STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2016-001667

BERT WAYNE FOSTER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 6

ARGUMENT 8

I. There is probative evidence in the record to support the PCR Court's finding that trial counsel was not ineffective for advising Petitioner not to testify at his trial, where counsel believed it was not in Petitioner's best interest because of his impeachable criminal record, his inconsistent stories, and the low likelihood that the jury would believe him. 8

CONCLUSION 10

RESPONDENT'S QUESTIONS PRESENTED

I. Is there any probative evidence in the record to support the PCR Court's finding that trial counsel was not ineffective in advising Petitioner not to testify at his trial, where counsel believed it was not in Petitioner's best interest because of his impeachable criminal record, his inconsistent stories, and the low likelihood that the jury would believe him?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2010, the Spartanburg County Grand Jury indicted Petitioner for two counts of armed robbery (2010-GS-42-1308, and -1309). Melinda Butler, Esquire, represented Petitioner. On December 15, 2010, Petitioner proceeded to trial before the Honorable Roger L. Couch and a jury.

During trial, two victims testified to the details of the two robberies, respectively. App. pp. 56-60; pp. 72-73. Additionally, Petitioner's accomplices testified about the crimes and identified Petitioner as one of the participants during each of the robberies. App. pp. 88-89; pp. 105-106; pp. 109-110; pp. 122-123; p. 126; p. 142. Petitioner's accomplices estimated the robberies were committed between one and two hours apart. App. p. 126; p. 144. Likewise, based on his investigation, Investigator Foster testified the robberies appeared to have been separated by between one and two hours. App. p. 134. Petitioner's niece, Cassie Cardoza, testified on behalf of Petitioner that he was living with her family and not paying rent. App. 161, l. 25 – 162, l. 14.

The jury found Petitioner guilty as indicted on both charges. Judge Couch sentenced Petitioner to imprisonment for consecutive terms of 12 years for each count of armed robbery. Petitioner filed a timely notice of appeal. Katherine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Foster, Op. No. 2012-UP-485 (S.C. Ct. App. filed August 8, 2012). The Remittitur was returned to the circuit court on August 24, 2012.

Petitioner filed a PCR application on August 6, 2013 (2013-CP-42-3201), alleging he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of trial counsel, in that;
    a. Trial counsel failed to make proper objections,
    b. Trial counsel failed to investigate,

2. Ineffective Assistance of Appellate Counsel, in that;
    a. Appellate counsel failed to raise all meritorious issues on appeal;

3. After discovered evidence, in that;
    a. Witnesses were offered a deal for testimony and lied about it.

Respondent made its Return on August 14, 2014, requesting an evidentiary hearing be held. On November 10, 2015, an evidentiary hearing was convened before the Honorable Larry B. Hyman, Jr. Petitioner was present and represented by Christopher Brough, Esquire. Alicia A. Olive, Esquire of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Petitioner testified that he committed one armed robbery, but not the other. He denied involvement with the robbery of the first victim, Freddie Robinson. He stated that he and his co-defendants went out planning to rob the second victim, Rigoberto Sanchez, and on the way, they saw Robinson and his co-defendants decided to rob him. Petitioner stated that he was not involved because based on Robinson's appearance, he was not worthy of being robbed. However, Petitioner admitted he was in the car when Robinson was robbed. Petitioner testified that he and Counsel did not discuss his niece, Cassie Cordoza, testifying until the day of trial because his sister did not show up. Counsel asked him who could testify about where he lived and he told her that Cordoza could.

Melinda Butler ("Counsel") testified that she was retained in December of 2009 and that she met with Petitioner at least ten times prior to trial and that those meetings were always longer than an hour. She testified she received full discovery and that she went over discovery with him in three separate visits. She stated at the time she represented Petitioner she was able to devote a substantial amount of time to preparing his case. She testified that she discussed with Petitioner

the elements of the offenses and what the State would be required to prove at trial. She discussed with him his version of the facts and the legal concept of "the hand-of-one is the hand-of-all" and the defense of mere presence. She testified she and Petitioner discussed all aspects of the defense, including the identification issues and the fact that Petitioner's co-defendants were getting deals in exchange for their testimony. Counsel requested a mere presence instruction at the trial. Both victims and all of Petitioner's co-defendants testified against him. Trial counsel cross-examined both victims about their inability to positively identify Petitioner as an assailant. Counsel also cross-examined Officer Bobbie Duncan regarding a 9-1-1 call in which victim Sanchez reported he had been robbed by four black males, though Petitioner is a white male. Counsel testified she called Petitioner's niece at trial because Counsel expected his sister to testify, but she did not appear. She testified the State's theory was that Petitioner participated in the robberies because he needed rent money. Counsel testified she needed the niece's testimony to show lack of motive because she could testify that Petitioner was living with them and did not need money for rent.

