

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

2012-CP-43-713
Appellate Case No. 2016-001481

MAURICE ABRAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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PETITIONER'S ISSUES PRESENTED

- I. Did the PCR court err in finding Petitioner's trial counsel visited Mr. Abrams a sufficient number of times prior to trial to prepare the case for trial.**
- II. Did the PCR court err in determining trial counsel's decision to not present an alibi defense was a strategic decision and the alibi witnesses were not credible.**
- III. Did the PCR court err in finding trial counsel did not fail to investigate or call witnesses to discredit the testimony of the alleged co-defendants in the case.**

STATEMENT OF THE CASE

Maurice Abrams (“Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was indicted during the July 2010 term of the Sumter County Grand Jury for murder, armed robbery, first degree burglary, and possession of firearms during commission of violent crimes. (2010-GS-43-0885). The indictments alleged that Petitioner entered the victim’s dwelling without consent in the nighttime with a firearm and feloniously took from the victim cash money and car keys. It further alleged that Petitioner willfully, feloniously, and intentionally killed the victim, Markeith Ford, by shooting him with a firearm while executing this armed robbery, and that Petitioner and his two co-defendants did assemble without authority of law for the premeditated purpose of committing an act of violence against the victim, who died as a result.

Charles Brooks, III, Esquire, represented Petitioner on the charges. Petitioner proceeded to a jury trial before the Honorable Howard P. King. The jury convicted Petitioner of all charges on June 8, 2011. Judge King sentenced Petitioner to life imprisonment for murder, life imprisonment for first degree burglary, thirty years for armed robbery, and 5 years for possession of a weapon during a violent crime; all sentences were to run consecutively.

Petitioner appealed to the South Carolina Court of Appeals. An order of dismissal was issued on March 15, 2012, after Petitioner notified the Court of his desire to withdraw the appeal. The Remittitur was issued on April 24, 2012.

Petitioner subsequently filed an application for post-conviction relief (PCR) on April 17, 2012 (2012-CP-43-713). Respondent filed its Return on November 30, 2012, requesting an evidentiary hearing. Thereafter, Petitioner filed an amended application on September 21, 2013. An evidentiary hearing was held on December 19, 2013, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present at the hearing and represented

by Bradley M. Kirkland, Esquire. Respondent was represented by Assistant Attorney General Mary S. Williams of the South Carolina Attorney General's Office. Testimony was presented from Petitioner, Stephen Witherspoon, Mary Smith, Catherine McFadden, Michael McFadden, and Charles Brooks, III.

Following the hearing, Judge Cothran issued an Order of Dismissal denying and dismissing the application signed on March 31, 2016 and filed on April 7, 2016. Petitioner filed a Notice of Motion and Motion for Amendment and Reconsideration Pursuant to Rules 52(a), 52(b) and 59(e), SCRCP on April 22, 2016. Judge Cothran filed an Order denying the motion for amendment and reconsideration on May 18, 2016.

Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on July 15, 2016. Petitioner's Appendix and Petition for Writ of Certiorari were filed on February 13, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief 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 proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; 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, (1984); Butler, supra.

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, supra. 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 counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry 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.” Cherry at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to visit Petitioner a sufficient number of times to discuss and prepare for his trial.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to visit Petitioner a sufficient number of times prior to his trial. The PCR court correctly relied on probative evidence in making its decision, and this Court should affirm its findings.

Relevant Law

A lawyer has a duty to communicate with his client so as to keep him informed of the status of his case and to explain information to him to allow him to make informed decisions regarding the lawyer's representation. Rule 407, SCACR, RPC 1.4. In order for an applicant to prove ineffective assistance of counsel for his lawyer's failure to communicate with him, the applicant must first show that his attorney did not meet with him a sufficient number of times, and then offer evidence to prove that his deficient performance prejudiced him at trial. Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). The applicant's mere speculation that his attorney's lack of communication will not satisfy his burden of proving prejudice. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (noting mere speculation and conjecture on the part of the applicant is insufficient to substantiate his allegation that counsel's deficient performance was prejudicial). "[E]ven if the meetings were brief, this fact alone is not indicative of inadequate trial preparation." Harris at 75, 659 S.E.2d at 145

Discussion

Petitioner argues Trial Counsel was ineffective for failing to meet with him to consult about his case a sufficient number of times before the trial. However, the PCR court properly

found Petitioner failed to meet his burden of proving both that Trial Counsel was deficient and Petitioner was prejudiced.

First, it is important to note that the PCR court found Trial Counsel's testimony to be credible and Petitioner's testimony to be not credible. App. 786. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the post-conviction relief judge's findings on the credibility of witnesses); Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (noting the heightened emphasis reviewing court's place the upon post-conviction relief court's credibility findings), citing Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (appellate court deference to post-conviction relief court's credibility findings is so great that it required the Court to uphold post-conviction relief court's determination even where testimony at post-conviction relief hearing was unequivocally contradicted by the trial record).

