

RECEIVED

JUL 11 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County

Tanya A. Gee, Circuit Court Judge

2014-CP-06-139
Appellate Case No. 2015-001659

KEVIN BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
Bar No. 102214

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

ATTORNEY FOR RESPONDENT

INDEX

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW4

ARGUMENT

I. Probative evidence supports the PCR Court's finding that plea counsel was not ineffective for failing to request a mistrial regarding Brenda O'Berry's testimony.....5

CONCLUSION.....8

PETITIONER'S ISSUE PRESENTED

- I. Petitioner's Sixth Amendment rights to the effective assistance of counsel were violated where the PCR court erroneously ruled that defense counsel had no basis for requesting a mistrial because of the improper testimony of School Resource Officer Brenda O'Berry, whom the solicitor repeatedly tried to have identify Petitioner in surveillance video of an armed robbery, when counsel's first objection came after O'Berry had already stated that she knew Petitioner, had reviewed the video surveillance, and was able to identify one person in the video; and where trial counsel failed to request that the foundation for O'Berry's identification be established outside the presence of the jury.**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Petitioner was true bill indicted at the January 2012 term of the Barnwell County Grand Jury for Armed Robbery (2012-GS-06-00027); Kidnapping (2012-GS-06-00028); Conspiracy (2012-GS-06-00029); and Possession of a Weapon During a Violent Crime (2012-GS-06-00030). Charlie Johnson, Jr., Esquire represented Petitioner. Petitioner proceeded to a jury trial before the Honorable Clifton Newman. Petitioner was found guilty and Judge Newman sentenced Petitioner to fifteen year term of imprisonment for Armed Robbery, ten year term of imprisonment for Kidnapping, five year term of imprisonment for Criminal Conspiracy, and five year term of imprisonment for Possession of a Weapon During Violent Crime. All sentences were to run concurrently.

A timely Notice of Appeal was filed and an Anders¹ brief was submitted on Petitioner's behalf. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Kevin Brown, Op. No. 2014-UP-037 (Ct. App. filed January 29, 2014). The Remittitur was issued on February 24, 2014.

Petitioner subsequently filed an application for post-conviction relief (PCR) on April 4, 2014 (C.A. No. 2014-CP-06-139). An evidentiary hearing into the matter was convened on May 18, 2015, at which Petitioner was present and represented by Lance Boozer, Esquire. The Honorable Tanya A. Gee denied and dismissed Petitioner's application with prejudice by written Order dated June 30, 2015 and filed July 6, 2015.

Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on July 31, 2015. Petitioner's Appendix and Petition for Writ of Certiorari were filed on March 25, 2016. This Return to the Petition for Writ of Certiorari follows.

¹ Anders v. California, 386 U.S. 738 (1967).

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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. Probative evidence supports the PCR Court's finding that plea counsel was not ineffective for failing to request a mistrial regarding Brenda O'Berry's testimony.

Petitioner argues the PCR court erred in finding that plea counsel was not ineffective for failing to request a mistrial regarding the testimony of Brenda O'Berry.

In a PCR 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 the 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, 104 S.Ct. 2052, 2064 (1984); Butler, supra.

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, supra. Petitioner 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 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.

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).

At the PCR hearing, plea counsel testified that during the trial he objected to almost every question Brenda O'Berry was asked and he won his objections. App. 417, ll. 21-23. He stated that she was not able to get any of her testimony in and he made the solicitor's office look "a little silly in trying to get that information in." App. 417, ll. 23-418, ll. 1. He testified that he thought about asking for a curative instruction on her testimony, but he decided to use the strategy to avoid it because it thought it would draw more attention to it than it already had. App. 418, ll. 2-17. He stated that all of his objections were sustained, so he had no reason to ask for a

mistrial. App. 427, ll. 23-24. He reiterated that he did not want to ask for curative instructions because it would call more attention to the testimony in front of the jury. App. 428, ll. 12-25.

In the Order of Dismissal filed on July 6, 2015, the PCR Court held that trial counsel had no basis for requesting a mistrial because O'Berry never identified Petitioner to the jury. App. 440. Accordingly, the PCR Court found that Petitioner had failed to meet his burden of proof and that trial counsel was not ineffective. Furthermore, the PCR Court found that trial counsel's testimony was credible.

Respondent contends that the testimony presented at the PCR hearing is probative evidence supporting the PCR Court's finding. First, it is important to note that the PCR Court found Counsel's testimony to be credible. App. 440. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Trial counsel credibly explained that his lack of a request for curative instruction or a mistrial was a trial strategy he used to avoid drawing attention to O'Berry's testimony. The trial and the PCR hearing transcript clearly indicate that trial counsel continuously objected to O'Berry's testimony and all of his objections were sustained. Trial counsel performed effectively in keeping this testimony out at trial and made reasonable strategic decisions in choosing not to press the issue any further in front of the jury.

Based on the foregoing, there is ample probative evidence supporting the PCR Court's finding that trial counsel was not ineffective for failing to request a mistrial after O'Berry's testimony. 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,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
Bar No. 102214

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

July 11, 2016

RECEIVED

JUL 11 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County

The Honorable Tanya A. Gee, Circuit Court Judge

KEVIN C. BROWN, #352266

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

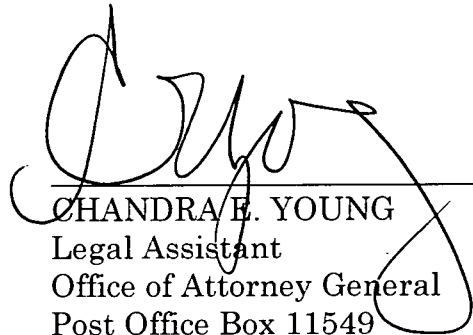
PROOF OF SERVICE

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:

Lara M. Caudy, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 11th day of July 2016.



CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

July 11, 2016

RECEIVED

JUL 11 2016

SC SUPREME COURT

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

**RE: Kevin Christopher Brown, #352266 v. State of South Carolina
2015-001659**

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: Lara M. Caudy, Esquire