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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

2013-CP-02-0856
Appellate Case No. 2015-000666

DARRIN HOLSTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether any probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for presenting defense witnesses to attack the credibility of victim, where defense counsel interviewed the witnesses prior to calling them at trial, articulated a valid trial strategy, and there is overwhelming evidence of guilt?

II. Whether any probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to preserve for review the admission of Petitioner's prior conviction for criminal sexual conduct, where Trial Counsel requested that the trial judge's 403 analysis be placed on the record?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was true bill indicted during the December 2010 term of the Aiken County Grand Jury for Burglary in the First Degree (2010-GS-02-1899), Kidnapping (2010-GS-02-1903), and Attempted Armed Robbery (2010-GS-02-1905). Wallis Alves, Esquire, represented Applicant. On May 9-12, 2011, a jury trial was held before the Honorable Doyet A. Early, III. The jury convicted Petitioner as indicted. On May 12, 2011, Judge Early sentenced Petitioner to life imprisonment for each offense, with all three sentences to run concurrently.

Petitioner filed an application for post-conviction relief on April 15, 2013 and an amended application on July 24, 2013. Respondent filed a Return September 5, 2013. An evidentiary hearing into the matter was convened at the Aiken County Courthouse on August 1, 2014, before the Honorable R. Knox McMahon. Petitioner was present at the hearing and represented by Lance Boozer, Esquire. Judge McMahon dismissed Petitioner's post-conviction relief application by Order on October 9, 2014. Petitioner filed a rule 59(e) motion to alter or amend on November 9, 2013 and an amended 59(e) motion to alter or amend on November 17, 2014. Judge McMahon denied the motion to alter or amend by order filed on March 25, 2015. Petitioner filed his Petition for Certiorari on or about December 21, 2015.

This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for presenting defense witnesses to attack the credibility of victim, where defense counsel interviewed the witnesses prior to calling them at trial, articulated a valid trial strategy, and there is overwhelming evidence of guilt.

Petitioner argues the PCR court erred in finding the Trial Counsel was not ineffective for calling Renne L. Tyler (hereinafter "Tyler") and Mary R. Sharp (hereinafter "Sharp") to attack the victims credibility. However, this argument is meritless as ample evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

During the PCR hearing Trial Counsel stated it was her overall trial strategy to attack the victim's credibility pointing out inconsistencies in his version of events relayed by him to different witnesses and showing that he falsified accountability logs. (App. p. 533 line11—p. 534 line 5). Trial Counsel was able to accomplish both prongs of her trial strategy by calling both Tyler and Sharp.

During trial, Victim testified that Petitioner busted through the front door of the Tri-County home[1] at 2:30 am. (App. 47 line 23—p. 48 line 3). Victim testified that he immediately jumped up, ran through the kitchen, and attempted to open the side door. (App. p. 48 lines 4-7). Victim stated that Petitioner caught him at the side door and put a gun to his head. (App. p. 48 lines 16-21). Victim further testified that he did not find any money in the office cabinets and was then escorted back into the living room. (App. p. 50 lines 1-13). Victim testified that he saw a second man standing underneath the ceiling fan. (App. p. 51 lines 14-18). Yet, Tyler testified that Victim informed her that a *second person was standing at the side door* when he was trying to run out of the house. (App. p. 264 line 18—p. 17) (emphasis added). Furthermore, Tyler testified Victim informed her that only *one* person entered the house. (App. p. 264 lines 13-17) (emphasis added). Additionally, Sharp testified that she inspected the house immediately after the incident and noticed that the front door was busted, mops and brooms were in disarray, and the medicine cabinet was unlocked. (App. p. 276 line23—p. 276 line 3). At no point in time did Victim testify that mops and brooms were in disarray or that he unlocked and opened the medicine cabinet. Trial Counsel was able to capitalize on various inconsistences during closing argument. (App. p. 292 lines 7-16; p. 295 line 22—p. 297 line 18).

Furthermore, Trial Counsel was able to introduce and discuss the fact that Victim

[1] Tri County development is a home for special needs people. (App. p. 45)

falsified his accountability logs through direct and re-direct examination of both Tyler and Sharp. Specifically, Sharp, Victim's immediate supervisor, testified that she was ordered to write Victim up for disciplinary actions due to the falsification of the logs. (App. p. 269 line 9—p. 271 line 1). Sharp explained to the jury that policy requires the accountability logs are should be kept real time and that Victim filled out the accountability logs in advance. (App. p. 271 line 5—p. 272 line 17). Tyler further testified that she realized the logs had been falsified after discovering the time frame of the kidnapping. (App. p. 276 lines 6-22). During closing arguments, Trial Counsel again pointed out to the jury that Victim had knowingly falsified logs. (App. p. 292 lines 17-23).