During the evidentiary hearing, Petitioner testified he hired Trial Counsel to represent him in February of 2010, and he met with him for the first time that month at the county jail. App. 556. At that meeting, he said that he discussed a potential alibi defense for the case at hand¹. App. 558-9. Petitioner stated after the February meeting, he did not meet with Trial Counsel again to discuss that specific case until over a year later at his trial on June 6, 2011. App. 563. However, Petitioner stated he met with Trial Counsel multiple times to discuss all his cases, and he met with Trial Counsel's investigator on at least one occasion. App. 570.

¹ Respondent notes that, according to the testimony presented, Trial Counsel represented Petitioner for three separate cases and alleges that he discussed the other two cases with Trial Counsel a sufficient number of times, but he did not meet with him specifically about this case at hand.

Trial Counsel testified at the evidentiary hearing he met with and spoke with Petitioner multiple times before the trial. Trial Counsel testified that he spoke with Petitioner's mother "probably every day or every other day," and everyone once in a while Petitioner would call from the jail, and he went to see him. App. 704. He explained there was a lot of communication involving Petitioner's case between him and Petitioner's mother because she came to his office all the time and called quite a bit. App. 704. He stated he occasionally visited Petitioner at the jail and thoroughly explained the situation with his case to him. App. 705.

The PCR court relied on this testimony in making its ruling, and it held Trial Counsel's testimony on the subject was credible. App. 787. The PCR court cited to Trial Counsel's testimony that he visited Petitioner at the jail and that there was "a lot of communication" with Petitioner's mother as she would call or visit Trial Counsel every day. App. 787. The PCR court noted Petitioner's mother, Catherine McFadden, confirmed in her testimony she was in constant contact with Trial Counsel, and Trial Counsel hired a private investigator to meet with Petitioner and conduct an investigation to Petitioner's witnesses and co-defendants. App. 787-788. The PCR court cited Trial Counsel's testimony that he discussed the various aspects of the case, the strength of the State's case, and potential trial strategy. App. 788. The PCR court then found that Trial Counsel was not deficient because he met with Petitioner and his family members on several occasions prior to trial. App. 788.

The PCR court further found Petitioner "failed to present any credible evidence or argument as to how Trial Counsel's alleged lack of preparation prejudiced him" or changed the outcome of his trial. App. 788. It explained in detail how Trial Counsel effectively cross-examined the State's witnesses and investigated but strategically chose not to call alibi witnesses at trial, so there was no resulting prejudice from any alleged failure to meet with Petitioner.

All of the relevant testimony from the PCR hearing is probative evidence that the PCR court relied on in making its decision to deny post-conviction relief. Furthermore, Petitioner's failure to present any credible evidence to meet his burden of proving that more communication would have changed the outcome of his trial is probative evidence supporting the PCR court's finding that there was no prejudice. Because the PCR court's decision in denying this allegation was supported by the probative evidence above, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

II. Probative evidence supports the PCR court's finding that Trial Counsel strategically chose not to call alibi witnesses at trial and that the potential alibi witnesses were not credible.

Petitioner argues the PCR court erred in determining that Trial Counsel strategically chose not to call alibi witnesses and that the alibi witnesses presented at the evidentiary hearing were not credible. The PCR court correctly relied on probative evidence in making its decision, and this Court should affirm its findings.

Relevant Law

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances,

applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel’s deficient performance constitutes prejudice under Strickland. First, the court must find as a matter of law whether the witness’s testimony meets the legal definition of an alibi. Second, the court must assess the witness’s credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant. Walker v. State, 397 S.C. 226, 238, 723 S.E.2d 610, 616 (Ct. App. 2012).

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland at 688-689. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d

529 (1992).

Discussion

Petitioner argues the PCR court erred in finding Trial Counsel strategically chose not to present alibi witnesses at trial, and in finding the alibi witnesses presented at the evidentiary hearing were not credible. The PCR court relied on probative evidence in making its findings and properly ruled that Trial Counsel was not ineffective.

In its Order of Dismissal, the PCR court cited to Trial Counsel testimony, which it found credible, that alibi was never a possible defense in this case because “there was never a situation of [Petitioner] saying to [Trial Counsel], hey, man, I know for sure I was at such and such place. And A, B, C, and D, know I was there. That never came across in our conversation.” App. 790 (citing App. 709). The PCR court further noted that Trial Counsel hired an investigator to investigate potential alibi witnesses. App. 709. Trial Counsel testified at the evidentiary hearing he and his investigator made a decision that the potential alibi witnesses were not very credible, at least partially because these witnesses were Petitioner’s family members. App. 708-709. The PCR court further relied on Trial Counsel’s testimony that Petitioner never denied being present at the scene of the crime. App. 791.

