

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2015-002286

CLARK THOMAS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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 III. The PCR judge correctly found that trial counsel was not ineffective for not deciding to review the victim’s medical records regarding Petitioner’s injuries to her face, including chipped teeth.

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QUESTIONS PRESENTED

1. Did the PCR judge correctly find that Petitioner's trial counsel was not ineffective for not requesting a jury instruction of the lesser included offense of criminal domestic violence?
2. Did the PCR judge correctly find that Petitioner's trial counsel was not ineffective or prejudicial by his commentary and description of Petitioner's drug and sexual activity that resulted in the underlying criminal charges?
3. Did the PCR judge correctly find that Petitioner's trial counsel was not ineffective for not reviewing the Petitioner's wife's medical records to examine any injuries to her face and mouth in order to corroborate her testimony?
4. Did the PCR judge correctly find that Petitioner's kidnapping offense included a sexual element, thereby requiring him to register as a sex offender?

STATEMENT OF THE CASE

Petitioner (Clark D. Thomas) was indicted at the December 2006 term of the Charleston County Grand Jury for Kidnapping (2006-GS-10-12295) and Criminal Domestic Violence of a High and Aggravated Nature (2006-GS-10-12296). Michael Bolus, Esquire represented Petitioner. On July 7, 2008, Petitioner proceeded to trial and was found guilty as indicted for kidnapping and Criminal Domestic Violence of a High and Aggravated Nature. The Honorable J.C. Nicholson, Jr. sentenced him to confinement for twenty (20) years for Kidnapping and ten (10) years for Criminal Domestic Violence of a High and Aggravated Nature. The sentences run concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Thomas, Op. No. 2012-UP-486 (S.C. Ct. App. August 8, 2012).

Petitioner subsequently filed an application for post-conviction relief on December 21, 2012. (App. p. 835). Respondent filed its Return on October 1, 2013. (App. p. 841). Petitioner filed an Amended Application for Post-Conviction Relief on August 29, 2014. (App. p. 847). On December 8, 2014, an evidentiary hearing was held before The Honorable J.C. Nicholson, Jr. On June 2, 2015, Judge Nicholson issued an Order of Dismissal, denying Petitioner post-conviction relief. (App. p. 1117). On June 12, 2015, Tristan M. Shaffer filed a Rule 59(e) Motion to Reconsider to Alter or Amend order of dismissal on behalf of Petitioner. (App. p. 1143). On June 15, 2015, Petitioner filed a *pro se* motion to alter or amend a judgment. (App. 1147). On July 12, 2015, Petitioner's appellate attorney, Orin G. Briggs, filed a memorandum of law in support of

post-conviction relief and the Rule 59(e) motion. (App. 856). A hearing regarding the Rule 59(e) motion was held before Judge Nicholson on July 14, 2015. Orin Briggs, Esquire, argued the motion on behalf of Petitioner and J. Rutledge Johnson, Esquire represented the State. At this time, Judge Nicholson relieved Counsel Shaffer as well. (App. pp. 1192-1193). Pursuant to an order filed on October 9, 2015, Judge Nicholson denied the Rule 59(e) motion. (App. p. 1230). Petitioner then filed a notice of appeal on November 5, 2015, followed by a petition for writ of certiorari. This return follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, 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. The PCR judge correctly held that Petitioner's trial counsel was not ineffective for not requesting a jury instruction of the lesser included offense of criminal domestic violence, as the evidence and testimony presented by the victim, arresting officer, and physician's records corroborates the crimes alleged.

Petitioner asserts that the PCR judge erred by finding that Petitioner abandoned the allegation that trial counsel was ineffective for not inquiring to the judge to issue jury instructions of the lesser included offense of CDVHAN, which would be the general charge of Criminal Domestic Violence. This argument is without merit.

