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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable R. Farrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2015-000881

Curtis Nealey, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN M. WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar No. 77889

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

ATTORNEYS FOR RESPONDENT

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[1] 385 S.C. 597, 685 S.E.2d 802 (2009).

ISSUES PRESENTED

I. The PCR court erred in finding that trial counsel provided effective assistance of counsel where Petitioner's right to a fair trial was adversely affected because trial counsel failed to call a toxicologist at trial to support the defense theory that Perkins fell off of Petitioner's motorcycle because she was extremely intoxicated while under the influence of prescription anti-depressants and alcohol.

II. Defense counsel provided ineffective assistance of counsel by failing to object to the trial court's improper charge on inferred malice, thus preserving it for appellate review, where this Court's decision in State v. Belcher[2] prohibiting such instructions in ABIK cases had been filed a month before Petitioner's trial.

[2] 385 S.C. 597, 685 S.E.2d 802 (2009).

STATEMENT OF THE CASE

The Petitioner was indicted at the June 2009 term of the Darlington County Grand Jury for two (2) counts of assault and battery with intent to kill (ABWIK) (2009-GS-16-0869, -0874), two (2) counts of possession of a weapon during commission of a violent crime (2009-GS-16-0870, -0871), criminal domestic violence of a high and aggravated nature (CDVHAN) (2009-GS-16-0872), and kidnapping (2009-GS-16-0873). He was represented by Tonya Copeland-Little, Esquire.

The State brought the case to trial before the Honorable J. Michael Baxley. Judge Baxley granted trial counsel's motion for a directed verdict on one (1) of the counts of possession of a weapon during commission of a violent crime (2009-GS-16-0871). The jury found the Petitioner guilty of the remaining charges. On November 10, 2009, Judge Baxley levied concurrent sentences of twenty (20) years on each count of ABWIK, ten (10) years for CDVHAN, and thirty (30) years for kidnapping. Judge Baxley levied a consecutive five (5) year sentence for possession of a weapon during commission of a violent crime (2009-GS- 16-0870).

A notice of appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[3] brief. The Court of Appeals dismissed the appeal. State v. Nealey, Op. No. 2011-UP-574 (S.C. Ct. App. filed Dec. 20, 2011).

Petitioner filed an application for post-conviction relief on January 17, 2012. (App. p. 319-364). Respondent ("the State") filed a return on or about May 8, 2012.

[3] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

(App. p. 365-371).

The Honorable R. Ferrell Cothran, Jr. ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Darlington County Courthouse on July 15, 2013. (App. p. 372). Petitioner was present and represented by Tristan M. Shaffer, Esquire, and Karen C. Ratigan, Esquire was present on behalf of the South Carolina Attorney General's Office. (App. p. 372). The post-conviction relief judge denied relief in an order signed August 20, 2013 and filed September 9, 2013. (App. p. 457-467). The Petitioner filed a Motion to Reconsider on or about September 26, 2013, and the State filed a return to this motion on October 1, 2013. The motion was denied by Judge Cothran without oral argument in an order dated March 19, 2015 and filed March 23, 2015. Petitioner filed a notice of appeal on April 20, 2015. The appeal was perfected by the filing of a Petition for Writ of Certiorari by appellate defender John H. Strom, Esquire on or about December 29, 2015, and 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 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).

ARGUMENT

I. Probative evidence exists to uphold the post-conviction relief judge's finding that trial counsel was not ineffective in her decision not to call a toxicologist at trial to testify regarding Perkins' level of intoxication at the time of the incident.

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. Petitioner's arguments on this matter center around his allegation that presenting a toxicologist would have bolstered his case. There is no allegation that the information that would have been presented by a was omitted at trial; in fact, the record is clear that the treating emergency room doctor testified that Perkins appeared intoxicated.

Petitioner describes this case as a credibility contest. For this reason, we must defer to the weight that all testimony was given by the finder of fact at trial – the jury. The record shows that Perkins admitted to having "a couple of beers and a couple of shots" and going on to speak further about the evening in question. (beginning at App. 119, line 115) We cannot know how credible Perkins' testimony was by merely reading the transcript. For this reason, must trust trial counsel's decision not to call an expert as she was the one making real time, strategic decisions. In describing this process of fairly evaluating an attorney's decisions at trial, we again look to Strickland v. Washington:

> 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. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983). Strickland, supra, at 689, 2065.

Similarly, we must defer to the finder of fact at the PCR level, "as the reviewing court lacks the opportunity to observe witnesses." Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 cert. denied, 510 U.S. 1014, 114 S.Ct. 607 (1993). Here, Judge Cothran did not find that the testimony of the toxicologist presented at the PCR hearing was credible or persuasive enough for its omission at trial to have risen to the level of making trial counsel's performance constitutionally deficient or to cause prejudice to the Petitioner.

