STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2015-001335

Sammy Cowan, #214656, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED

I. Is there any probative evidence in the record to support the PCR judge's finding that counsel was not ineffective in failing to enhance 911 tape introduced at trial, where counsel was acting pursuant to a valid trial strategy, and Petitioner failed to show prejudice?

II. Is there any probative evidence in the record to support the PCR Judge's finding that the State did not violate its discovery obligations under Brady, where the evidence in question was not impeaching; and the alleged nondisclosure was not material?

III. Is there any probative evidence in the record to support the PCR judge's finding that counsel was not ineffective in failing to object to alleged hearsay testimony by Detective Reeves, where the testimony in question was not hearsay, and Petitioner failed to show prejudice?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Petitioner was indicted at the April 2005 term of the Anderson County Grand Jury for Murder (2005-GS-04-0696); and possession of a firearm by a convicted felon (2005-GS-04-2157). He was represented by Nancy Jo Thomason, Esquire. On November 14, 2005, Petitioner proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable Lee S. Alford to life imprisonment for murder, and five years concurrent for possession of a firearm by a convicted felon.

A timely Notice of Appeal was filed on Petitioner's behalf, and an appeal as perfected. Petitioner was represented by Katherine Hudgins, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Cowan, Op. No. 08-UP-577 (filed on October 14, 2008). The Remittitur was issued on October 30, 2008.

Petitioner subsequently filed an application for post-conviction relief on January 27, 2009. He was represented by C. Rauch Wise, Esquire. Respondent was represented by Kaelon May, Esquire, of the Office of the Attorney General. An evidentiary hearing was convened on June 5, 2012, at the Anderson County Courthouse, with the Honorable Alexander S. Macaulay presiding. In a written order dated April 2, 2015, and filed April 7, 2015, Judge Macaulay denied and dismissed the application with prejudice. This appeal follows.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. There is probative evidence in the record to support the PCR judge's finding that counsel was not ineffective in failing to enhance the 911 tape introduced at trial, where counsel was acting pursuant to a valid trial strategy, and Petitioner failed to show prejudice.

Petitioner argues counsel was ineffective for failing to hire an investigator to enhance the 911 tape, and that had counsel done so, the jury would have conclusively determined that there was no mention of "Detroit style" on the tape, as testified by the bouncer – Allen Johnson – and the investigator could have identified the voice on the tape as Kinshaba Simmons rather than Petitioner. Respondent submits that the PCR judge's findings are sound. Where a PCR applicant alleges ineffective assistance of counsel as a ground for relief, they 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. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant 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, *supra*. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

In this case, there is probative evidence in the record to support the PCR judge's finding that counsel pursued a valid trial strategy in deciding not to enhance the tapes.[1] See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). Counsel testified that her strategy was to show that the witnesses "were just flat-out lying," and that what they were "saying to the Solicitor, to the Jury and the Court one thing, and that wasn't supported by what the Jury heard coming from the 911 tape." App. p. 391, l. 6-15. Counsel testified that it "never occurred to [her] to have any analysis done on the 911 tape," and that based on hearing the enhancement during the evidentiary hearing she did not believe it would have helped at trial. App. p. 394, l. 16-24. Counsel did an excellent job of cross-examining Mr. Johnson on the fact that the "Detroit style" language was not on the 911 tape. App. p. 100, l. 2-22. Mr. Johnson admitted that those words were not on the 911 tape. App. p. 100, l. 23-25. The "enhanced" version therefore fails to add anything on this issue. Respondent submits counsel's performance was adequate. There are countless ways to provide effective assistance in any given case. Strickland at 689, 104 S.Ct. at 2065. Even the best criminal defense attorneys would not defend a particular client in the same way. Id. Accordingly, there is probative evidence to support the PCR judge's findings with respect to this allegation.

[1] Contrary to Petitioner's assertions, counsel's testimony indicates that she did have access to an investigator. App. p. 390, l. 1-3. Her investigator "talked to every witness that had been identified by the Solicitor's Office, looked for other witnesses who were there the night of the incident, and, of course, interviewed any witnesses that [Petitioner]" told her about. App. p. 30, l. 8-12.

