

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No.: 2016-000289

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S.C. SUPREME COURT

BENNIE GOLSTON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
SC Bar #102100

P.O. Box 11549
Columbia, SC 29211
(803) 734-4124

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Is there any probative evidence in the record to support the PCR Court's finding that Petitioner did not meet his burden to prove counsel ineffective in failing to obtain a larger, color version of a booking photograph where 1) counsel's investigation was reasonable under the circumstances; and 2) the corroborative value of the photograph – as determined by the fact finder – was insufficient to call the outcome of the proceeding into question?

STATEMENT OF THE CASE

Petitioner (Bennie Golston) was indicted at the May 12, 2009 term of the Lexington County Grand Jury for criminal domestic violence of a high and aggravated nature (CDVHAN) (2009-GS-32-5027). Matthew C. Buchanan, Esquire and David M. Mauldin, Esquire represented Petitioner. On May 13-14, 2009, Petitioner proceeded to trial and was found guilty as indicted. The Honorable R. Knox McMahon sentenced him to confinement for ten (10) years imprisonment for criminal domestic violence of a high and aggravated nature (CDVHAN).

Applicant filed a timely notice of appeal. Assistant Appellate Defender LaNelle Canty DuRant of the South Carolina Commission on Indigent Defense represented Applicant on his appeal. A Final Brief of Respondent was submitted on June 10, 2011. A Final Brief of Appellant was submitted on June 17, 2011. The South Carolina Court of Appeals heard arguments on May 13, 2012. Applicant's conviction and sentence were affirmed by the South Carolina Court of Appeals. State v. Golston, 399 S.C. 393, 732, S.E.2d 175 (2012). Applicant then filed a Petition for Rehearing on June 19, 2012 which was denied on September 13, 2012. Applicant then filed a Petition for Writ of Certiorari on December 13, 2012. The State filed its return to petition for writ of certiorari on December 31, 2012. The South Carolina Supreme Court denied the petition on December 5, 2013. The remittitur was issued on December 11, 2013.

Petitioner subsequently filed an application for post-conviction relief on December 27, 2013. Respondent filed a return to this application dated June 13, 2014. Petitioner filed an amended application for post-conviction relief on April 13, 2015 and a second amended application for post-conviction relief on October 1, 2015.

On December 9, 2015, an evidentiary hearing was convened at the Lexington County Courthouse before the Honorable D. Craig Brown. Patrick Schmeckpeper, Esquire, represented the State, and Kristy Goldberg, Esquire represented Petitioner. On February 1, 2016, Judge Brown issued an Order of Dismissal, denying Petitioner post-conviction relief. This petition for writ of certiorari 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, 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. The PCR Court's finding that Petitioner did not meet his burden to prove counsel ineffective in failing to obtain a larger, color version of a booking photograph is supported by probative evidence in the record where 1) counsel's investigation was reasonable under the circumstances; and 2) the corroborative value of the photograph – as determined by the fact finder – was insufficient to call the outcome of the proceeding into question.

Petitioner argues counsel was ineffective for failing to locate a larger, color version of the black and white photograph in his booking report. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Applicant 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

1) Deficient Performance

Petitioner argues counsel's failure to find the color photograph – which he says would have corroborated his theory of self-defense at trial – constituted deficient performance. Respondent disagrees, and submits the PCR Court's contrary findings are supported by probative evidence in the record.

Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to a *reasonable investigation*.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (*emphasis added*). Accordingly, the controlling standard for counsel's duty to investigate is reasonableness. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011).

In this case, the record supports the PCR Court's finding that counsel's failure to locate the color-version of Petitioner's booking photograph did not fall below the level of reasonableness under prevailing professional norms. App. p. 591. Counsel testified that he looked for a color-version of Petitioner's booking photograph, but was unable to find one. App. p. 524, l. 4-6. Counsel said that he believed he requested a copy from the jail. Id. Based on the circumstances of the case – as they existed leading up to Petitioner's trial – counsel had compelling reasons to believe further investigation into Petitioner's injuries would have been fruitless. The black and white booking photo counsel had access to did not show any visible scars or markings on Petitioner's face. More importantly, the booking report itself stated that Petitioner had no visible marks or scars at the time of his arrest. App. p. 519, l. 12-16; Defendant's Exhibit No. 1. Counsel could have reasonably believed time spent continuing to search for the photograph would have been better spent elsewhere.

Admittedly, with the benefit of hindsight and the color photograph in hand,¹ it may very well be tempting to argue counsel should have taken *some* extra step or further efforts in tracking it down. The mere fact, however, that Petitioner was able to find it does not relieve him of his burden to prove counsel's performance was actually deficient. Petitioner has not presented any evidence outlining what efforts were actually required to obtain the photograph. There is no evidence in the record that the color version of the photograph was readily available, or that but for counsel's failure to take reasonable steps he would have been able to locate it. Without establishing how counsel could have gotten the photographs, it is impossible – without a high level of speculation – to determine whether his failure to do so was objectively unreasonable.

As Petitioner failed to meet his burden to prove deficient performance, there is probative evidence in the record in support of the PCR Court's findings. Certiorari should therefore be denied.

2) Prejudice

a.

