STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2015-000544

Noah C. Mumford, ...Respondent-Petitioner,

v.

State of South Carolina, ...Petitioner-Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT-PETITIONER

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TABLE OF CONTENTS

ISSUES PRESENTED

1. Whether probative evidence exists to find that trial counsel was ineffective when he questioned a witness regarding his history of convictions and drug use.
2. Whether probative evidence exists to find that trial counsel's pre-trial investigation was ineffective.
3. Whether probative evidence exists to find that trial counsel's decision not to request any specific instructions on self-defense constitutes ineffective assistance of counsel.
4. Whether probative evidence exists to find that trial counsel was ineffective because he did not request the lesser-included offense of first degree assault and battery.

STATEMENT OF THE CASE

In February 2011, the Chesterfield County Grand Jury indicted Respondent-Petitioner for attempted murder. (App. p. 9, lines 4-14). (App. p. 1). On October 24, 2011, Respondent-Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. (App. p. 1). Larry W. Knox, Esquire ("trial counsel"), represented Respondent-Petitioner. On October 26, 2011, the jury found Respondent-Petitioner guilty of the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN"). (App. p. 366, lines 21-24). Judge Russo sentenced Respondent-Petitioner to ten years imprisonment. (App. p. 379, lines 20-23).

Respondent-Petitioner filed a timely notice of appeal, but the South Carolina Court of Appeals granted Respondent-Petitioner's request to withdraw appeal by order dated July 24, 2012. (App. p. 382). The court of appeals returned the remittitur to the circuit court on September 19, 2014. (App. p. 383).

Respondent-Petitioner filed an application for post-conviction relief on February 28, 2013, and an amended application on May 13, 2013. (App. p. 384; p. 391). Petitioner-Respondent ("the State") filed a return on or about May 16, 2013. (App. p. 398) The Honorable Paul M. Burch ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Dillon County Courthouse on July 31, 2014. (App. p. 402). Respondent-Petitioner was present and represented by Jack B. Swerling, Esquire. (App. p. 402). The post-conviction relief judge granted relief in an order filed November 21, 2014. (App. p. 543). The post-conviction relief judge denied the State's motion for reconsideration on February 6, 2015, and he denied Respondent-Petitioner's motion for reconsideration on February 23, 2015. (App. p. 586; p. 587). The State, as Petitioner-Respondent, filed a notice of appeal on March 12, 2015. Respondent-Petitioner filed a notice of cross appeal on March 25, 2015. Petitioner-Respondent filed a Petition

for Writ of Certiorari on or about August 14, 2015. Respondent-Petitioner filed its Return to Petition for Writ of Certiorari and a Petition for Writ of Certiorari on or about October 29, 2015, to which the State now files its return.

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.

When reviewing questions of fact, this Court may affirm the post-conviction relief

judge's grant of relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387 (U.S.S.C. 2015) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

ARGUMENT

I. Trial counsel had a valid strategy and was not ineffective in his presentation of information regarding Steven Teal's prior criminal record and drug usage.

The post-conviction relief judge found trial counsel was not ineffective in presenting information from Steven Teal regarding his prior criminal record and drug use. Specifically, the post-conviction relief judge found trial counsel's testimony credible regarding his desire to preempt the State from effectively impeaching him with the conviction, regardless of the prior discussion about it, as the post-conviction relief judge found credible trial counsel's testimony that the conviction was actually less than ten (10) years old. The post-conviction relief judge further found that trial counsel was entitled to act on this information. Cf. Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)). The post-conviction relief judge found trial counsel articulated a valid strategy of putting Teal's record before the jury to add

credibility to his testimony. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). The PCR court also found trial counsel articulated a valid strategy regarding Teal's drug use. Id. Overall, the post-conviction relief judge court found credible trial counsel's testimony he wanted to demonstrate Teal was not drinking or on drugs the night of the shooting, thereby showing his memory of events was more reliable that the witnesses who had been drinking. For these reasons, certiorari should not be granted for this issue or, if certiorari is granted, these findings should be affirmed.

II. No probative evidence exists to show that trial counsel was ineffective in not investigating Corey Williams before trial.

The post-conviction relief judge found that trial counsel was not ineffective in his pre-trial investigation. The specific allegation presented now by Petitioner-Respondent – that trial counsel should have interviewed Corey Williams before trial – was not raised as part of the allegation of a failure to investigate at the post-conviction relief hearing. Instead, it was raised as an allegation of its own. Though this may not prevent it from being preserved for appeal in the strictest sense of the term, Respondent-Petitioner wishes to make this Court aware of the distinction.

