

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Williamsburg County
Tanya A. Gee, Circuit Court Judge

Lower Court Case No. 2015-CP-45-0037
Appellate Case No. 2016-000615

Robert Troy Taylor, #315084,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
OF RESPONDENT-PETITIONER**

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RESPONDENT-PETITIONER'S ISSUES PRESENTED

- I.** "Whether the lower erred in finding that trial counsel's handling of the expert and her testimony did not amount to ineffective assistance nor did her evidentiary hearing testimony amount to newly discovered evidence."

- II.** "Whether the lower court erred by failing to find that trial counsel provided ineffective assistance when he failed to argue against the imposition of a sentence of life without parole based upon Rule 404(b), SCRE, and S.C. Code 17-25-50 (2003), which resulted in the issue being unpreserved for appellate review."

STATEMENT OF THE CASE

Respondent-Petitioner (Robert Troy Taylor) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Respondent-Petitioner was true bill indicted at the May 2006 term of the Williamsburg County Grand Jury for criminal sexual conduct-second degree and kidnapping (2006-CP-45-176). Charles D. Barr, Esquire represented Respondent-Petitioner. Respondent-Petitioner proceeded to trial before the Honorable George C. James, Jr. Respondent-Petitioner was convicted as indicted. On July 12, 2007, Judge James sentenced Respondent-Petitioner to life without the possibility of parole for kidnapping and criminal sexual conduct-second degree.

A timely Notice of Appeal was filed on Respondent-Petitioner's behalf. Jeremy A. Thompson, represented him on appeal. On June 6, 2012, the South Carolina Court of Appeals affirmed his conviction and sentence. State v. Taylor, Op. No. 4920 (refiled June 2012). Respondent-Petitioner sought certiorari to the South Carolina Supreme Court. The South Carolina Supreme Court denied certiorari on April 3, 2014. The Remittitur was issued on April 7, 2014.

Respondent-Petitioner filed an application for post-conviction relief on December 31, 2014. App. 442. Petitioner ("the State") filed a Return on June 5, 2015. App. 452. The Honorable Tanya A. Gee convened an evidentiary hearing on the application at the Sumter County Courthouse on November 19, 2015. App. 459. Respondent-Petitioner was present and represented by Tricia A. Blanchette, Esquire. An Order Granting Application for Post-Conviction Relief was signed by Judge Gee on February 19, 2016 and filed on February 24, 2016. App. 711.

Both parties filed a notice of appeal. On September 6, 2016, Petitioner-Respondent submitted its Petition for a Writ of Certiorari, to which Respondent-Petitioner filed his return on November 16, 2016. Respondent-Petitioner filed his Petition for a Writ of Certiorari on November 14, 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

- I. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for never contacting the State's expert witness prior to trial and for not objecting to her trial testimony, as well as the PCR Court's finding that the expert witness's testimony at the evidentiary hearing was not newly discovered evidence.**

Respondent-Petitioner's argument that the PCR Court erred in finding that trial counsel was not ineffective for his actions regarding the State's expert witness is without merit.

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).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 386 S.E.2d at 625, (citing Strickland, 80 L.E.2d 674). 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."

Trial Counsel's interaction with Expert

Respondent-Petitioner argued that Trial Counsel was ineffective for failing to request information regarding expert witness Gaye Allen Cook's findings and opinions prior to trial, for failing to discuss those findings with her, and for failing to object and/or move to suppress her testimony at trial. App. 727. The PCR Court disagreed and found that Trial Counsel was not ineffective in this regard.

Ms. Cook testified at the trial about her experiences in general with children under the age of eighteen who are victims of sexual abuse. App. 46-63. She testified about their behavior patterns, the reasons why they act as they do, and typical experiences in revealing their abuse to others. App. 46-63. On cross-examination, Trial Counsel had Ms. Cook confirm to the jury that she did not personally know any of the parties in this case and had not interviewed or examined the victim. App. 59-60.

Upon review of the trial transcript and her testimony, the PCR Court found that her expert testimony was "in line with State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), and defense counsel was not deficient for never contacting her prior to trial or for not objecting to her trial testimony." App. 727. The PCR Court explained, "She simply testified about generalities and did not vouch for the victim." App. 727.

