STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Anderson County
Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2016-001356

JAMARIO QUINTON JONES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTION PRESENTED

I. Is there probative evidence in the record to support the PCR court's finding Counsel was not ineffective for telling the jury during closing argument that Petitioner was a convicted felon when Counsel articulated a reasonable trial strategy for doing so, and Petitioner has failed to show any prejudice resulted from Counsel's statement?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Petitioner was indicted at the July 2011 term of the Court of General Sessions for Anderson County for armed robbery (2011-GS-04-1210), burglary – first degree (2011-GS-04-1211), and possession of a weapon during a violent crime (2011-GS-04-1212). Petitioner was represented by Donald L. Smith, Esquire ("Counsel"). Petitioner proceeded to trial before the Honorable R. Lawton McIntosh and a jury on February 15, 2012, and was convicted as indicted. Judge McIntosh sentenced Petitioner to concurrent terms of twenty years each for armed robbery and burglary plus a consecutive sentence of five years for the weapons.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Carmen Ganjehsani, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Jones, No. 2014-UP-040 (filed January 29, 2014). The remittitur was issued on March 4, 2014.

Petitioner then filed a post-conviction relief ("PCR") application on August 13, 2014. An evidentiary hearing into the matter was convened on February 9, 2016, at the Anderson County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present at the hearing and was represented by Hugh W. Welborn, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Petitioner and Counsel both testified, and Judge Goldsmith ultimately denied Petitioner's application by order filed June 15, 2016. Petitioner filed a timely notice of appeal on June 20, 2016, and a Petition for Writ of Certiorari on March 23, 2017. This Return follows.

STATEMENT OF THE FACTS

On April 15, 2011, Petitioner knocked on the door of an apartment in Belton, South Carolina, occupied by Ronnie Bentley, Darcel Taylor, and Darcel's two young children. App. 200-02. When Ronnie opened the door, Petitioner asked for a man he knew did not live in that apartment as a method of scoping out the situation inside. App. 202. A few minutes later, Petitioner knocked again, and this time when Ronnie answered, he pointed a .380 handgun in her face and forced his way inside. App. 203. While Petitioner forced Ronnie into the kitchen at gun point, his codefendant entered the apartment and began kicking Darcel while she was holding her one-year-old child. App. 151-53. Eventually, Petitioner and his codefendant took approximately $350 in cash and fled the apartment. App. 210. Petitioner was seen by several witnesses running from the area with a .380 handgun in his hand. App. 83, 100-01. Petitioner eventually obtained a ride to a friend's house, where he stored the gun and admitted he had robbed someone before being arrested shortly thereafter. App. 107-10. Petitioner then gave a statement to law enforcement in which he denied any knowledge of or participation in the robbery, but admitted he was in his car in the vicinity and picked up his codefendant on the street outside the apartment complex shortly after these events took place. App. 253-54.

STANDARD OF REVIEW

The PCR 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 in a PCR action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the PCR court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

ARGUMENT

I. There is probative evidence in the record to support the PCR Court's finding Counsel was not ineffective for telling the jury during closing argument that Petitioner was a convicted felon and was carrying a gun when Counsel articulated a reasonable trial strategy for doing so, and Petitioner has failed to show any prejudice resulted from Counsel's statement.

Petitioner contends the PCR court erred in finding Counsel was not ineffective for telling the jury during his closing argument that Petitioner was a convicted felon who was carrying a gun. PWC, p. 3. However, Counsel articulated a reasonable strategy for making this argument, which was that he needed a way to explain why Petitioner was seen running from police with a gun in his hand. Therefore, the PCR court correctly found Counsel's performance was not deficient. App. 495.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "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) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

During the trial, several witnesses testified they saw a black male matching Petitioner's description running away from the apartment complex. App. 82-85, 99-101. One of those witnesses further testified he saw Petitioner drop a gun matching the description of the handgun used in the robbery on the sidewalk no more than four feet in front of the witness. App. 82-84. Another witness testified Petitioner showed up at his house around the time of the robbery and asked him to hide a gun in the kitchen. App. 107. Additionally, Petitioner's own statement to police indicated he was running away from the apartment complex with his codefendant. App. 312-13. During closing arguments, Counsel acknowledged Petitioner had a gun and told the jury he was a felon, which is why he was running away from the area that day. App. 416, 418.

During the PCR hearing, Counsel testified he remembered making comments to the jury as to Petitioner's status as a felon, and he explained his strategy was to try to give the jury an alternative explanation for why Petitioner would run from police. App. 486. He explained Petitioner was "seen with a gun running away" from the apartments. App. 486. He then explained the reasoning for why he put before the jury that Petitioner was a felon:

> The reason I did what I did is because . . . the jury needed to know why he would run, because he had a gun, because other than that it looks like he's in an armed robbery. So I said to myself. . . you need to show the jury he had a reason to run. . . because of a felon having a gun. . . . [T]his had nothing to do with a robbery; he wasn't using it for a violent act. So I wanted them to understand that. Because having a gun for a felon is. . . slightly better than armed robbery.

App. 486-87. The PCR court found Counsel's comment was not deficient performance because Counsel, for strategic reasons, need to explain why Petitioner would be fleeing the scene if he hadn't committed the robbery. App. 487-88, 495.

Furthermore, Petitioner cannot have been prejudiced[1] by such a comment because the jury was already aware Petitioner had a previous arrest record, and Petitioner has not alleged Counsel erred in introducing that evidence. App. 347-48, 445-56. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Petitioner is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

One of the victims in the case testified she first met Petitioner two days before the armed robbery at her cousin's house, and Petitioner showed up at her apartment around noon the next day looking for her cousin. App. 198-99. However, Counsel impeached that testimony by introducing evidence showing Petitioner was in jail until around 4:00 pm the day before the robbery, and therefore, the victim's account was incorrect. App. 349-50. Given that the jury was already aware Petitioner had a previous criminal history, Counsel's strategy in

[1] The Order of Dismissal makes no finding as to prejudice, stating only that Petitioner "failed to meet his burden, as [C]ounsel acted pursuant to a valid trial strategy." App. 495. Because Petitioner did not file a motion to alter or amend pursuant to Rule 50(e), SCRCP, the issue of prejudice is not preserved. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review. . . .").

acknowledging he was a felon illegally in possession of a firearm is not unreasonable, and Petitioner was not prejudiced by any alleged deficiency caused by Counsel's closing argument.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). 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. Id. "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).

Because Counsel articulated a valid strategy for informing the jury that Petitioner was a felon, the PCR court correctly found his performance was not deficient. Additionally, because the jury was already aware Petitioner had a criminal history, and Petitioner has not challenged Counsel's introduction of that evidence, Petitioner cannot be prejudiced by any deficiency in Counsel's closing argument. Therefore, this Petition should be denied.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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8/7, 2017

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JAMARIO Q. JONES, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT,

CERTIFICATE OF SERVICE

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

Robert M. Pachak, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
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This 7th day of August, 2017

DEONNA ROGERS
LEGAL ASSISTANT