There is also probative evidence to support the PCR Court's finding that Petitioner failed to meet his burden to prove prejudice. First, this Court owes great deference to the probative weight assigned to the photographs by the fact finder in this case, who had the opportunity to hear testimony live and observe the witnesses' demeanor. See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (PCR Court's findings of facts and conclusions of law are entitled to great deference); see also, Gavin v. State, 473 So.2d 952, 955 (1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in

¹ Taking into account its limited corroborative value. See Prejudice, infra.

general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire”); *Harris v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 3 F.3d 103, 106–07 (4th Cir.1993) (“Factfinders exist for definite purposes, one of which is to observe the demeanor of [witnesses]. Appellate courts are well-positioned to determine whether a factual finding is without support in the evidence; we are much less able simply 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 Court found that it was not clear what the photograph actually depicted, and that its corroborative value was too limited to call the outcome of the proceeding into question where it was unclear what the marks actually were, when they were made, and whether they were marks on Petitioner’s face or simply marks on the photograph itself. App. p. 592. In deciding how to weigh the photographs, the PCR Court also emphasized the fact that Petitioner’s actual booking report did not indicate that he had any scars, marks, or tattoos at the time the picture was taken. App. p. 592. These factual findings are entitled to a high degree of deference, and should not be disturbed. Certiorari should therefore be denied.

b.

There is also no evidence the photograph would have affected the outcome of the proceeding in light of the evidence presented at trial. Taking into account the victim’s injuries, Petitioner’s self-defense story is utterly unbelievable. C.f., Jackson v. State, 355 S.C. 568, 573, 586 S.E.2d 562, 564-65 (2003) (failure to request self-defense charge not prejudice where defendant’s testimony was unsupported by the physical evidence and highly incredible).

Petitioner testified at trial that he acted in self-defense. Petitioner lived with the victim,² and said that on the night of the incident he left the victim's house to go to a nearby barbecue. App. p. 291, l. 13-16. Petitioner testified that he stayed at the barbecue for roughly an hour, and then returned to the victim's house. App. p. 291, l. 21-25. Upon returning, Petitioner said the victim met him outside "furious." App. p. 292, l. 1-4. The victim walked off and told Petitioner that she was "going," to which Petitioner – following – responded "you ain't going nowhere." App. p. 292, l. 4-5. Petitioner testified that the victim then "turned around and jumped on me, clawed me in the face." App. p. 292, l. 7-9. Petitioner said she

clawed me on both sides of my nose and must be a thumb cut my lip all the way through, stuck her fingernails all the way down in my face.

App. p. 292, l. 11-13. Petitioner testified that he responded by "slapping her" on both sides of her face and walking into the victim's house. App. p. 292, l. 14-19. Inside, Petitioner said he wiped the blood off of his face, went into the victim's bedroom, and picked up a hatchet.³ App. p. 292, l. 19-22. He said he then heard the victim say "Ben, come help me get up," at which point he "knew [the victim] was sorry" and realized everything was alright. App. p. 292, l. 20-24. Petitioner said he laid the hatchet on the car and took the victim back up to her house before leaving. App. p. 292, l. 24 - p. 293, l. 15.

To the limited extent the color photograph corroborates Petitioner's story, his version of events is utterly inconsistent with the injuries suffered by the victim. The severity of the victim's injuries was such that the Court of Appeals found they were serious as a matter of law, to the point where it was not possible for the jury to have found Petitioner guilty of CDV but not guilty

² Whether Petitioner actually cohabitated with the victim was a subject of contention at trial. Ultimately, the jury found they lived together sufficient to find him guilty of criminal domestic violence of a high and aggravated nature.

³ On cross-examination, Petitioner explained that he picked up the hatchet because he was "going home." App. p. 298, l. 9-11. He said he was just "taking [the hatchet] with [him]." App. p. 298, l. 12-13. Petitioner testified that he did not carry a hatchet often. App. p. 298, l. 14-19.

of CDVHAN.⁴ App. p. 420-22. The victim testified that she saw Petitioner getting agitated, but did not realize how angry he was until he struck her. App. p. 125, l. 1-10. She said she tried to flee after he struck her again, attempting to get into her car, only to be dragged out and beaten “[m]any, many, many times” while Petitioner straddled her on the ground. App. p. 125, l. 7 - p. 126, l. 11. Petitioner also threatened to kill her with a hatchet. App. p. 126, l. 22 - p. 127, l. 18.⁵ Concerning her injuries, the victim testified that she was in terrific pain from the beating, and had to crawl inside her house after Petitioner left her injured on the ground. She suffered permanent damage to her vision, and had difficulty breathing and feeding herself for several days. App. p. 125-135. Her account of her injuries was substantiated by the photographs entered as evidence, as well as testimony from the officers who came to the scene, the victim’s son,⁶ and the trauma nurse who was on duty when the victim was brought in to the emergency room by ambulance. App. p. 168-69; 172-73; 187-88; 228-31; 242-48; 252-58; State’s Exhibits 11-25 [Photographs].

Given the severity and of the victim’s injuries, Petitioner’s claim that he only slapped her twice is unbelievable. As a result, even taking into account the limited corroborative value of the color version of Petitioner’s booking photograph, Respondent submits there is still no reasonable likelihood that but for counsel’s alleged deficiency the outcome of the proceeding would have been different. Because Petitioner has failed to meet his burden to show prejudice, certiorari should be denied.

⁴ Criminal domestic violence and criminal domestic violence of a high and aggravated nature, respectively.

⁵ Understandably, the victim testified that she had trouble with the exact sequence of events because she was hit “so quickly and so many times.” App. p. 126, l. 14-18.

⁶ The victim’s son testified the swelling was so pronounced that, upon arriving on the scene, her face was so swollen that he did not recognize her. App. p. 418; p. 243, l. 5-18.

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,

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
SC Bar #102100

By: 

ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

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Lower Court Case No. 2013-CP-32-04474

BENNIE GOLSTON,

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
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 10th day of November, 2016



DEONNA ROGERS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

November 10, 2016

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S.C. SUPREME COURT

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

Re: Bennie Golston v. State of South Carolina
Appellate Case No. 2016-000289
Lower Court Case No. 2013-CP-32-04474

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: Lara M. Caudy, Esquire (2 copies)
Trisha Allen, Victim Services