Petitioner has also failed to show prejudice. The PCR judge found that the evidence against Applicant was overwhelming. App. p. 442-43. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (finding overwhelming evidence of guilt negated claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). It went through the testimony and evidence presented at trial, and noted that two eye witnesses saw Petitioner shoot the victim, and several others saw him approaching the victim with one or more guns. Id. The PCR judge pointed out that another witness testified that after Petitioner was apprehended by law enforcement, he confessed several times to his fellow inmates. Id. That testimony was corroborated by evidence that Petitioner fled the state after the murder. Id. In light of the numerous eye witnesses, as well as the corroborating circumstantial evidence, the PCR judge's finding of overwhelming evidence is appropriate.

Regardless, even assuming the evidence against Petitioner was not overwhelming, he failed to show prejudice at the evidentiary hearing. Concerning identification, the PCR Court found that the enhanced tape "would not have diminished the eyewitness identification testimony of Applicant's involvement in the victim's murder," and agreed with counsel that it would not have benefited Petitioner's defense. App. p. 438-39. Clearly the PCR judge found trial counsel's testimony to be more probative and informative on this point than that of Mr. Powers. The respective weight attributed to each witness by the PCR judge commands great deference on review. See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); see also Harris v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 3 F.3d 103, 106-07 (4th Cir. 1993) (Appellate courts are ill suited "to overturn a factfinder on a question on which two views of the evidence are possible. . . . Factfinders routinely resolve discrepancies between evidentiary sources, and by being able to observe testimony first-hand, they are in the best position to do

so."). The PCR judge's conclusion is also reasonable. Counsel spent a substantial amount of time with Petitioner preparing for trial.[2] Moreover, while there is nothing in the record to suggest anything other than that Mr. Powers is a competent private investigator, he was not a qualified expert in any field related to multimedia analysis or voice comparison. Certainly the PCR judge could take these factors into account. Respondent would also note that the PCR judge heard both the 911 record *and* Petitioner's testimony during the evidentiary hearing, and was just as capable as any lay witness – in its fact finding capacity – of determining whether or not the voice on the tape was inconsistent with the voice of Petitioner. As there is substantial probative evidence in the record to support the PCR judge's findings of fact and conclusions of law with respect to this argument, Respondent respectfully submits certiorari in inappropriate.

[2] App. p. 389, l. 19-21.

II. There is probative evidence in the record to support the PCR judge's finding that the State did not violate its discovery obligations under Brady, where the evidence in question was not impeaching and the alleged nondisclosure was not material.

There is also probative evidence in the record to support the PCR judge's finding that the State did not violate the disclosure requirements in Brady. The evidence in question – a guilty plea to trespassing by Kinshaba Simmons – is not impeaching, and does not call into question the outcome of the proceeding.

A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). This rule applies to impeachment evidence as well as exculpatory evidence. Id. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Sheppard v. State, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2005); see also State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981) (State's failure to disclose does not warrant reversal unless defendant deprived of fair trial).

Respondent first submits that the "evidence" in question is neither favorable nor impeaching. As the PCR judge noted out in its order, Petitioner failed to show that these convictions would have been admissible in the first place for impeachment purposes. See State v. LaBarge, 275 S.C. 168, 288 S.E.2d 278 (1980) (holding that trial judge did not err in finding a witness's convictions for, *inter alia*, disorderly conduct and trespassing were not admissible for impeachment purposes). There is also nothing in the record to indicate Simmons pled to trespassing as part of some sort of *quid pro quo* arrangement with the Solicitor's office. See

State v. Johnson, 306 S.C. 119, 124, 410 S.E.2d 547, 550 (1991) (nondisclosure of a promise of immunity to a material witness, when reliability is outcome determinative, may be a violation of due process). Instead, Petitioner merely points to an unrelated charge that happened to have been resolved while this case was pending, and essentially argues he was entitled to a negative inference against the State that some sort of deal was involved.[3] Setting aside the fact that this "nondisclosure" was a part of Simmons' publicly available criminal history, and that its nondisclosure was the result of an unintentional clerical error,[4] Respondent submits that Petitioner has failed to show a reasonable probability such information would have made a difference at trial. In light of the credibility issues already resolved by the jury, as well as what the PCR judge found to be "overwhelming evidence of guilt," the PCR judge correctly determined the purported nondisclosure was not material. App. p. 442.

Alternatively, any resulting prejudice, or materiality, is too speculative on these facts to grant relief. Such a failure is especially critical where, as stated above, the evidence was overwhelming and several other witnesses implicated Petitioner as the murderer. Compare Rutland v. State, 415 S.C. 570 (2016) (finding a reasonable probability the outcome of trial would have been different where counsel failed to impeach **only** independent witness on prior inconsistent statement). Accordingly, there is probative evidence to support the PCR judge's finding that Petitioner failed to meet his burden with respect to this allegation. This petition should therefore be denied.

