief for Petitioner. The presumption, above all, is that trial counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Here, trial counsel acted reasonably under prevailing professional norms in his presentation of evidence, questioning of witnesses, and zealous representation of his client through attacks on the victim’s credibility. Therefore, his performance was not deficient. Even assuming, *arguendo*, that counsel’s performance was deficient, it was certainly not prejudicial, as there is no evidence whatsoever to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding

⁴ “The assessment of witness credibility is within the exclusive province of the jury.” State v. Berry, 413 S.C. 118, 125, 775 S.E.2d 51, 55 (Ct. App. 2015), citing State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App. 2012).

would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The idea of “reasonable probability” “finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In other words – did trial counsel’s error make a material difference to the outcome of the case? Again, no evidence exists to support the proposition that prejudice (or even deficiency) exists. For these reasons, this Court must rely on the post-conviction relief judge’s finding that trial counsel performed effectively and deny this petition for writ of certiorari.


CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court deny a writ of certiorari to review the post-conviction relief judge's proper findings of effective performance of trial counsel.

Respectfully submitted,

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Certiorari to Horry County

The Honorable John C. Hayes, III, Circuit Court Judge

MARK ALLEN ELLIOTT,

Petitioner,

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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:

Benjamin J. Tripp, Esquire
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SC Commission on Indigent Defense
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This 17th day of March, 2016.


NORMA BIGBEE
LEGAL ASSISTANT