Petitioner-Respondent argues that the failure of trial counsel to interview Corey Williams was so severe as to deprive him of his right to effective counsel. Williams testified at the post-conviction relief hearing that he would have testified on Petitioner-Respondent's behalf that he shot at the ground and was hit with the beer bottle, as well as that the victim tried to hit and kick Petitioner-Respondent, and that the victim was facing Petitioner-Respondent. He goes on to allege that the post-conviction relief judge's

conclusion that Williams' testimony was cumulative and harmful to Petitioner-Respondent is erroneous and without evidentiary support. (App. 568-9.)

The case law that Petitioner-Respondent cites all speaks to the idea that trial counsel's action or inaction negatively affected the Applicant's case. This is directly contrary to the findings by the post-conviction relief judge, who found that Williams's testimony "actually would have been harmful to Applicant's case." (App. p.568.) Williams's testimony placed Petitioner-Respondent out of the grasp of the victim and with the ability to retreat from the fight, thus negating any potentially positive testimony he could have provided about Petitioner-Respondent's actions. Specifically:

> Applicant could not have entertained a reasonable fear of danger where the victim was not armed with the beer bottle and was not engaged with him. Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (valid claim of self-defense based upon a belief of imminent danger requires "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" (citing State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984))). Because Williams' testimony does not further Applicant's theory of self-defense, the Court finds Applicant has not shown he was prejudiced by trial counsel's failure to call Williams as a witness. (App. p.569.)

It is well-settled law that, when reviewing the post-conviction relief judge's findings, any credibility findings deserve "great deference," as it is he or she whom has had the ability to experience the testimony firsthand. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (reversed on other grounds). In this instance and regarding this allegation, there is simply no basis on which to overturn the post-conviction relief judge's findings.

Regarding investigation in a more general sense, the order of dismissal looks to Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) for the proposition that failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful

information. Trial counsel received all the witness statements prior to trial and thoroughly reviewed them. The testimony at trial did not surprise him. Such an investigation was reasonable under the circumstances. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). To the extent the testimony at trial differed from the statements, trial counsel thoroughly cross-examined the witnesses on these inconsistencies. Petitioner-Respondent did not show, according to the post-conviction relief judge, how a pre-trial interview of these witnesses would have helped trial counsel more thoroughly cross-examine them.

Similarly, regarding Petitioner-Respondent's injuries, there was no evidence presented that further investigation would have produced helpful evidence. The post-conviction relief judge found that the victim's testimony was consistent in that he was shot from behind, and rebuttal testimony was used to clarify the extent of his injuries. The post-conviction relief judge further found credible trial counsel's testimony he did not think the victim's medical records were relevant to the facts at issue in this case. Regardless, the post-conviction relief judge was unable to determine the value of these records because Petitioner-Respondent failed to produce them at the evidentiary hearing. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) ("Since the contents of these documents were never revealed at the PCR hearing, Defendant has failed to present any evidence of probative value demonstrating how the failure to obtain the unproduced statements or acquire the other documents in a more timely fashion prejudiced the defense." (citations omitted)). For these reasons, certiorari should not be granted for this issue or, if certiorari is granted, these findings should be affirmed.

III. Trial counsel's decision not to request specific instructions on self-defense is not ineffective assistance of counsel.

In arguing this allegation, Petitioner-Respondent states that it appears that the post-conviction relief judge skipped the effectiveness prong of the Strickland test, or found that trial counsel failed it, and went on to find that trial counsel's performance was not prejudicial. This is an appropriate use of the Strickland analysis. Petitioner-Respondent then goes on to argue that the finding of no prejudice is a legal error, as it is the trial judge's "responsibility to craft a self-defense charge tailored to the facts of the case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989)." That is precisely what happened in this matter.

Though Petitioner-Respondent likens this case to State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), that case involved only the boiler-plate elements of self-defense, to use the other side's words, from State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). This was held to be error because defendant had requested additional charges; therefore, the judge erred by not giving specific charges. In the case at bar, Petitioner-Respondent alleges that trial counsel erred by not requesting additional charges; regardless, the trial judge used not only the standard charges from Davis, but also language echoing Fuller – that Petitioner-Respondent had a right to act on appearances and that words, accompanied by hostile acts, could establish self-defense. This is substantially similar to the language Petitioner-Respondent feels should have been used: "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951)."

Because the post-conviction relief judge went beyond the requirements of Davis in providing this charge, Petitioner-Respondent could not prove that he was prejudiced by

the fact that trial counsel did not request additional charges regarding self-defense. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.' 'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.' A jury charge which is substantially correct and covers the law does not require reversal." (citing State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003); State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996))).

The several charges that Petitioner-Respondent argues should have been given during the trial were not deemed necessary by either trial counsel or the trial court. To go back now and attempt to determine a way to decide this case flawlessly is not the goal of post-conviction relief; rather, the goal is to decide whether the performance of trial counsel prejudiced the then-Defendant. The post-conviction relief judge's finding that counsel was effective should note be disturbed. For these reasons, certiorari should not be granted for this issue or, if certiorari is granted, these findings should be affirmed.