During Petitioner's trial, the victim testified extensively as to her reasons for leaving him, which were largely attributed to domestic violence. She stated that she wanted to leave Petitioner because she could not tolerate being constantly on edge, terrified that he may hit her again or explode into a fit of fury. (App. p. 144, line 18 – p.145, line 1). She also testified that the night of the incident, Petitioner became enraged that she was leaving him and proceeded to tie her up and continuously shock her with a stun gun, to the point where she felt like she was being punched repeatedly and her body felt like it was on fire. (App. p. 149, line 15 – p. 151, line 4). The victim also testified that she lost count of how many times Petitioner shocked her with the taser, stating that it could be upwards of thirty (30) times, which eventually made her feel as though she was going to "black out". (App. p. 152, line 18 – p. 153, line 2). Petitioner stunned her all over her body, including on her neck, the insides of her thighs, the ribs, chest, and even on the bottoms of her feet. (App. p. 153, lines 3 – 9). Petitioner shocked her so many times that the gun left little red burn marks all over her body. (App. p. 153, lines 10 -15). The victim further testified that her injuries extended to her face, where Petitioner hit her, chipping a couple of her teeth. (App. p. 158, lines 20 – 25). In addition to using the stun gun, Petitioner also repeatedly hit her on her ribs

and in between her legs. (App. p. 159, line 20 – p. 159, line 1). The victim testified that throughout the entire period of the abuse that night, she was handcuffed, shackled, and had duct tape on her mouth. (App. 159, lines 23 – p. 161, line 3).

In addition to the physical abuse, Petitioner was talking to the victim, shouting that she was worthless and that he wanted her dead. (App. 159, lines 7 – 16). The victim also testified that later in the night, Petitioner began to tell her that she was going to have sex with him, despite her objections. (App. p. 173, line 17 – p. 174, line 4). Petitioner began to force himself upon her, sexually assaulting her while simultaneously beating her. (App. 174, line 14 – p. 176, line 21). The victim emphasized that Petitioner sexually assaulted her more than once. *Id.* Petitioner shocked the victim so many times that the victim testified to witnessing him change the batteries three times on the stun gun. (App. p. 177, lines 21-23). The victim testified that perhaps the most terrifying point was when Petitioner repeatedly reiterated that she would not live through it and that she would never see her family again. (App. p.176, line 23 – p.177, line 3). She further explained that he attempted to force her to swallow several pills, saying that if she took enough of them, she would overdose and he would not have to kill her himself. (App. 179, lines 5-10).

The victim's testimony, even in part, presents overwhelming evidence that Petitioner committed no less than criminal domestic violence of a high and aggravated nature. The evidence presented is gruesome and shocking. Petitioner clearly went above and beyond to not only assault the victim, but to even threaten to kill her. Petitioner's actions carried life-threatening implications, which is supported by the repeated death threats he conveyed to her while relentlessly beating and sexually assaulting her. Furthermore, the victim's testimony is supported by the account of the arresting officer, who testified that she relayed to him the same

version of events. (App. p. 350, line 25 – p. 351, line 12). The victim's medical records also indicated clear signs of trauma as well. (App. p. 1241 – 1251). Therefore, it is more than appropriate that Petitioner was charged with criminal domestic violence of a high and aggravated nature. Thus, the PCR court correctly ruled that Petitioner's trial counsel was not ineffective for failing to request a jury instruction of the lesser-included offense of criminal domestic violence.

- II. The PCR judge correctly found that trial counsel was not ineffective for his description and characterization of Petitioner in his opening and closing arguments, as it is clear that he had a clear that he had formulated a sound trial strategy, with the consent of Petitioner, of an attempt to render sympathy from the jury regarding the struggles of both parties.

Petitioner alleges that trial counsel was ineffective for making "disparaging" comments in his opening and closing statements. Petitioner believes that trial counsel's comments describing both Petitioner and the victim as "immoral" and "sexually deviant" was not a valid strategy, prejudicial, and therefore adversely affected the outcome of the case. This argument is without merit.

Petitioner's trial counsel testified at the PCR hearing in detail as to his justification for painting Petitioner as an immoral, sexual deviant, and a drug addict. He testified to the fact that Petitioner and the victim admitted to having a history of drug abuse and addiction, which in his professional opinion, was a logical reason as to why they engaged in the type of behavior that was the subject of the proceedings. (App. p. 1063, line 23 – p. 1064, line 7). Trial counsel testified further that those comments were taken out of context in a way that made it seem like he was attempting to secure a conviction for his client. (App. 1064, lines 8-10). However, his intention and strategy was to do the opposite: he was attempting to garner sympathy from the jury that these were two troubled individuals who needed help. (App. 1064, lines 10-12). Furthermore, trial counsel testified that Petitioner knew and consented to this strategy, given that

he conceded that he engaged in drug and odd sexual behavior with the victim. (App. 1064, lines 12-14). At trial, he explained that the fact that Petitioner engaged in this behavior with the victim regularly would help convince the jury that the incident underlying the criminal charges was consensual, and if it was consensual, it was not a crime. (App. p. 133, line 5 – p. 134, lines 1-2). Trial counsel testified that the underlying facts of the case were so bad that there was no other alternative than to tell the facts as they were and attempt to arouse an emotional response for individuals who badly needed help for the consensual abusive activities that they engaged in with one another.