Though a toxicologist was presented at the PCR hearing, she did not testify to the fact Petitioner alleges would have bolstered his case, specifically "adversarial expert testimony detailing [Perkins'] alcohol and drug consumption on the day of the incident and the impact it would have had on her balance and coordination." (PWC, p.17) There was no evidence presented that any expert, or even any person, could detail Perkins' alcohol and drug consumption on the day of the incident, as no one knew exactly how much of any substance Perkins had consumed. The only evidence from which to testify was in the form of reports regarding blood and urine testing, which were presented by the treating physician during the State's case. Petitioner alleges that trial counsel's failure to

call an expert left this testimony uncorroborated, but that simply is not so, as the treating emergency room physician stated that Perkins was impaired and intoxicated, and described how this affected his treatment of her. (see cross examination, App. p. 173-175)

It is also important to note trial counsel's theory and strategy of the case, as outlined in her testimony at the PCR hearing on page 398 of the Appendix. Though it was important to show that Perkins was intoxicated on the night of the incident, this was only one piece of the overall strategy. The end goal was to prove that both Perkinses were lying in an attempt to regain custody of the children that the Department of Social Services removed from their care.

Even assuming, *arguendo*, that trial counsel was deficient, her performance certainly was not prejudicial to the Petitioner's case. Evidence was presented regarding Perkins' intoxication; whether it was to the extent that PCR counsel would have preferred is not at issue. Petitioner cites to Strickland, arguing that trial counsel's performance was prejudicial and "undermine[d] confidence in the outcome of [his] trial." 466 U.S. at 694. However, Respondent argues that Petitioner has not overcome the burden of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. The needed information was presented, it fit within trial counsel's strategy of case presentation, and at no point was trial counsel deficient or prejudicial in her performance. The Petitioner's request for a writ of certiorari should be denied.

II. Probative evidence exists to uphold the post-conviction relief judge's finding that trial counsel as not ineffective in her decision not to object to an inferred malice jury charge regarding ABIK, even though State v. Belcher[4] had been published approximately one month earlier.

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. In particular, trial counsel's decision not to object to an inferred malice jury charge was deficient, but it was not prejudicial to the Petitioner. Petitioner argues that the post-conviction relief judge erred in his application of the standard in the harmless error analysis outlined in Belcher, namely that he considered whether there was overwhelming evidence of guilt, rather than whether there was overwhelming evidence of malice other than from the use of a deadly weapon. While Respondent understands and appreciates the difference, we argue that it is without significance in the case at hand.

For purposes of this return, Respondent stipulates that the inferred malice charge was improper; however, we argue that its issuance was harmless error and that Petitioner is not entitled to a new trial. Petitioner correctly argues that, because there was no evidence of a deadly weapon presented at trial, the instruction cannot be harmless because there is no overwhelming evidence of malice. This is precisely what Belcher states in its consideration of the application of a harmless error analysis. Petitioner further argues that this "error could not have been harmless because evidence of an accident and third party guilt was put forward by Petitioner, 'thereby highlighting the prejudice resulting from the charge.' 385 S.C. at 612, 856 S.E.2d at 810." (PWC, p.22)

While these arguments are logical and comport with the specific case law, Respondent argues that the post-conviction relief judge's finding of overwhelming

[4] 385 S.C. 597, 685 S.E.2d 802 (2009).

evidence, regardless of the standard used in Belcher, is overriding in this context. Several opinions arising from post-conviction relief challenges address the idea that, if evidence is overwhelming, the result of a trial may not have been different if trial counsel's performance had not been deficient. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d. 718, 722 n. 3 (2001); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991).

As considered above, the post-conviction relief judge is in the best position to make determinations, particularly as to credibility, as he or she is able to review the evidence firsthand. Respondent takes note of this Court's recent decision in Gibson v. State (published May 11, 2016), as it specifically undertakes to weigh deficiency and prejudice in terms of failure to object to an improper implied malice charge. In Gibson, this Court found that "the PCR judge erred in finding there was evidence of malice other than the use of a deadly weapon." (no citation available) In the case at hand, though, the PCR judge made no such particular finding, instead repeatedly making the general finding that the State presented overwhelming evidence of guilt. (App. p. 464, 465, 466) For these reasons, Respondent relies on the above-cited case law allowing post-conviction relief judges to make findings of overwhelming evidence, and the resulting conclusion that this finding negates any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial. The Petitioner's request for a writ of certiorari should be denied.

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.

Respectfully submitted,

ALAN M. WILSON
Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar No. 77889

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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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:

John H. Strom, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 18th day of May, 2016.

JESSICA E. KINARD
S.C. Bar # 77889
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT