STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County
Court of Common Pleas
The Honorable R. Markley Dennis Jr., Circuit Court Judge

Appellate Case No. 2017-000826

DAVID ALLEN GOINS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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INDEX

STATEMENT OF ISSUE ON CERTIORARI 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 4

ARGUMENT 6

I. There is no evidence of probative value to support the PCR court's finding counsel was ineffective for failing to introduce evidence of the victim's reputation for violence. 6

II. There is no evidence of probative value to support the PCR court's finding counsel was ineffective for failing to investigate, identify or call a favorable witness Goins. 8

III. There is no evidence of probative value to support the PCR court's finding counsel was ineffective for failing to request a charge of voluntary manslaughter. 9

CONCLUSION 11

STATEMENT OF ISSUE ON CERTIORARI

I. Is there evidence of probative value to support the PCR court's finding counsel was ineffective for failing to introduce evidence of the victim's reputation for violence?

II. Is there evidence of probative value to support the PCR court's finding counsel was ineffective for failing to investigate, identify or call a favorable witness Goins?

III. Is there evidence of probative value to support the PCR court's finding counsel was ineffective for failing to request a charge of voluntary manslaughter?

STATEMENT OF THE CASE

Procedural History

Respondent David Allen Goins (Goins) is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Fairfield County Clerk of Court. During the July 2005 term, the Fairfield County Grand Jury indicted Goins for assault and battery with intent to kill (2005-GS-20-0347) and murder (2005-GS-20-0348). Michael Hemlepp, Esquire represented Goins. On January 4-7, 2010, Goins proceeded to trial before the Honorable Clifton Newman and a jury. The jury convicted Goins of murder and acquitted him of assault and battery with intent to kill. Judge Newman sentenced Goins to thirty-five years imprisonment.

Goins filed a timely notice of appeal and an appeal was perfected on Goins behalf by Tristan M. Shaffer, Esquire. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals dismissed the appeal. State v. Goins, Op. No. 2012-UP-331 (filed May 30, 2012). The Remittitur was issued on June 15, 2012.

Thereafter, on September 10, 2012, Goins filed a timely application for post- conviction relief (PCR). Respondent made its return on June 25, 2013 requesting an evidentiary hearing be held. An evidentiary hearing was held on June 12, 2016 at the Lancaster County Courthouse before the Honorable R. Markley Dennis Jr. Edward W. Miller. Goins was present and represented by Ernest M. Spong III, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Goins testified on his own behalf at the PCR hearing. Also testifying were: Fleming Anderson and Goins' trial counsel, Michael Hemlepp, Esquire. Following the evidentiary hearing, Judge Dennis granted Goins' application by written order filed December 19, 2016.

Respondent subsequently filed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRCP, dated December 29, 2016. In a written order filed February 16, 2017, Judge Dennis denied the Respondent's Motion to Alter or Amend.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari and appendix 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 decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or

omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

In his application for post-conviction relief, Goins alleged his trial counsel was ineffective for failing to take reasonable steps to investigate all avenues of defense and for failing to make timely objections while asserting a proper defense. In granting Goins' application for post-conviction relief, the PCR judge found Goins had met his burden of proof and he was deprived of constitutionally effective assistance of counsel. Furthermore, in granting Goins' application for post-conviction relief, the PCR judge concluded that trial counsel was ineffective for: (1) failing to introduce evidence of the victims' reputation for violence; (2) failing to investigate, identify, or call to testify Mr. Fleming Anderson as a witness favorable to the Goins; and (3) failing to request a charge of voluntary manslaughter and to consult with his client on significant trial strategy. Here, the PCR court improperly granted Goins's application for post-conviction relief as there was no evidence of probative value to support the court's findings on any of the three issues.

I. There is no evidence of probative value to support the PCR court's finding counsel was ineffective for failing to introduce evidence of the victim's reputation for violence.

In finding that trial counsel was ineffective for failing to introduce evidence of the victim's reputation for violence, the PCR court found there was ample opportunity to get into evidence the violent reputation of both victims and that the failure to do so could have had a significant impact on the outcome of the trial. (App.II.p.718). This finding is without any evidence of probative value. Trial counsel decision not to introduce evidence regarding the victim's reputation for violence was made pursuant to a valid trial strategy. During the evidentiary hearing, trial counsel testified:

> "when you are defending a criminal case . . . when the defendant gives a statement that statement is evidence and you . . . build your defense along that statement. The statement was not that [the Goins] was afraid of the victim, in fact, that he had been with the victim before it happened, but rather that the victim pulled a gun on him and expressly threatened him, and that he had actual fear based upon a weapon and a threat." (App.II.p.672)

Here, trial counsel articulated his trial strategy was built around a statement that Goins had given to the police after being arrested which indicated that Goins was not afraid of the victim. 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). "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, 417 S.E.2d 529, 531 (1992).

