STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

ERIC D. PHILLIPS,

RESPONDENT/PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT/PETITIONER

INDEX

INDEX 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT I 4

ARGUMENT II 7

ARGUMENT III 9

ARGUMENT IV 12

ARGUMENT V 14

CONCLUSION 16

QUESTIONS PRESENTED

1. Whether the PCR court erred in finding trial counsel ineffective for failing to attempt to admit Phillips' testimony as to his opinion of the victims' character and their reputation in the community for violence which was admissible pursuant to Rule 404(a)(2), SCRE?

2. Whether the PCR court erred in finding trial counsel *per se* ineffective due to illness such that prejudice to Phillips was presumed pursuant to United States v. Cronic, 466 U.S. 648 (1984)?

3. Whether the PCR court erred in finding trial counsel ineffective for failing to sufficiently argue Phillips' defenses of self-defense and ABHAN to the jury which was prejudicial to Phillips because both solicitors argued in closing how Phillips was guilty of ABWIK and could not be guilty of ABHAN; if there had been a sufficient defense argument, there was a reasonable probability that the jury would have found Philips guilty of ABHAN or not guilty?

4. Whether the PCR court erred in finding trial counsel ineffective for not objecting to the admission of eight shell casings found at the scene when the state's witnesses testified that Phillips fired three or four times which was prejudicial to Phillips because trial counsel argued to the jury in closing that Phillips fired eight shots?

5. Whether the PCR court erred in finding that Phillips was prejudiced by trial counsel's failure to convey the solicitor's plea offer to ABHAN straight up which would have been a maximum sentence of ten years when Phillips was facing a possible sentence of forty-five years if convicted at trial for two counts of ABWIK?

STATEMENT OF THE CASE

Eric Phillips was indicted on two counts of assault and battery with intent to kill (ABWIK) and one count of possession of a weapon during the commission of a violent crime. On October 16, 2006, he proceeded to trial before the Honorable James C. Williams and a jury. Phillips was represented by the late Gene Dukes, Esquire. The jury returned a verdict of guilty on each charge as indicted. Judge Williams sentenced Phillips to fifteen years on each ABWIK and to five years on the possession of a weapons charge. App. 516; App. 521; App. 526. The sentences were to be served concurrently. Phillips did not file a notice of appeal.

On February 6, 2007, Phillips filed an application for post-conviction relief (PCR). The state filed a return on July 27, 2007. An amended PCR application was filed June 10, 2009. An evidentiary hearing was held on June 10, 2009 before the Honorable Diane S. Goodstein. Judge Goodstein issued an order on January 25, 2010 granting Phillips' PCR application, and ordering a new trial. Judge Goodstein also granted Phillips a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The state filed a notice of appeal on February 22, 2010. Phillips' PCR attorney filed a notice of appeal on February 23, 2010. The state filed a Petition for Writ of Certiorari October 11, 2010. This Return to the State's Petition follows.

ARGUMENT

I.

The PCR court correctly ruled that trial counsel was ineffective for failing to attempt to admit Phillips' testimony as to his opinion of the victims' character and their reputation in the community for violence which was admissible pursuant to Rule 404(a)(2), SCRE.

Eric Phillips was convicted of shooting John Griffin in the side and Griffin's brother, Gerald, in the hand during an altercation at the Waffle House on December 14, 2003. John Griffin and Phillips had words earlier in the evening when both were at a club called the "Farm." The issue concerned the child that Phillips allegedly had with Griffin's sister. App. 211 – 213.

Phillips and his girlfriend, Louvenia Lloyd, left and Phillips took her home. Phillips then went back out to the Waffle House for food where Griffin started the same argument again. Griffin had a group of men with him who all started approaching Phillips while they were still outside. A gun fell from someone else onto the ground in the group, and Phillips grabbed the gun and started shooting into the air to disperse the crowd. One of the shots hit John Griffin in his side, and another bullet hit Gerald Griffin's hand. App. 214 – 226.

Phillips turned himself into the police at the precinct that night. App. 224 – 227.