The PCR Court relied on this trial testimony in making its finding that Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. Ms. Cook's testimony was not objectionable, and there was no reason for Trial Counsel to object. Any communication with her before the trial would not have altered her testimony about generalities. Trial Counsel cannot be ineffective for failing to object to something that is not objectionable. Furthermore, his lack of objection is not prejudicial. Even if

her testimony had been objected to and excluded for any reason, the jury still would have found Respondent-Petitioner guilty. The victim's testimony and the other evidence presented by the State were strong enough to convict Respondent-Petitioner regardless of this expert's testimony on the general behavior of sexual assault victims.

The PCR Court's finding that Trial Counsel's actions were reasonable in the circumstances and not prejudicial was well-supported by the factual record and the trial testimony. No credible evidence or testimony presented at the PCR hearing proved that Trial Counsel was ineffective in any way in this regard. Therefore, because the PCR Court's findings were supported by probative evidence, this Court should deny the Petition for Writ of Certiorari.

Expert's testimony as Newly Discovered Evidence

At the evidentiary hearing, expert witness Ms. Cook testified that she had reviewed the entire case file to prepare for the post-conviction relief action, and after reviewing that material, she had changed her opinions on the case. She stated that if she had known all this information before the trial, she would not have testified for the State at the trial. Respondent-Petitioner asserts that this her change of stance qualifies as newly discovered evidence that entitles him to a new trial. This is meritless.

First, Petitioner-Respondent submits that this "evidence" is not evidence at all that could have been presented at trial—it is only Ms. Cook's statement that, in retrospect, she has changed her opinion and decided that she would not testify at trial. This is not new testimony or an actual piece of evidence that could have been presented by Respondent-Petitioner if given the chance. In analyzing Respondent-Petitioner's argument, this new "evidence" clearly does not fit under the standard for newly discovered evidence which would entitle him to a new trial.

A party requesting a new trial based on after-discovered evidence must show that the evidence (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

Addressing each prong of this test, the first requirement is that the new evidence must probably change the result if a new trial was had. Trial Counsel testified at the evidentiary hearing that his strategy was to discredit the victim. App. 643. He stated that he did not think that the jury would have given much weight to Ms. Cook's testimony, and her testimony did not bolster the victim's credibility. App. 677. The PCR Court found in its Order that "Ms. Cooke affirmed that the testimony she offered at trial was accurate regarding the topics addressed, and this Court struggles to find how her testimony changed the outcome of Taylor's trial."

The PCR Court further held that Respondent-Petitioner "failed to establish that [Ms. Cook's] change in position could not have been discovered, in the exercise of due diligence, prior to trial." These findings are clearly based on Trial Counsel's testimony as well as the underlying facts and circumstances of the case, and thus are supported by probative evidence.

Although the PCR Court did not address the other three prongs on the test, Petitioner-Respondent submits that they are not met, either. Ms. Cook's testimony, if considered evidence, is merely impeaching, as its only purpose would be to impeach any testimony she gave at trial. Finally, her statements are not material to the issue of guilt or innocence. Her testimony only concerned the general behavior of people under the age of eighteen who have been victims of sexual abuse; she did not give any statements about the specific victim of this case, nor did she tell the jury that she personally saw Mr. Taylor sexually abuse a child.

In conclusion, the changed testimony of Ms. Cook is neither actual evidence, nor newly discovered evidence that entitles Respondent-Petitioner to a new trial according to the Hayden test. The PCR Court's findings were based on the probative evidence presented at the hearing and in the trial testimony, and they should not be overturned.

Error as a matter of law

The crux of Respondent-Petitioner's argument in his Petition for Writ of Certiorari is that, as a matter of law, the PCR Court could not possibly have found both that Trial Counsel was ineffective with this witness and that the witness's changed testimony was not newly discovered evidence. This argument has no merit.