Additionally and more importantly, Goins did not present any admissible evidence regarding the victim's reputation for violence at the evidentiary hearing. At the hearing, Goins did not testify that the victim had a reputation for violence. Mr. Fleming Anderson, who testified at the evidentiary hearing for Goins, simply testified on questioning prompted by the court, that the victim was a "bad person in the community." (App.II.p.702.ll.5-8). Furthermore, trial counsel testified at the evidentiary hearing that he was formerly a prosecutor and he had prosecuted both victims before and they had a terrible criminal reputation in the community. (App.p.670-671). To the extent the PCR court relied on trial counsel's testimony in ruling, trial counsel would not have been able to testify at trial. Moreover, to the extent the PCR court relied on the video of Goins' statement to law enforcement it did so in error, where it is apparent from the record that counsel was acting pursuant to a valid trial strategy and also Goins did not present the video at

the evidentiary hearing, therefore failing to meet his burden to prove prejudice. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Accordingly, there is no evidence of probative value to support the PCR court's ruling.

II. There is no evidence of probative value to support the PCR court's finding counsel was ineffective for failing to investigate, identify or call a favorable witness to the Goins.

In finding that trial counsel was ineffective for failing to investigate, identify, or call to testify Mr. Fleming Anderson as a witness favorable to the Goins, the PCR court found Mr. Anderson's testimony would have directly contradicted the State's case in several significant particulars. The court found he was prepared to contradict the State's theory on issues concerning Goins' possession of the gun and would testified he was with Goins the day of the incident and was certain that Goins did not have a gun in his possession when they arrived at the victims' residence. The PCR court also found he would have disputed the State's theory of motivation, that they were at Michael Robertson's residence not to seek revenge but by an invitation from the Robertson's cousin and to "drink some beers". The PCR court also found he would have testified that Michael Robertson started the argument and was the aggressor. Finally, the court found Mr. Anderson, though a friend of Goins, in the Court's view could have had a substantial impact on the outcome of a trial that depended heavily on the credibility of the witnesses (App.II.p.718). However, the court erred in this ruling because Mr. Anderson's testimony would have simply been cumulative and was practically identical to the other witnesses that testified at trial.

At trial, Christopher Kauffin, Goins' brother testified that he was with Goins that day. Additionally, Kauffin testified that Goins did not have a gun with him nor did he have any bullets. Furthermore, Kauffin testified that he and Goins went over to the victim's house because of a party and that the victim became upset with Goins and pointed a gun at him. (App.p.431-

447). Moreover, when Kauffin was asked on cross-examination if Mr. Anderson was even there at the time of the crime, he testified that Mr. Fleming Anderson was not even there. (App.p.453.ll.2-7). Goins also testified in his own defense and his testimony was practically identical to his brother's testimony. (App.I.p.479-App.II.p.515). Here trial counsel called several witnesses who said the same thing that the witness at the PCR hearing said. "We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011). Accordingly, there is no evidence of probative value to support the PCR court's ruling.

III. There is no evidence of probative value to support the PCR court's finding counsel was ineffective for failing to request a charge of voluntary manslaughter.

In finding that trial counsel was ineffective for failing to request a charge of voluntary manslaughter and to consult with his client on significant trial strategy, the PCR court found that a manslaughter charge was appropriate and if requested likely would have been given. (App.II.p.719). Additionally, the court found that even if the decision to not seek a voluntary manslaughter charge was an acceptable trial strategy to maximize Goins' self-defense claims, this court finds that Counsel had a duty to discuss this decision with the Goins and that he did not. (App.II.p.719).

Here, trial counsel testified that this was a tactical decision, and had valid strategic reasons for choosing not to request a voluntary manslaughter charge. Trial counsel testified at the evidentiary hearing, "Goins was consistent from the very beginning of this case, from the first statement that he gave he was consistent on the video statement that he gave, he was consistent on his testimony that he was acting in self-defense, and self-defense is an absolute bar to being

criminally liable if we can establish that. If the State cannot disprove self-defense then he is not guilty. I felt like at the time of the trial that the State's lay witnesses were not strong, and frankly, to be honest, I believed my client. I think he did act in self-defense and I think he did – I think it went down exactly the way he described." (App.II.p.681). A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not 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. Wood v. Allen, 558 U.S. 290 (2010). 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 v. Washington, 466 U.S. 668, 688-689 (1984). "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).

Additionally, trial counsel testified that he did not remember if he discussed the charges with Goins and never said he definitely did not discuss the charges. (App.II.p.682). Accordingly, there is no evidence of probative value to support the PCR court's ruling.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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August 7, 2017

STATE OF SOUTH CAROLINA
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David Allen Goins, ... Respondent,

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CERTIFICATE OF SERVICE

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

Susan B. Hackett, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 7th day of August, 2017.

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