

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

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JAN 11 2017

2014-CP-23-1070
Appellate Case No. 2016-001070

S.C. SUPREME COURT

DANTAE RAHEEVE STUKES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

Is there any probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for choosing not to utilize specific portions of the victim's prior statement to law enforcement during cross-examination, where 1) counsel's decision was made pursuant to a valid trial strategy; and 2) the alleged deficiency does not call into question the outcome of the proceeding?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. Petitioner was indicted at the August 2010 term of the Greenville County Grand Jury for second-degree criminal sexual conduct with a minor (2010-GS-23-6454). He was represented by George R. McElveen, III, Esquire.

After the State called the case to trial, Petitioner was found guilty. On March 15, 2012, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to 15 years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Mr. McElveen perfected the appeal. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Stukes, Op. No. 2014-UP-027 (S.C. Ct. App. filed Jan. 22, 2014). The Remittitur was sent on February 7, 2014.

Petitioner filed a PCR application on March 7, 2014 (2014-CP-23-1295), alleging he was being held in custody unlawfully. An evidentiary hearing was convened on February 16, 2016. Petitioner was represented by Kenneth P. Shabel, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Daniel D. Hall denied and dismissed the PCR application by order filed March 30, 2016.

Petitioner filed a notice of appeal. His attorney submitted a petition for writ of certiorari and appendix on September 6, 2016. 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, 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

There is probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for choosing not to utilize specific portions of the victim's prior statement to law enforcement during cross-examination, where 1) counsel's decision was made pursuant to a valid trial strategy; and 2) the alleged deficiency does not call into question the outcome of the proceeding.

There is probative evidence to support the lower court's findings. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test 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, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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." Id. at 117-18, 386 S.E.2d at 625.

Deficiency

Petitioner failed to meet his burden to prove his attorney's performance was objectively unreasonable. This was not a case where counsel failed to utilize highly probative impeachment evidence due to an "oversight." Compare Rutland v. State, 415 S.C. 570, 575, 785 S.E.2d 350, 352 (2016). Counsel actually used the victim's prior statement to law enforcement during cross-examination. App. p. 101-02. Counsel specifically questioned the victim on whether there were "a few things different about [her] statement than what [she] testified to [at trial]," emphasizing that she "told [the jury] some things that happen [sic] today that [she] didn't put in the statement." App. p. 101-02. The victim agreed. Id. The PCR Court took this into account in making its ruling, in addition to counsel's testimony that the victim was a "solid witness at trial." App. p. 376. The PCR Court concluded that it was clear from the record counsel "had to walk a fine line at trial in order to point out the discrepancies in the victim's testimony while keeping in mind that she was a minor and the victim of a sexual assault." App. p. 376. Second guessing counsel's strategic decision absent any actual evidence that they were unreasonable would be inappropriate, given that Petitioner has the burden in this forum. Simply put, Petitioner's current dissatisfaction with the result does not render counsel's objectively reasonable performance deficient. "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. Because the PCR Court's finding is supported by probative evidence in the record, certiorari should be denied.

Prejudice

The PCR Court also properly concluded that Petitioner had failed to meet his burden to prove further impeachment of the victim would have affected the outcome of the proceeding. App. p. 376.

Given 1) the subject matter of the inconsistency – that the victim was unsure of the exact date of the abuse – was already established by her trial testimony; and 2) arguably, the unexplained fact that her testimony differed from her statement to law enforcement had a bigger impact than if the actual discrepancies had gone before the jury.

Petitioner's comparison to Rutland is particularly illuminating. Rutland, who was charged with murder, testified at trial that he was acting in self-defense. 415 S.C. at 578, 785 S.E.2d 353. An eye witness to the shooting testified that she "had a good view of the victim" at the time of the incident and "the only thing she saw in [his] hands was a pack of cigarettes." Id. at 573, 785 S.E.2d at 351. She testified that while she saw the victim reach behind his back prior to being shot, she never saw the victim in possession of a gun. Id. The Supreme Court found Rutland's attorney ineffective in failing to impeach the state's only neutral eye-witness¹ with prior statements to law enforcement and news agencies, in which she said she saw the victim with a firearm and was "scared ... to death." Id.

This case is remarkably different than Rutland from a prejudice perspective. Specifically, the alleged inconsistency in the victim's prior statement does not rise to the level of affecting the outcome of the proceeding. The only issue the alleged inconsistency in this case touches on is that the victim did not know the exact day of the week that Petitioner abused her. Such an inference, however, is already supported by a fair reading of the victim's testimony as it was

¹ Rutland's paramour – also the victim's estranged wife – also testified in a manner consistent with self-defense. Id. at 574, 785 S.E.2d at 351.

presented at trial. The victim was frank in her admission that she did not know exactly when the abuse took place, given the amount of time she spent with Petitioner and his family. That discrepancy, however, goes toward the victim's ability to remember specifics concerning an event that occurred *a year* before it was even disclosed, not toward her credibility regarding the underlying abuse.

In any event, counsel was able to successfully elicit testimony – from the victim – that there were inconsistencies in her prior statements. That testimony, left unexplained, was likely more damaging than the actual inconsistency would have been, particularly in light of the fact that the victim's characterization of the actual abuse was practically indistinguishable from what she testified to at trial.

Given the innocent and nature of the alleged inconsistency in the victim's statement, there is probative evidence in the record to support the PCR Court's finding that Petitioner failed to meet his burden to show prejudice. Certiorari should therefore be denied.

[*Signature follows*]

CONCLUSION

For the foregoing reasons, 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,

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January 11, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

2014-CP-23-1070
Appellate Case No. 2016-001070

Dantae Raheev Stukes,Petitioner,

v.

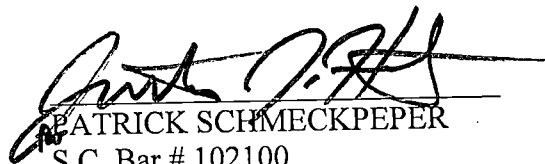
State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Patrick Schmeckpeper, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kenneth P. Shabel, Esquire
Kennedy | Brannon, PA
Post Office Box 3254
Spartanburg SC 29304

I further certify that all parties required by Rule to be served have been served.
This 11th day of January, 2017.


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