IV. Trial counsel decision not to request a charge on the lesser-included offense of first degree assault and battery was not ineffective assistance of counsel.

Petitioner-Respondent alleges that trial counsel was ineffective because he did not request a charge for the lesser-included offense of assault and battery in the first degree. At the post-conviction relief hearing, trial counsel candidly admitted that asking for a lesser charge would have been a "smart thing to do." (App. 463:23-24). He further admitted that he did not discuss lesser charges with Petitioner-Respondent. However, trial counsel had a valid strategy for doing so, because his goal was to get the jury to acquit Petitioner-Respondent, not find him guilty of a lesser-included offense. It is certainly valid and reasonable to believe that providing the jury with the options of lesser-included

offenses would distract from the intention to acquit a defendant entirely. Furthermore, trial counsel felt, in his professional judgment, that there was no way the evidence would lead to a guilty verdict. These factors constitute a valid trial strategy that the courts of this state have upheld. See Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 547 (Ct. App. 2014), reh'g denied (Apr. 24, 2014) (failing to ask for a jury charge on a lesser included offense is a valid trial strategy); see also State v. Walker, 605 S.E.2d 647, 654 (N.C. Ct. App. 2004), overruled on other grounds, 695 S.E.2d 750 (N.C. 2006) ("The record indicates defendants' counsel were employing an 'all or nothing' strategy[.] ... The fact that it failed does not mean that defendants were deprived of effective assistance of counsel."). Therefore, trial counsel was not deficient for not requesting a lesser-included offense.

Regardless, Petitioner-Respondent was not prejudiced by the lack of a first degree assault and battery charge in this case. Although first degree assault and battery is a lesser included offense of ABHAN, S.C. Code Ann. § 16-3-600(C)(3), a judge can only charge the jury on offenses which are supported by the facts of the case. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006) (citations omitted). Here, the facts support a charge on ABHAN based on Petitioner-Respondent's use of a firearm. State v. Dennis, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013) ("Under the common law, ABHAN 'requires an unlawful act of violent injury accompanied by circumstances of aggravation,' which may include 'the use of a deadly weapon, the infliction of serious bodily injury, [or] the intent to commit a felony.'" (citing State v. Coleman, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000))). However, there is no evidence from which the jury could have convicted Petitioner-Respondent of the lesser-included offense of first degree assault and battery. The evidence is clear Petitioner-Respondent inflicted great bodily harm on the victim by shooting him. S.C. Code Ann. §

16-3-600(A)(1) (defining great bodily injury). His plea of self-defense and the supporting evidence may reduce the attempted murder to ABHAN. Dennis, 402 S.C. at 638, 742 S.E.2d at 27 ("'An ABHAN charge is appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill.'" (citing Coleman, 342 S.C. 172, 536 S.E.2d 387)). However, there is no evidence to reduce it further to a first degree assault and battery because the victim was actually injured. See State v. Middleton, 407 S.C. 312, 316, 755 S.E.2d 432, 435 (2014), reh'g denied (Apr. 2, 2014) (distinguishing the two subsections of the first degree assault and battery statute where subsection (a) requires an injury to the victim and subsection (b) does not require an injury to the victim). Because Petitioner-Respondent actually inflicted great bodily harm on the victim, he was not entitled to a charge on first degree assault and battery. Accordingly, trial counsel's decision not to request a charge on the lesser-included offense did not prejudice Petitioner-Respondent.

Petitioner-Respondent specifically points out that trial counsel did not object when the trial judge charged the jury on the lesser-included offense of ABHAN, and alleges that this shows a lack of strategy that justifies a finding of deficient performance. Respondent-Petitioner respectfully disagrees. In this case, all presentations made by trial counsel were consistent with the idea that the then-defendant was not guilty and acquittal was appropriate. When the trial judge charged the jury on this lesser-included offense, the then-defendant received a gift, in a sense, without trial counsel having to request it and thereby potentially harm his strategy of "all or nothing." Trial counsel's certainty that an insufficiency of evidence would lead to the acquittal of Petitioner-Respondent goes hand-in-hand with trial counsel's valid and articulated trial strategy. See Stokes, supra. For these reasons, certiorari should not be granted for this issue or, if certiorari is granted, these findings should be affirmed.

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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CERTIFICATE OF SERVICE

I, Jessica E. Kinard, 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 the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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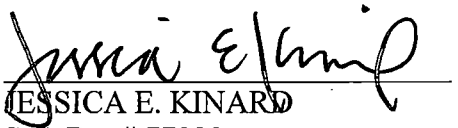
I further certify that all parties required by Rule to be served have been served. This 17th day of March, 2016.



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