At his trial, during defense counsel's direct examination of Phillips, Phillips testified that he was scared during the episode at the Waffle House with Griffin's men crowding around him, and when the pistol dropped because he feared they would shoot him. App. 224, ll. 1 – 25. Phillips said that when they were at the Farm, John Griffin threatened to kill him and shoot him. Phillips said he had heard about things "they had did." The solicitor objected and the judge held an *in camera* hearing. App. 225, ll. 1 – 25; App. 226, ll. 1 – 25; App. 227, ll. 1 – 15.

During his proffer, Phillips testified that he had heard that the victims shot up the Villa Apartments during a card game. The judge, after completing some research, overruled the solicitor's objection, but told defense counsel not to go "any further into the matter." App. 229, ll. 1 – 25; App. 230, ll. 1 – 25. Defense counsel elicited only the testimony that Phillips was scared nd believed he was in danger of being harmed. App. 231, ll. 1 – 25.

The state argued in their petition that Phillips' testimony at the PCR hearing was only cumulative to the trial testimony. Petition p. 8. However, Phillips' testimony at the PCR hearing was that he believed John Griffin was a dangerous person as he had a reputation in the community for being a dangerous and aggressive person. App. 408 – 411.

The PCR judge ruled that the proffered testimony may not have been admissible because it concerned specific acts of conduct, but that pursuant to Rule 404(a)(2), SCRE, defense counsel could have proffered opinion or reputation evidence of the victims' character. The judge wrote that testimony that the victims were violent people would have "shifted the scales in Phillips' favor." App.500 – App. 502.

Rule 404(a)(2), SCRE, provides evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except that evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible.

The defendant has the right to attack the reputation of the prosecuting witness for violence, but it cannot be done by showing specific instances of violence. State v. Boyd, 126 S.C. 300, 119 S.E.2d 839 (19230.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The PCR judge wrote:

> At the evidentiary hearing convened in this case, the Applicant testified that his opinion of the victims was that they were dangerous people and that they had a reputation for violence in the community. The Applicant alleged that defense counsel was ineffective for failing to present this testimony at trial. This Court agrees.

App. 501.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

The PCR court correctly held that trial counsel was ineffective for not admitting reputation evidence of the victims during the trial. Phillips' testimony concerning reputation in the community of Griffin's violence was different from Phillips saying he was scared due to threats and the gun.

ARGUMENT

II.

The PCR court was correct in finding trial counsel *per se* ineffective due to illness such that prejudice to Phillips was presumed pursuant to United States v. Cronic, 466 U.S. 648 (1984).

In United States v. Cronic, Id., the United States Supreme Court held that there were three situations where prejudice was appropriately presumed. The first was when the defendant was completely denied counsel at a critical stage. The second occurred if there was a constructive denial of counsel as when a lawyer fails to subject the prosecution's case to meaningful adversarial testing. The third occurred when there were certain instances when even a fully competent lawyer could not provide effective assistance.

The PCR judge ruled that Phillips' trial attorney was ineffective because he failed to subject the prosecutor's case against Phillips to meaningful adversarial testing due to trial counsel's illness. App. 512 – 514.

Phillips and his two witnesses at the PCR hearing who were his mother and his girlfriend, Louvenia Lloyd, testified that trial counsel was ill for a period of time before the trial and during the trial. [1] Trial counsel Dukes asked Phillips to come to counsel's home for their appointments and counsel was usually in bed or on the sofa. App. 388 – 389. Counsel appeared intoxicated one time, and told him to be in court the next day. Phillips arranged to get off from work and went, but no one was there. Phillips testified that trial counsel Dukes denied telling Phillips that. App. 390.

Phillips' testimony was that trial counsel Dukes told him after closing argument when counsel returned to the table that counsel was not able to argue the case like he was supposed to. App. 391, ll. 1 – 25.

---

[1] Trial counsel, Gene Dukes, Esquire, died August 21, 2007 ten months after Phillip' trial. App. 487.