Notably Trial Counsel testified that she interviewed both Tyler and Sharp prior to calling them as witnesses. (App .p. 542 lines 17-22). Trial Counsel testified that she expected Tyler and Sharp to testify that victim was a good employee because neither were going to admit to failing to supervise an employee and expose themselves to potential lawsuits. (App. p. 541 lines 13-19). Trial Counsel pointed out to the jury that the employees of Tri-County were "talking a little fast" in an effort to protect themselves from potential lawsuits. (App. p. 294 line 22—p. 295 line 3).

Clearly, Trial Counsel provided a reasonable strategy in calling both Tyler and Sharp as witnesses. Trial Counsel was able to point out various inconsistencies in Victim's testimony as compared to his statements to both Tyler and Sharp. Trial Counsel was further able to introduce and expound on the Victim's falsification of logs and the implications of his falsification. Furthermore, Trial Counsel was able to argue to the jury that Victim was not a credible person and his version of events was not consistent. Based off of the foregoing, there is ample probative evidence to support the PCR Court's finding that Trial Counsel articulated a viable trial strategy when calling both Tyler and Sharp as witnesses.

Additionally, Petitioner can show no prejudice as there is clear evidence of overwhelming guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). In the instant case, Petitioner was identified by victim in the courtroom (App. p. 48 lines 1-2; p. 53 lines 2-7). Additionally, Bryan Salley, identified Petitioner as the person who was driving the car that crashed directly in front of his house. (App. p. 124 lines 1-23). Consistent with victim's statement, Bryan Salley stated that Petitioner had a gun in his lap, wearing boxers, gloves, and socks. (App. p. 125 lines 5-13). Clainton Vomund, a second house member identified Petitioner as the person involved in the car crash. (App. p. 140 lines 12-25). Clainton Vomund noted that Petitioner was wearing boxers and mismatched gloves. (App. p. 143 lines 21-24). Vomund testified that Petitioner eventually exited the car, approached their house, and questioned him about the whereabouts of the victim. Voumond stated Petitioner specifically asked him "where is that MF rat. I am going to kill him". (App. p. 142 line 18—143 line 8). Based off of the foregoing, there is ample probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for calling Tyler and Sharp as witnesses. Furthermore, any potential ineffectiveness is negated by the clear overwhelming evidence against defendant.

II. Probative evidence supports the PCR Court's finding Trial Counsel was not ineffective for failing to preserve for appellate review the admission of the Petitioner's prior conviction for criminal sexual conduct.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective in failing to secure an on the record Rule 403 analysis prior to the admission of Petitioner's prior conviction for criminal sexual conduct. However, this issue is meritless as ample probative

evidence supports the PCR Court's finding.

While it is true that Trial Counsel's failure to contemporaneously object to Petitioner's prior conviction left the issue unpreserved for appellate review, the PCR Court did not err in finding that Trial Counsel's actions were not ineffective. Trial Counsel warned Petitioner that his prior conviction would come in to impeach him if he chose to testify at trial, and Petitioner chose to testify regardless. Trial Counsel did object to the use of the prior conviction, and the Trial Court indicated to her in a sidebar that it was going to allow the conviction to come in over her objection. Although her objection was not made contemporaneously, the Trial Court stated on the record at the end of the trial that it had made an analysis under Rule 403 during the trial and found the conviction to be more probative than prejudicial and that it was a proper matter for the jury to consider for credibility purposes. (App. p. 340).

Furthermore, Petitioner can show no prejudice as a result of Trial Counsel's alleged deficiency because Petitioner has shown nothing to support his argument that this issue would have been successful on appeal. The PCR Court was correct in finding that Petitioner could be impeached with his 2006 conviction because the Colf factors support that the probative value of the prior conviction outweighed the prejudicial effect. See State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); See Rule 609(a)(1), SCRE. The offense was clearly allowed in within the rules of evidence because it was a felony offense punishable by more than one year in prison and it occurred within the last ten years. See id.

Since Petitioner has shown no adequate support for his argument that the conviction would have been overturned on appeal if Trial Counsel had properly preserved the issue of his prior conviction being used for his impeachment, he can prove no prejudice and thus fails in his argument that Trial Counsel was ineffective. Therefore, since there is clearly evidence of

probative value to sustain the PCR Court's findings, Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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Bar No. 102214

By: 
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May 5, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

The Honorable R. Knox McMahon, Circuit Court Judge

DARRIN HOLSTON, #288828

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine Hudgins, Esquire
1330 Lady Street; Suite 401
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 5th day of May 2016.

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ALAN WILSON
ATTORNEY GENERAL

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MAY - 5 2016
SC SUPREME COURT

May 5, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***RE:* Darrin Holston v. State of South Carolina**
2015-000666

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:cey
Enclosures

cc: Kathrine Hudgins, Esquire
Trisha Allen, Victim Services