The PCR court properly relied on this testimony as probative evidence supporting its ruling that Trial Counsel strategically chose not to present these alibi witnesses at trial. In Edwards v. State, this Court held that “[a] witness’s credibility and demeanor is crucial to an attorney’s trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions.” Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011). The evidence presented to the PCR court clearly showed that Trial Counsel used a valid strategy in choosing not to call those witnesses. Where

counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Therefore, the PCR court's ruling was proper and supported by probative evidence.

Secondly, the PCR court's ruling that the alibi witnesses presented by Petitioner at the evidentiary hearing were not credible was properly based on their testimony, which is probative evidence. The PCR court found these witnesses were not credible based on "their demeanor and presentation during the PCR hearing," as well as the fact that both of them are Petitioner's close relatives. App. 792. The PCR court accordingly held neither witness's testimony would have changed the outcome of the trial. App. 792.

This Court has always given great deference to a PCR judge's findings where matters of credibility are involved, because the trial court is in the best position to directly observe the witnesses. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010); Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). "If we find 'any evidence,' we must affirm the ruling of the PCR judge." Glover v. State, 318 S.C. 496, 501, 458 S.E.2d 538, 541 (1995) (citing Grier v. State, 299 S.C. 321, 384 S.E.2d 722 (1989)). "To reverse in this case would be to substitute our judgment of the facts for that of the PCR judge, which would contravene our scope of review in these cases." Grier at 323, 384 S.E.2d at 724. The PCR court's credibility findings were based on the witnesses' testimony as well as the fact that they are Petitioner's close family members. Therefore, this probative evidence supports the ruling, and it must be upheld.

Because the PCR court's decision in denying this allegation was supported by the probative evidence above, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

III. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to call witnesses to discredit Petitioner's codefendants where Trial Counsel impeached and discredited the codefendants' trial testimony through other means.

Petitioner argues Trial Counsel was ineffective for failing to call witnesses to discredit Petitioner's co-defendants at trial. The PCR court relied on probative evidence in making its findings and properly ruled that Trial Counsel was not ineffective.

Relevant Law

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland at 688-689. Recognize, however, that a strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290 (2010).

A decision to attack a witness's credibility through means other than presenting witness testimony can be a valid trial strategy. Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (1998). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Discussion

At the evidentiary hearing, Petitioner presented testimony from witnesses Stephen Witherspoon and Mary Smith to contradict and discredit the written statements used at trial

which were created by Petitioner's co-defendants. Petitioner argues Trial Counsel was ineffective for failing to present these witnesses to discredit the co-defendants' testimony.

The PCR court held otherwise, finding Trial Counsel's strategy was to discredit the co-defendant's testimony through other means. Trial Counsel testified at the evidentiary hearing his strategy was to discredit the co-defendants' testimony:

Question: And that was the big issue. And somehow your goal was going to be to just discredit [the co-defendants] somehow in any way, shape, or form that you could discredit them. Because they seemed to be the linchpin of the case in your opinion?

Answer: That's correct.

App. 718. The PCR court found it was Trial Counsel's trial strategy to impeach and discredit the co-defendants through cross-examination rather than by presenting additional witnesses:

[T]his Court notes Trial Counsel's strategy was to impeach and discredit Applicant's co-defendants through other available means. It is apparent from the record that Trial Counsel was able to successfully discredit both of Applicant's co-defendants, Owens and Lowery. (Tr. p. 251—p. 276; p. 321—p.348). In light of Trial Counsel's thorough cross-examination, this Court finds Witherspoon's testimony would have had little impact on the trial itself.

App. 793. The PCR court further found the testimony from these witnesses would not have changed the outcome of the trial so there was no prejudice, noting Trial Counsel thoroughly cross-examined both co-defendants' and successfully discredited their testimony at trial. App. 792-793.

A brief review of the trial transcript reveals that Trial Counsel thoroughly impeached both Frederick Owens and Tony Lowery at trial. The use of both Witherspoon and Smith as impeachment witnesses during trial would have been cumulative at best. This Court further notes that both Witherspoon and Smith are cousins of Applicant.² (Tr. p. 99 lines 4-8; p. 195 lines 21-22). Regardless, neither Witherspoon nor Smith's testimony would have had any meaningful

² Trial Counsel opined that close family members do not make credible witnesses.

impact on Applicant's trial as Trial Counsel thoroughly and systematically impeached both Tony Lowery and Frederick Owens during his cross-examination.

App. 789. This finding was directly based upon cross-examination in the trial transcript, part of the record before the court, which is probative evidence. App. 270-295; App. 340-367. This evidence supported the PCR court's finding that neither witnesses' testimony would have changed the outcome of the trial, so Petitioner could show no prejudice. App. 793.

Because the PCR court's decision in denying this allegation was supported by the probative evidence above, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. 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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S.C. SUPREME COURT

MAURICE ABRAMS, #346362

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Respondent.


PROOF OF SERVICE

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

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

This 16th day of June 2017.



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