Trial counsel was wearing a catheter under his pants in the courtroom during the trial. App. 392. Trial counsel told the jury in his opening statement that Phillips "came back with his pistol to the Waffle House." Counsel later said that Phillips did not have a gun. App. 40 – 41; App. 394, ll. 1 – 25. Counsel also told the jury in his closing argument that "the pistol had been shot probably eight times." App. 282, ll. 1 – 25. This was bolstering to the state's case as the gun was not found and not submitted for forensic testing. App. 499.

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. Nance v. State, 367 S.C. 547, 626 S.E.2d 878 (2006) citing Herring v. New York, 422 U.S. 853 (1975). In Nance v. State, *supra,* the Supreme Court held that prejudice was presumed from the deficient performance of appointed counsel where counsel failed to provide an adversarial challenge to the state.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

Trial counsel Dukes made no pretrial motions; his only few objections were to leading questions by the solicitor; and he made a directed verdict motion without any argument. He agreed to the admission of all forty-one of the state's exhibits. App. 191, ll. 1 – 25; App. 6, ll. 1 – 25; App. 29, ll. 1 – 25; App. 30, ll. 1 – 25.

ARGUMENT

III.

The PCR court was correct in finding trial counsel ineffective for failing to sufficiently argue Phillips' defenses of self-defense and ABHAN to the jury which was prejudicial to Phillips because both solicitors argued in closing how Phillips was guilty of ABWIK and could not be guilty of ABHAN; if there had been a sufficient defense argument, there was a reasonable probability that the jury would have found Phillips guilty of ABHAN or not guilty.

Trial counsel made one reference to the term "self-defense" at the close of his argument. He simply said that it means that a person has the right to defend himself. Counsel then told the jury that the judge's charge "will go much more into that." Counsel made no reference to the ABHAN. Counsel basically reiterated the testimony and evidence. App. 272 – 283; App. 506 – 508.

The PCR judge found :

> had the jury had the benefit of a well-reasoned defense argument, there is a reasonable likelihood that the jury would have found the Applicant either guilty of ABHAN or not guilty at all.

App. 508.

The right to effective assistance of counsel extends to closing argument. Yarborough v. Gentry, 540 U.S. 1 (2003). The state argued that counsel's closing argument was tactical trial strategy. However, Mr. Duke was not available to explain any trial strategy. There was no evidence that his closing argument was part of a strategy.

Labeling counsel's actions as "trial strategy" does not "automatically immunize an attorney's performance from Sixth Amendment challenges. Stacey v. Solem, 801 F.2d 1048 (U.S. Ct. App. Eighth Circuit 1986).

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. Nance v. State, 367 S.C. 547, 626 S.E.2d 878 (2006) citing Herring v. New York, 422 U.S. 853 (1975). In Nance v. State, *supra,* the Supreme Court held that prejudice was presumed from the deficient performance of appointed counsel where counsel failed to provide an adversarial challenge to the state.

Defense counsel argued in his closing argument that the gun was fired eight times which was detrimental to his client. App. 282, ll. 1 – 25. In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court held that Lounds' own counsel damaged the defense case because counsel's closing argument did not support petitioner's account of what happened; Lounds was granted a new trial.

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 (1984); Butler v. State, 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. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

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).

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

ARGUMENT

IV.

The PCR court was correct in finding trial counsel ineffective for not objecting to the admission of eight shell casings found at the scene when the state's witnesses testified that Phillips fired three or four times which was prejudicial to Phillips because trial counsel argued to the jury in closing that Phillips fired eight shots.

Eight .45 shell casings were found at the scene of the incident at the Waffle House. No gun was ever found. The state admitted all of them through the testimony of Officer John Poole. Defense counsel did not object although no forensic testing was done to confirm the casings were from the same gun. App. 60 - App. 63.

The state said in his opening statement that Phillips shot eight times. Defense counsel did not object. App. 36, ll. 21 – 25; App. 37, ll. 1. The evidence at trial was that Phillips fired the gun three or four times as told by four witnesses: Gerald Griffin, victim and brother of John, App. 101; Cheri Darden, App. 133; Peter Willis, cousin of Phillips, App. 153; and Phillips who said he fired two or three times, App. 219.

