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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000521

Ronnie W. Wilson, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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QUESTION PRESENTED BY PETITIONER

Did the PCR judge err by finding counsel provided effective representation where counsel failed to object to improper testimony of prior physical abuse of Felita Graham by Petitioner since the evidence was inadmissible as a prior bad act under Rule 404(b), SCRE, which unfairly prejudiced Petitioner?

STATEMENT OF THE CASE

In July 2007, the Georgetown County Grand Jury indicted Petitioner for criminal domestic violence of a high and aggravated nature ("CDVHAN") (2007-GS-22-737), kidnapping (2007-GS-22-740), first degree burglary (2007-GS-22-739), and possession of a weapon during the commission of a violent crime (2007-GS-22-738). C. Reuben Goude, Esquire, represented Petitioner. On November 26, 2007, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Petitioner guilty of CDVHAN and kidnapping. The jury found Petitioner not guilty of first degree burglary and possession of a weapon during a violent crime. Judge Burch sentenced Petitioner to concurrent terms of ten (10) years for CDVHAN and twenty-two (22) years for kidnapping.

Petitioner filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on August 11, 2010. State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010). The remittitur was returned to the circuit court on September 2, 2010.

Petitioner filed a prior Post-Conviction Relief Application on May 4, 2011 (2011-CP-22-614). (App. p.439-444.) In that application, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. Forged Signature
2. Newly Discovered Evidence
3. Judicial error by trial judge
4. Judicial error by Court of Appeals
5. Improperly introduced evidence

Respondent filed a return on or about June 3, 2011. (App. p.445-448.) Louis H. Hutto, III, Esquire, represented the Applicant. On August 31, 2012, the Honorable

Thomas A. Russo convened an evidentiary hearing into the application. (App. p. 450.) Judge Russo denied and dismissed Petitioner's PCR action by written order dated September 10, 2012, and filed September 24, 2012. (App. p.549-554.) Petitioner did not appeal Judge Russo's order.

Petitioner filed a second post-conviction relief application on or about February 9, 2014, in which he alleged that his prior post-conviction relief counsel as ineffective for failing to file an appeal. (App. p.562-570.) Respondent filed a return and motion to dismiss on or about May 29, 2014 (App. p.571-577.) An evidentiary hearing was convened on February 5, 2015 in Conway, South Carolina before the Honorable G. Thomas Cooper, Jr. Stephen Fowler, Esquire, represented the Petitioner. At the time of the hearing, Respondent, represented by Joshua L. Thomas, Esquire, consented to the granting of a belated appeal from the prior post-conviction relief action. (App. p. 583, lines 21-23; p, 585, lines 18-21) Judge Cooper agreed that this was the proper remedy to resolve the matter of an appeal and allow review of all other claims. An order to this effect was signed February 13, 2015 and filed February 26, 2015. (App. p.600-604.) Petitioner filed the instant appeal, including a petition for writ of certiorari and a petitioner for writ of certiorari pursuant to Austin v. State, on November 12, 2015, to which Respondent now files this 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 counsel as a ground for relief, the applicant must prove 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)). This standard is the same for both trial and appellate counsel.

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 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 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, 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 will affirm the post-conviction relief judge's grant of relief "if there is any probative evidence to support those 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)). Conversely, the Court will not uphold a finding that is not supported by

probative evidence. 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 can reverse the post-conviction relief judge when a 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).

Specifically regarding appellate counsel, they need not, and perhaps should not, raise every nonfrivolous claim, "but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765 (2000) (referring to Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983)). In a review of the strength of the issues appellate counsel raised, "[s]ignificant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

ARGUMENT

Probative evidence supports the post-conviction relief judge's finding that counsel was acting in accordance with a reasonable trial strategy in choosing if and when to object to victim's testimony.

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. In particular, there is no evidence to dispute the finding that "Counsel indicated he chose not to object to certain statements to [*sic*] as not to drill it into the jury's heads, and that it was his trial strategy to not bring it up and highlight it to the jury." (App. p. 552.) As discussed above, the burden rests on the Applicant in a post-conviction relief matter to overcome the strong resumption of adequate assistance and decisions made in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Petitioner considers the basic analysis performed by trial judges when considering whether evidence of prior bad acts may be admitted, namely whether it is admissible under Rule 404(b), SCRE as an exception to the general prohibition of evidence that may show propensity to commit the charged crime, as well as the probative versus prejudicial test in Rule 403, SCRE. These are certainly important considerations, yet Petitioner completely disregards the motion *in limine* that the parties were acting under during this trial. Prior to the beginning of the case, trial counsel moved to prohibit any testimony regarding a prior incident between the victim in Petitioner in 2004. The State agreed to this limitation. (App. p.24, line 6-23.)

