

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001632

Perry Buchanan, #281305,..... 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

RECEIVED
JUN 20 2016
SC SUPREME COURT

INDEX

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT.....4

I. 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 strategy5

CONCLUSION.....8

ISSUE PRESENTED

1. Is there any 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?

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case.

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). Reviewing courts give “great deference to the post-conviction relief court’s findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). 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

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 argues that there is no probative evidence in support of the PCR court's finding that counsel was not ineffective in failing to request a jury instruction on the lesser included offense of larceny when there was evidence presented at trial from which the jury could have concluded the lesser offense was committed. This argument is without merit. 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.

Trial Strategy

There is ample probative evidence in support of the PCR court's finding that counsel chose not to request a jury charge on larceny pursuant to a valid trial strategy. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). In this case, counsel has maintained that his strategy was to avoid an armed robbery conviction, which would have resulted in a mandatory life sentence.¹ In pursuit of that goal, counsel chose to request a charge of common law robbery rather than larceny. Counsel testified that he did not want to confuse the jury with multiple charges, and that of the two, common law robbery seemed the more realistic alternative to armed robbery. App. p. 301, l. 6-21. Counsel further explained that he did not want to "shoot for the moon" in case he "missed the whole thing." App. p. 301, l. 21-24. Respondent submits counsel's credible testimony on the matter is dispositive. Petitioner's assertion that counsel may have been able to get the judge to charge larceny to the jury is not relevant to the analysis.

In light of counsel's credible explanation, Petitioner's argument appears to be that counsel simply should have been less risk averse. With the aid of hindsight, Petitioner's line of thinking is deceptively logical – several years after he has been acquitted of armed robbery, and absent the urgency of a looming **mandatory** life sentence, it is easy to argue counsel should have been more brazen in his strategy and perhaps "shot for the moon." Such an argument, however, unjustifiably narrows the range of effective assistance beyond what was known and available to counsel at the time of his representation. Judicial scrutiny of counsel's performance must be highly deferential. Strickland at 689, 104 S.Ct. at 2065. Moreover, a fair assessment of attorney

¹ The State filed a Notice of Intent to Seek a Sentence of Life Without Parole on April 7, 2014. App. p. 320.

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. Id. Courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. There are countless ways to provide effective assistance in any given case, and even the best criminal defense attorneys would not defend a particular client in the same way. Id.

At the time of the trial, when there was a real possibility that Petitioner would never be released from prison, Respondent submits counsel's aversion to risk was both reasonable and prudent. Accordingly, given counsel's credible testimony, the PCR judge's findings of fact and conclusions of law are supported by probative evidence in the record. Certiorari should therefore be denied.

Petitioner has also failed to show prejudice. In order to prove prejudice in the context of a claim of ineffective assistance of counsel, Petitioner was required to show at the evidentiary hearing a reasonable probability that but for counsel's alleged unprofessional errors, the outcome of the proceeding would have been different. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Petitioner's claim that there was no evidence other than the victim's testimony to support a conviction for armed robbery or common law robbery is not supported by the record. The PCR court specifically found that there was evidence in the record where the victim's testimony and other evidence, including the video, could be interpreted to support a determination that the larceny was accomplished by threats, coercion, or intimidation apart from the possession of a knife. App. p. 339-40.

Moreover, the trial judge clearly charged that the State had the burden of proving each and every element of the indictment beyond a reasonable doubt. App. p. 43, l. 11-14. The trial

judge also charged the jury that in order to find Petitioner guilty of robbery,² the State must prove beyond a reasonable doubt that Petitioner stole property “with violence or by putting the person from whom the property was taken in fear of violence.” App. p. 192, l. 12-22.

It is the duty of the jury to take the law from the court in the case on trial and it must be presumed that they do so. State v. Northcutt, 372 S.C. 207, 225, 641 S.E.2d 873, 883 (2007). As the jury found beyond a reasonable doubt that Petitioner acted with violence or the threat of violence in robbing the victim in this case, Respondent submits there is not a reasonable likelihood that he would have been convicted of larceny if it had been charged. Petitioner has not presented any evidence that the jury did not follow the judge’s instructions. This Petition for Writ of Certiorari should therefore be denied.

² This specific charge was related to armed robbery. The trial judge referred the jury back to this language when charging robbery. App. p. 193, l. 13-21.

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 20, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001632
Lower Court Case No. 2013-CP-32-3673

PERRY BUCHANAN, #281305,

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:

**Lara Mary Caudy, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589**

This 20th day of June, 2016



DEONNA ROGERS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

June 20, 2016

RECEIVED
JUN 20 2016
SC SUPREME COURT

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

Re: Perry Buchanan, #281305 v. State of South Carolina
Appellate Case No. 2015-001632
Lower Court Case No. 2013-CP-32-3673

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,

Patrick Schmeckpeper
Assistant Attorney General
SC Bar No. 102100

PS/dr
Enclosures

cc: Appellate Defender Lara M. Caudy (2 copies)
Trisha Allen, Victim Services