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Here, Petitioner's trial counsel articulated valid strategic reasons for the way he characterized and described Petitioner in his opening and closing arguments. Petitioner has not presented any evidence that counsel was deficient in that choice of tactics.

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).

It is clear from the record that trial counsel offered valid reasons for his choice of trial strategy. It is obvious that the underlying facts of drug use and extreme, odd sexual behavior (admitted by Petitioner) were those that any reasonable attorney would be forced to concede in order to employ sound, valid defenses during the proceeding. Most importantly, trial counsel's choice of tactics was not so prejudicial as to believe that the outcome of the trial would have been different in their absence.

- III. The PCR judge correctly found that trial counsel was not ineffective for deciding to review the victim's medical records regarding Petitioner's injuries to her face, including chipped teeth.

Petitioner alleges that trial counsel was ineffective not reviewing the victim's medical records, which he claims contradict his wife's testimony that she was hit in the face and suffered a couple of chipped teeth. He alleges that trial counsel failed to impeach the victim and her medical records, which, in his belief, would have potentially had a significant impact on the outcome of the case. This argument is without merit.

During the PCR hearing, trial counsel admitted that he did not review the medical records prior to trial. (App. p. 1075, lines 10-13). However, he emphasized that he believed that when analyzing the big picture, the evidence, or lack thereof, would not make a material difference on the outcome of the case. (App. p. 1076, lines 3-7). He explained that compared to thirty (30) taser burn marks on a person's body, coupled with her testimony, as well as that of the doctor and officers', a chipped tooth is almost immaterial. *Id.* In other words, absent the dispute over

whether the victim suffered a chipped tooth, there existed overwhelming evidence of CDVHAN incriminating the defendant.

As indicated before, our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Here, Petitioner's trial counsel articulated a valid explanation for why he did not review the victim's medical records prior to trial and how it would most likely have not made a difference in the outcome of the trial, had it been raised as an issue.

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). In the case at hand, Petitioner failed to present any evidence that would impeach the victim and her medical records. Therefore, Petitioner failed to meet his burden of proof required to show ineffective assistance of counsel in this regard.

IV. The PCR judge correctly held that the kidnapping offense that Petitioner was convicted of did, in fact, contain a sexual element, despite him being acquitted of a sexual battery charge.

Petitioner alleges that his kidnapping conviction should not have subjected him to being required to register as a sex offender, as he was acquitted of a sexual battery charge. He believes that his trial counsel was ineffective for failing to make a request to the judge to make a finding that he should not be subject to general sex offender conditions upon release. (App. p. 837). This argument is without merit.

As the PCR court noted, a *conviction* of a sexual offense is not a prerequisite for a person convicted of kidnapping to register as a sex offender. (App. 1137). Pursuant to S.C. Code Ann. §23-3-430(15), any person convicted of kidnapping must register as a sex offender if the court finds that individual committed *or* attempted a sexual offense. Petitioner interpreted the statute too narrowly, as only applying to *convictions* of a sexual offense; however, this was not a completely accurate interpretation of the law. According to the victim's testimony, Petitioner sexually assaulted her while violently physically abusing her. Thus, even though Petitioner was not convicted of the sexual offense charge because of a discrepancy over consent, there is strong evidence of an *attempted* sexual battery that is sufficient to warrant the Court to require him to register as a sex offender. Because Petitioner failed to meet his burden to show that his kidnapping conviction did *not* include a sexual offense, he therefore failed to show ineffective assistance of counsel in this regard. As a result, the PCR judge correctly held that Petitioner was properly sentenced, including the sex offender registry requirement.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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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 H. Hudgins, Esquire
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This 29th day of August, 2016


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