The language that Petitioner describes as objectionable begins with testimony of the victim that contains references to fear that victim had regarding Petitioner. (PWC, p.4-5.) There is no testimony of any actual harm or bad conduct. Id. When victim finally testified about actual harm that she received, she stated that Petitioner grabbed her neck

and bruised her, and trial counsel objected and immediately moved for a mistrial. (App. 67, lines 1-5.) Trial counsel argued that not only was this testimony improper, it was barred by the motion *in limine* that was previously granted. (App. p.67, line 10-p.69, line 3.) The trial court denied the mistrial motion, and did not issue a curative instruction to the jury after trial counsel argued it would be insufficient. (App. p.71, line 24-p.72, line 21.)

Respondent notes that the trial court never ruled on the admissibility of the testimony prior to trial counsel's objection. There was no consideration of whether it fit a 404(b) exception, whether it was more probative than prejudicial, or if it should even be considered a prior bad act. Rule 404(b), SCRE uses the term "evidence" when describing what may be permitted at trial. Furthermore, our state's case law supports the idea that, "[i]f the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2002) (citing State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)).

None of the statements that the witness made could be considered evidence or characterized as clear and convincing. Petitioner cites to the case of Mitchell v. State, 298 S.C. 186, 379, S.E.2d 123 (1989) for examples of improper character evidence. Respondent submits that the character evidence described in Mitchell is of a depth and magnitude far exceeding the case at bar. In that case, several witnesses testified to the alleged satanic practices of the defendant, and several insinuations were made that the defendant may be involved with the mafia. Id. In the case at bar, however, the only potentially harmful testimony was one witness's testimony that she felt threatened. This is certainly not "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. As soon as

the witness referred to actual bad acts by the Petitioner (which included a statement that she lied about the marks found on her), trial counsel objected and moved for a mistrial. (App. p. 67, lines 1-5.)

Certainly, it was up to trial counsel to object to any testimony he found improper, just as suggested by the solicitor and Petitioner. This is precisely what he did. Trial counsel let mentions of threats of harm go by without objection because he did not want to draw the jury's attention to these statements. (App. p. 541, line 13-p.542, line 3.) Furthermore, the testimony to which trial counsel objected was the first piece of testimony that was counter to the previously granted motion *in limine* regarding admitting evidence of the alleged incident in 2004. This was in response to the solicitor's question, "Okay, so anything else that the jury needs to know about your relationship leading up to the incident on May the 9th?" (App.p. 67, lines 10-12.) Though the solicitor had relayed to the trial judge that he advised the witness not to speak to that incident, this question certainly left open the opportunity for her to testify about it. (App. p.24, lines 17-22.)

Pursuant to the Strickland test, Respondent submits that there was no deficient performance by trial counsel, as he was operating under a valid and articulable trial strategy. "Where, as here, counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The post-conviction relief judge found that such strategy existed, and his ruling should not be disturbed, as he had the benefit of witnessing trial counsel's testimony. It is well-settled law that "[t]his Court gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270,

701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

Assuming, *arguendo*, that this Court finds trial counsel to be deficient in his performance, Petitioner still has not carried his burden to show prejudice under Strickland. The only argument presented is that, because the objection was not made earlier, the jury was allowed to hear more regarding alleged physical abuse, thus convincing them further of Petitioner's guilt. Respondent again submits that this testimony was not regarding abuse or actions of the Petitioner that could have been deemed prior bad acts; instead, the testimony was about the witness's feelings toward Petitioner. In support of this argument, Respondent refers to the Court of Appeals' review of Petitioner's conviction. In its review, the Court of Appeals considered whether the mistrial discussed above should have been granted. The initial issue is one of preservation of the record, and once it is found to be preserved for review, the Court of Appeals discusses the effects of not granting the mistrial:

> "The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. (internal citations omitted). A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial. Id. "Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence." White, 371 S.C. at 447-48, 639 S.E.2d at 164. (App. p.436.)

The Court of Appeals followed this with a statement that it could not find prejudice to the Petitioner in the denial of a mistrial, but that it did not have the benefit or reviewing the entire record, which would be necessary in order to obtain such a finding.[1] Overall, there

[1] "In this case, although it would appear the trial transcript is in excess of four hundred pages, the record on appeal consists of only twenty-five pages, including (1) the *in limine* agreement to exclude prior bad act evidence, (2) the portion of the victim's testimony preceding Wilson's objection, (3) Wilson's objection and

is simply no evidence presented to satisfy the prejudice prong of the Strickland test. The appropriate motions and actions were made at the appropriate time, and no prejudice occurred to Petitioner based on trial counsel's action or inaction. For the above reasons, Respondent submits that trial counsel was not deficient in the timing of his objection, no prejudice was incurred by Petitioner as a result of it, and trial counsel's performance cannot be deemed ineffective.

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the arguments regarding mistrial, and (4) the indictments. The record indicates nothing of whether additional witnesses testified or if other evidence, such as photographs, was admitted. Accordingly, even assuming for the sake of argument that the admission of the testimony was error, we find no indication of prejudice in the record. See id. at 448, 639 S.E.2d at 1 64 (indicating prejudice must be based on review of the entire record)." (App. p.436-7.)

CONCLUSION

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

Respectfully submitted,

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