

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
Court of Common Pleas
Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2015-000542

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APR 24 2017

S.C. SUPREME COURT

KEITH DESUE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The PCR Judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel's representation was deficient and that he was prejudiced as a result.

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the December 2010 term of General Sessions for first-degree criminal sexual conduct with a minor (2009-GS-23-4190). (App.pp.250-51). Scott D. Robinson, Esquire represented Petitioner. After the State called the case to trial, Petitioner was found guilty. On January 10, 2012, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to twenty-five years imprisonment. (App.p.194).

A notice of appeal was filed at the South Carolina Court of Appeals. On November 7, 2013, the Court of Appeals issued an order dismissing the appeal based upon Petitioner's request. (App.pp.193-95). The remittitur was sent on November 26, 2013. (App.p.196).

Petitioner filed an application for post-conviction relief (PCR) on January 16, 2014 (2014-CP-23-0257). (App.pp.197-203). A hearing was held at the Greenville County Courthouse on December 16, 2014. (App.pp.210-41). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Eugene C. Griffith, Jr. denied relief in an order filed February 11, 2015. (App.pp.243-49).

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). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. See Jordan v. State, 406 S.G. 443, 448, 752 S.E.2d 538, 540 (2013). 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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that trial counsel's representation was deficient and that he was prejudiced as a result.

Petitioner argues trial counsel erred because he opened the door to additional testimony about the victim's statements about her sexual abuse by Petitioner. Petitioner argues he suffered prejudice as the result of this additional testimony. This argument is without merit.

A.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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.

B.

At trial, the eight-year-old victim testified her biological father (Petitioner) "put ice cream on my private spot, and then he put his private spot in mine. And then he smeared the ice cream down in there" (App.p.43; pp.45-46; p.48; p.50). When asked if "this kind of thing happen[ed] one time or more than one time," the victim testified it happened three times. (App.p.52). The victim testified Petitioner told her not to tell anyone what happened. (App.p.51). On cross-examination, trial counsel asked the victim if she had discussed with her stepparents and the assistant solicitor about what her testimony would be, and she stated that she had. (App.pp.56-58).

The assistant solicitor then argued, outside of the jury's presence, that Jeffcoat would allow her to present the victim's "prior consistent statements to other persons." (App.pp.59-60). Trial counsel noted he had not read Jeffcoat and the trial judge allowed him time to study it and determine if he could distinguish it from the case at bar. (App.p.60). Trial counsel subsequently agreed with the assistant solicitor's position saying "As far as distinguishing, I have no ability to do a Shepardizing on this case, whether it's current law or not. But I think that if she plans on doing that, then I have the same -- I think this is going to stand from the idea that statements made prior to any sort of contact with law enforcement or anything like that would be something that can be brought into to rebut any sort of thing." and the trial judge allowed the State "to rebut." (App.pp.65-66). Dr. Breann Bailey (the pediatric emergency room doctor). Officer Jonathan Taylor (the officer who met with the victim at the emergency room), and James Austin

(the investigator in this case who had since retired) were allowed to testify in more detail about the victim's description of the abuse. (App.pp.81-82; pp.95-96; pp. 101-05).

C.

At the PCR hearing, Petitioner argued the assistant solicitor was allowed to bolster the victim's testimony because trial counsel asked her questions that opened the door to such. (App.pp.215-17). Petitioner stated he did not believe trial counsel knew these questions would hurt his case. (App.p.217). Petitioner admitted, however, that trial counsel also brought out the victim's conflicting stories and inconsistencies during trial. (App.pp.223-24).

Trial counsel testified Petitioner proclaimed his innocence, so the case went to trial. (App.p.227). Trial counsel testified his trial strategy was to argue inconsistencies in the victim's statements, the lack of conclusive evidence of sexual assault, and that the blood in the victim's underwear was the result of a bowel condition. (App.p.228). Trial counsel testified he believed at the time that it was worth the risk in order to question the victim about whether she had discussed her testimony beforehand. (App.pp.230-31).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving trial counsel did not properly cross-examine the victim. The PCR judge noted that "Trial counsel testified he believed asking the victim about potential coaching was worth the risk. Trial counsel testified part of his trial strategy was to point out inconsistencies in aspects of the victim's testimony." The PCR judge found trial counsel articulated a valid strategic reason for asking the victim "about whether she had spoken to several people about the case and what she should testify about." (App.p.246). The PCR judge also found Petitioner failed to meet his burden of proving he "suffered any prejudice resulting

from the application of Jeffcoat in this case because the State presented such strong evidence of his guilt." (App.p.247).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel's representation was deficient. Trial counsel's cross-examination of the victim cannot be viewed as ineffective or deficient because the PCR judge found trial counsel articulated a valid strategic reason that he pursued this line of questioning. (App.p.246). Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State. 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State. 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State. 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State. 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State. 308 S.C. 119,122,417S.E.2d 529, 531 (1992).

Trial counsel testified he believed asking the victim about whether she had previously discussed her testimony with her guardians and/or the assistant solicitor was worth the risk. Based upon the record in this case, this was a valid trial strategy. The victim was eight years old at trial and five years old at the time of the sexual assault. The victim's testimony was perfunctory and not very descriptive and, due to her age, often the result of some leading questions by the assistant solicitor. It would have been objectively reasonable for trial counsel to risk additional testimony about prior consistent statements in the hope that questions about potential coaching would lead the victim to waver or open the door to allow impeachment of her testimony. See Huggler v. State. 360 S.C. at 633, 602 S.E.2d at 756. This Court should not view

trial counsel's tactics after reflecting upon the end result of Petitioner's trial. See Whitehead v. State, 308 S.C. at 122, 417 S.E.2d at 531. As trial counsel articulated a strategic decision for his cross-examination of the victim, the PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel's performance was deficient.

E.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced by trial counsel's representation. Whether or not trial counsel was well-versed in Jeffcoat's holding prior to this trial, Petitioner cannot prove prejudice because the State presented abundant evidence that he was guilty of sexually assaulting his daughter. Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). The victim testified about the sexual abuse, that it hurt and made her cry, and that Petitioner told her not to tell anyone. (App.pp.46-53). The videotaped forensic interview of the victim was published to the jury. (App.p.137). Blood was found in the crotch of the victim's underwear and the victim testified the blood was from when Petitioner 'was doing all that stuff to me down in my private spot." (App.p.58; pp.63-64). There was a laceration on the victim's labia and redness at her vaginal opening. (App.pp.82-83). The victim's hymen was transected on the same side of her body as the laceration on her labia. (App.pp. 140-41; pp. 145-48).

As such, even assuming arguendo that trial counsel should not have asked the victim about potential coaching, there is no reasonable probability that the admission of additional testimony in fact changed the outcome of Petitioner's case. Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625; Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735; see also Geter v. State.

305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Petitioner failed to meet his burden of proving the prejudice prong of the Strickland test because the State presented overwhelming evidence of Petitioner's guilt and the likelihood of a different result of his trial was highly unlikely. See Butler v. State. 286 S.C. at 442, 334 S.E.2d at 814.

F.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland - that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State. 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

[Signature follows]


CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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April 24, 2017

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CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Lara M Caudy, Esquire
South Carolina Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served. This 24th day of April, 2017.



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