The PCR Court found in its order that the testimony of Ms. Cook presented at the evidentiary hearing was not newly discovered evidence, in part because it could have been discovered before the trial. App. 729. Respondent-Petitioner now argues that, if this is true, then Trial Counsel *must* have been ineffective in failing to discover this testimony before the trial. This is simply not true. According to the PCR court's order, Trial Counsel *could have* changed Ms. Cook's testimony if he had spoken to her before the trial, but South Carolina case law does not require that he do so in order to be effective. Trial Counsel was not required to speak with the State's expert witness, present her with his entire file and all the defendant's information, and change her opinion and testimony in order to fully represent his client. To require all attorneys to do so would be unreasonable and absurd.

More importantly, Respondent-Petitioner cannot prove prejudice. There are many other factors that go into this analysis, such as whether the State would have obtained a different expert to testify to the same extent as Ms. Cook if she decided not to testify. Again, even without Ms. Cook's testimony, the testimony of the victim and all other evidence that the State presented

at trial would have been strong enough for the jury to find a guilty verdict. Respondent-Petitioner simply did not meet his burden to prove that this testimony absolutely would have changed the outcome of the trial. Therefore, there is no error of fact, nor an error of law made by the PCR Court.

Failure to use Ms. Cook as a defense witness at trial

If Respondent-Petitioner is arguing in any way and to any extent that Trial Counsel should have been found ineffective for failing to consult with or use Ms. Cook as an expert witness for the defense at trial, Petitioner-Respondent asserts that this issue is not preserved for appeal, as the PCR Court held that Ms. Cook's testimony was excluded for that purpose. See App. 474-479 (objections made by State and discussion with PCR Court).

II. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for failing to preserve the issue of the sentence of life without parole for appellate review.

The PCR Court acknowledged that post-conviction relief was the proper avenue to raise the issue of Trial Counsel's failure to preserve the sentence of life without parole for appeal. However, the PCR Court held that Respondent-Petitioner failed to meet his burden of proving any prejudice by this failure to preserve the issue on appeal.

In order to be successful on this issue, Respondent-Petitioner was required to prove that the unpreserved issue would have been successful on appeal. The PCR Court held that he failed to meet that burden of proof, and it pointed to specific reasons why the burden was not met. The PCR Court explained:

Although the Court of Appeals initially described Taylor's argument as "persuasive" in its *Taylor I* opinion, the Court of Appeals withdrew that opinion and issued *Taylor II*, which found only that the argument was not preserved. No other appellate decision has addressed this specific issue. However, a review of

section 17-25-50 and the Supreme Court's interpretation of the language used in that statute suggest that Taylor would not prevail on appeal.

App. 735. The PCR Court then went on to address the exact statute and Supreme Court case law that interpreted it as requiring multiple offenses to be considered separately for sentencing purposes when they are "intractably connected and share an immediate temporal proximity." App. 735 (citing Bryant v. State, 384 S.C. 525, 532, 683 S.E.2d 280, 283-84 (2009)). The PCR Court then compared this case to Respondent-Petitioner's case, pointing out that Respondent-Petitioner committed his offenses nine months apart. The PCR Court suggested that these events were too far apart in time for this argument to prevail on appeal, and held that Respondent-Petitioner had failed to meet his burden.

Because the PCR Court's findings were clearly based on very specific probative evidence, including the testimony from the evidentiary hearing, the trial documents and testimony, the appellate briefs and opinions, South Carolina statutes and current case law, the ruling should not be overturned. Therefore, this Petition for Writ of Certiorari should be denied.

CONCLUSION

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

[signature page to follow]

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Williamsburg County

The Honorable Tanya A. Gee, Circuit Court Judge

ROBERT T. TAYLOR, #315084

Respondent,

STATE OF SOUTH CAROLINA

Petitioner.

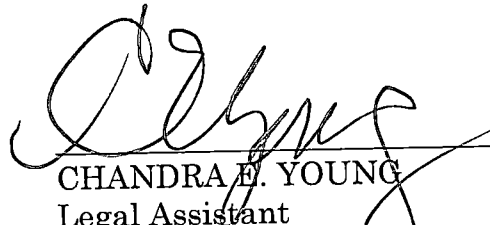
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari of Respondent-Petitioner on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
Post Office Box 2147
Leesville, SC 29070

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

This 7th day of March 2017.


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