Defense counsel argued in his closing argument that the gun was fired eight times which was detrimental to his client. App. 282, ll. 1 – 25. In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court held that Lounds' own counsel damaged the defense case because counsel's closing argument did not support petitioner's account of what happened; Lounds was granted a new trial.

The PCR judge found prejudice to Phillips because the admission of the eight casings hurt Phillips credibility because he testified he fired only two to three times. App. 219. In addition, the eight casings was detrimental to Phillips' self-defense as there was a reasonable probability that the

jury could find that the eight shots were in excess of what was needed for Phillips to defend himself.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of serious bodily harm or he must have believed he was in imminent danger of harm; (3) a reasonably prudent person would have believed he was in imminent danger of harm; (4) the defendant had no other probable means of avoiding the danger. State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) citing State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007).

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

ARGUMENT

V.

<u>The PCR court was correct finding that Phillips was prejudiced by trial counsel's failure to convey the solicitor's plea offer to ABHAN straight up which would have been a maximum sentence of ten years when Phillips was facing a possible sentence of forty-five years if convicted at trial for two counts of ABWIK and possession of a weapon during a crime of violence</u>.

At the PCR hearing, Russell Hilton, who was one of the assistant solicitors who prosecuted Phillips' case, testified that he gave trial counsel a plea offer for Phillips about one month prior to trial for a guilty plea to ABHAN straight up. Phillips was not present when he made the offer. Trial counsel did not accept the offer. App. 441 – App. 442.

Phillips testified at the PCR that trial counsel never told him of any plea offers before trial. App. 396, ll. 1 – 25; App. 397, ll. 1 – 25; App. 398, ll. 1 – 25; App. 399, ll. 1 – 25. During the trial, trial counsel told him the state was offering him twenty years, but he did not say to what charge. Philips said he would not have taken a plea offer to ABWIK, but he would have taken on to ABHAN. App. 400, ll. 1 – 25; App. 426, ll. 1 – 7.

Trial counsel could not be present to testify about the plea offers, and there was no evidence in his file showing that counsel conveyed the offers to Phillips. App. 496.

A defendant must show actual prejudice to satisfy the prejudice prong of the test for ineffective assistance of counsel where defense counsel was deficient for failing to communicate a plea offer to the defendant. <u>Davie v. State,</u> 381 S.C. 601, 675 S.E.2d 416 (2009).

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." <u>Strickland v. Washington</u>, 466 U.S.

668, 104 S. Ct. 2052 (1984); Butler v. State, 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. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

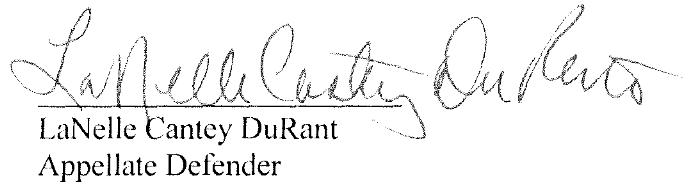
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

CONCLUSION

Based on the above, the order of the PCR court should be affirmed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

This 2nd day of March, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

ERIC D. PHILLIPS,

RESPONDENT/PETITIONER,

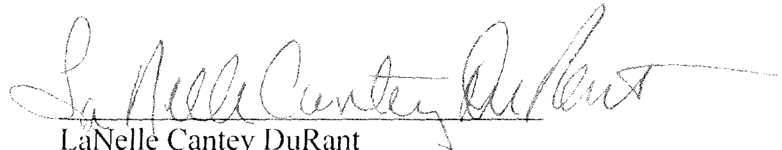
V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

CERTIFICATE OF SERVICE

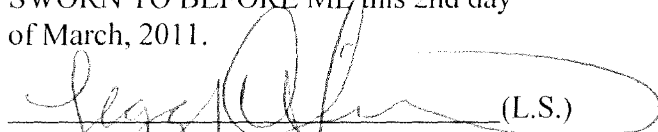
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Mary S. Williams, Esquire, and Eric Phillips, this 2nd day of March, 2011.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

SWORN TO BEFORE ME this 2nd day
of March, 2011.



_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.