Petitioner did not deny that he was involved in the robbery of Sanchez. Counsel characterized the State's case against Petitioner as "compelling." She testified it was his decision to go to trial. She testified she thought the most viable defense was mere presence and that the judge did charge the jury on the concept of mere presence. Counsel stated she did not think Petitioner should testify at trial because he had a criminal record that the State intended to impeach him with. She testified she discussed with Petitioner the risks and benefits of testifying, and it was ultimately his decision not to testify.

Judge Hyman denied and dismissed the PCR application by order filed July 22, 2016. Petitioner filed a notice of appeal. His attorney submitted a petition for writ of certiorari and

appendix on March 23, 2017. 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 post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 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, 104 S.Ct. 2052 (1984); Butler, 286 S.C. at 442.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118.

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 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."

Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

ARGUMENT

I. There is probative evidence in the record to support the PCR Court's finding that trial counsel was not ineffective for advising Petitioner not to testify at his trial, where counsel believed it was not in Petitioner's best interest because of his impeachable criminal record, his inconsistent stories, and the low likelihood that the jury would believe him.

This Court should uphold the PCR judge's findings because there is ample, probative evidence in the record to support them. First, Petitioner argues he should have been "allowed" to testify at trial in support of his defense. PWC p. 7. However, Counsel testified during the PCR hearing that she "discussed [her] calling [Petitioner to testify] and after giving [Petitioner] all of the risks and the benefits [of testifying, Petitioner] decided not to testify." App. 247, ll. 17-19. Furthermore, the trial court advised Petitioner of his right to testify and inquired as to whether he wanted to testify. App. 157, l. 17 – 159, l. 22; 159, ll. 23-24; 238, ll. 13-15. After discussion with counsel and questioning by the trial court, Petitioner made the decision not to testify. App. 159, ll. 10-24. At the PCR hearing, when asked whose decision it was not to testify, counsel responded, "[t]hat was Mr. Foster's decision. I can't make that decision for him." App. 248, ll. 23-24. Therefore, Petitioner's assertions that he was prohibited from testifying are meritless, as Petitioner elected not to testify based upon sound advice from counsel not to testify.

Second, the evidence presented at the PCR hearing and gleaned from the record show Counsel's advice not to testify was reasonable in light of the circumstances. Counsel made a motion in limine to determine which, if any, previous convictions could be used against Petitioner if he were to testify. App. 244, ll.11-15. Counsel testified Petitioner had a prior burglary conviction that would be admissible for impeachment purposes if he elected to testify. App. 244, l. 12. In addition to Petitioner's prior record, counsel testified she believed it was not in Petitioner's best interest for Petitioner to take the stand because neither of the victims could

identify him and the three co-defendants that testified against Petitioner were biased by their motive to testify in order to receive reduced sentences. App. 246, ll. 11-14. Counsel also believed the jury would not believe Petitioner's inconsistent stories, since Petitioner admittedly placed himself in the car with the co-defendants and admittedly planned and participated in one robbery, but not the other. App. 247, l. 23 – 248, l. 3. Based on the foregoing, Counsel advised Petitioner it would not be in his best interest to testify based on her judgment and view of the circumstances. This was a valid trial strategy based on the facts and circumstances of Petitioner's case. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))).

Additionally, counsel testified that she called Petitioner's niece, Cassie Cardoza, as a witness to disprove the State's theory that Petitioner's motive to rob was a need for money to pay his rent to co-defendant, Shannon Varner, not to establish an alibi for Petitioner on the night of the robberies. App. 243, l. 15 – 244, l. 8. By calling Cardoza to rebut the State's theory, Counsel did not risk putting Petitioner on the stand to testify. Therefore, the PCR court's finding trial counsel was not deficient for advising Petitioner not to testify is fully supported by the record.

Furthermore, Petitioner failed to establish the requisite prejudice for relief, as his testimony at the PCR hearing as to what his trial testimony would have been would not have any impact on the jury's verdict. Specifically, his anticipated trial testimony would not have likely established a defense or otherwise supported his mere presence defense. Rather, his testimony that he was riding with others to go rob someone, but did not participate in another robbery of

someone else on the way to the planned robbery, is inconsistent and not credible. App. 230, ll. 1-17. Therefore, the PCR court's finding Petitioner failed to establish he was prejudiced by counsel's advice not to testify is fully supported by the record.

Because the record contains probative evidence supporting the PCR judge's finding that counsel's performance was not deficient and that Petitioner failed to show that but for counsel's alleged deficient performance, the result of the proceeding would have been different, certiorari should be denied.

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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By: ____________________
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May 8, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Spartanburg
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001667

BERT WAYNE FOSTER, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies of the Return in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
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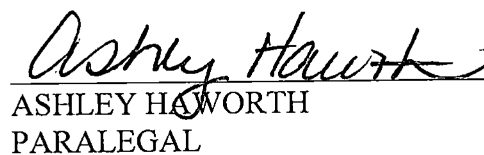
This 8th day of May, 2017



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