[3] In fact, the existence of such an agreement is directly refuted by the affidavit of Assistant Solicitor Campbell – which the PCR judge found to be credible. App. p. 429-31; 441.
[4] App. p. 441-42.

III. There is probative evidence in the record to support the PCR judge's finding that counsel was not ineffective in choosing to request the trial judge charge the jury with the lesser included offense of robbery rather than larceny, where counsel was acting pursuant to a valid trial strategy.

Petitioner's final argument is that there is no probative evidence in the record to support the PCR judge's finding that counsel was not ineffective for failing to object to purported "negative hearsay" comments. Detective Reeves testified that following his interviews with witnesses, he did not have anyone listed as a suspect other than Petitioner, and that nobody stated Kinshaba Simmons killed the victim. App. p. 242, l. 16-22. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).

The PCR judge correctly determined this testimony did not constitute improper hearsay, or negative hearsay, because it was not elicited to prove the truth of the matter asserted.[5] Rather, it found the information was used for the limited purpose of explaining why a government investigation was undertaken. App. p. 439 (*citing* State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). The context and the record support this finding. During direct examination of Detective Reeves, the Solicitor went through his investigation chronologically. The offending passage immediately precedes questioning concerning where Applicant went after the shooting. App. p. 242, l. 23 - p.243, l. 22. The testimony that Petitioner, rather than Mr. Simmons, was the

[5] Additionally, Respondent would point out that this "negative hearsay" does not contain several other required elements of actual hearsay. First, there is no specified "declarant." Compare Smith v. Korn Industries, Inc., 274 S.C. 182, 183, 262 S.E.2d 27, 27-28 (1980). Moreover, there is no "statement." Respondent further submits that there is at least an arguable basis that Smith was abrogated by the subsequent passage of the South Carolina Rules of Evidence, which contains no reference to "negative hearsay."

suspect informed Detective Reeves' investigation, and further explained to the jury why he was out chasing down Greyhound bus tickets rather than focusing on other leads.

In any event, there is also probative evidence to support the PCR judge's finding that Petitioner failed to show any resulting prejudice. As outlined above, this was a case involving overwhelming evidence of guilt. See Harris, supra; see also State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) ("Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice.").

In addition, the testimony at issue – even if inadmissible – is not of such weight and consequence that it calls into question the validity of the proceeding. The information elicited was that Petitioner was a suspect during the investigation, and Mr. Simmons was not. Such testimony was clearly already before the jury, given there was no evidence or testimony that Mr. Simmons was armed or that he killed the victim. As counsel pointed out, while objecting could have helped Petitioner, it also could have hurt him by allowing the Solicitor to "go into specifics." App. p. 392, l. 11-13. This was also information that could have been brought in by the solicitor simply by rephrasing the question if she had objected, as pointed out by counsel during the evidentiary hearing. App. p. 398, l. 7-12. Counsel wondered aloud whether an objection would have "brought more attention" to the issue, causing the jury to have considered it more important than it actually was. App. p. 398, l. 13-15. As a result, Respondent submits there is probative evidence in the record supporting the PCR judge's finding that Petitioner failed to show prejudice with respect to this allegation. Certiorari is therefore not warranted.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari.

Respectfully submitted,
ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

June 6, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2015-001335
Lower Court Case No. 2009-CP-04-0319

SAMMY COWAN, #214656, PETITIONER,

v.

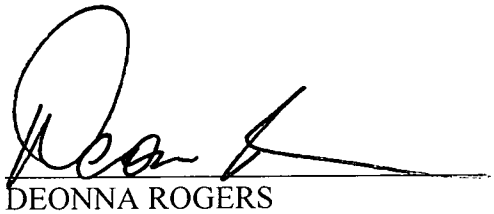
THE STATE OF SOUTH CAROLINA, RESPONDENT,

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:

Kathrine Haggard Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady St., Ste.401
Columbia, SC 29201

This 6th day of June, 2016



DEONNA ROGERS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

June 6, 2016

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

Re: **Sammy Cowan, #214656 v. State of South Carolina**
Appellate Case No. 2015-001335
Lower Court Case No. 2009-CP-04-0319

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

PLS

Patrick Schmeckpeper
Assistant Attorney General
SC Bar No. 102100

PS/dr
Enclosures

cc: Appellate Defender Kathrine H. Hudgins (2 copies)
Trisha Allen, Victim Services