STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-001851

WILLIAM ANTHONY BUTTS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT'S QUESTIONS PRESENTED

I. Is there evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to cross examine witnesses in regard to the height of the robbers ?

II. Is there evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to cross examine witnesses in regard to the height of the robbers?

STATEMENT OF THE CASE

Procedural History

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court of Greenville County. During its July 2011 term, the Greenville County Grand Jury indicted Petitioner for three counts of armed robbery (2011-GS-23-5149, count 1; -5150, count 1; -5151, count 1) and three counts of possession of a weapon during commission of a violent crime (2011-GS-23-5149, count 2; -5150, count 2; -5151, count 2). Scott D. Robinson, Esquire represented Petitioner. On October 17, 2011, Petitioner proceeded to trial before the Honorable Robin B. Stilwell and a jury. The jury convicted Petitioner of all charges. Judge Stilwell sentenced Petitioner to concurrent terms of twenty years on each count of armed robbery and five years on each count of possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Frank L. Eppes, Esquire, perfected the appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Butts, Op. No. 2014-UP-141 (S.C. Ct. App. filed April 2, 2014). The remittitur was sent on April 18, 2014.

On February 10, 2015, Petitioner filed an application for post-conviction relief. Respondent made its return on July 17, 2015, requesting an evidentiary hearing be convened. On August 12, 2015, Petitioner filed an amended application for post-conviction relief. On August 25, 2015, Respondent filed an amended return. An evidentiary hearing was held on April 19, 2016, at the Greenville County Courthouse before the Honorable R. Knox. McMahon. Petitioner was present at the hearing and was represented by Peter S. Smith, Esquire, appearing *pro hac vice*, and Frank L. Eppes, Esquire. Respondent was represented by Patrick Schmeckpeper,

Esquire, of the South Carolina Attorney General's Office. Petitioner testified at the hearing. Additionally, Trial counsel Scott D. Robinson, Esquire, David Weiner a detective from Petitioner's case and Jeff Spivack, an expert in the field of photogrammetry also testified. Thereafter, Judge McMahon denied Petitioner's PCR application by written order filed August 9, 2016.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari and Appendix. This Return to Petition for Writ of Certiorari follows.

Factual History

Petitioner robbed the same Citgo gas station on Woodruff Road in Greenville three times in 2009.

On October 18, 2009, a few minutes before the first robbery, Petitioner's ex-girlfriend, Sarah McCroskey, dropped Petitioner off at the Rite Aid parking lot, which was near the Citgo gas station. (App.p.188). Petitioner was wearing a t-shirt and black sweatpants. (App.p.189). McCroskey testified that Petitioner had some other stuff in his hand "like a hoodie or something[.]" (App.p.189). Petitioner carried his gun in the waist of his pants. (App.p.193). Shortly thereafter, Petitioner robbed the gas station for the first time. (App.p.94; App.p.95; App.p.98). William Flynn, a Citgo employee, was working on the night of the October 18th robbery. He testified that the robber wore a homemade mask, a white hoodie, black pants, tennis shoes, and gloves. (App.p.115). Furthermore, Flynn testified the robber carried a black gun with a silver stripe. Flynn stated that State's Exhibit 14[1], which was the mask the police recovered from a van that Petitioner would drive on occasion, was similar to the mask the robber wore on

[1] McCroskey found a homemade mask underneath her mattress sometime after the robberies; however, she threw the mattress away. (App.p.194-195). Around August 2011, McCroskey's grandmother found a mask with eye slots cut of it in her van underneath one of the seats. She gave the mask to the investigations, which is State's Exhibit 14. (App.p. 231-234).

the night of the October 18th robbery. (App.p.116-117; App.p.194). Moreover, Flynn testified that State's Exhibit 12, which was Petitioner's gun, was similar to the gun the robber used on the October 18th robbery. (App.p.118).

On October 30, 2009, Petitioner robbed the gas station for the second time. (App.p.130-131). Victor Campbell, a Citgo employee, testified that the robber was a black male, who wore a mask, hoodie, and gloves. Furthermore, Campbell testified that the mask found at Petitioner's girlfriend's house was similar to the mask the robber wore during the October 30th robbery. (App.p.132-133). In addition to stealing money, Petitioner also stole cigars from the gas station. (App. p.132).

On November 5, 2009, Petitioner robbed the gas station for the third time. (App.p.120; App. p.126). Flynn, the same employee working during the October 18th robbery, was working during the November 5th robbery. The robber wore a mask, blue jeans, a black shirt over his hoodie, and gloves. (App.p.123). Moreover, the gun looked like the same gun the robber used in the first robbery. (App.p.123-124). Flynn believed the robber was the same person that robbed him on October 18th. (App.p.124-125).

At trial, the State introduced videos of each robbery. McCroskey testified that the robber in each video had a similar voice, mannerisms, and clothing as Petitioner. (App.p.196-201). In November 2009, Petitioner called McCroskey and asked her to take his gun that was under McCroskey's mattress and give it to his cousin. (App.p.201-202). Furthermore, McCroskey's grandmother, Mary Katherine Spaulding, testified that Petitioner had a similar, voice, mannerisms, and clothing as the robber each of the videos. (App.p.246-248).

During Petitioner's cross-examination of David Weiner, a sergeant at the Greenville County Sherriff's Office, Petitioner asked Weiner if the gun belonging to Petitioner was

connected to the robberies. (App.p.301). In response, Weiner stated that he believed the gun used in the robberies was the same gun as Petitioner's gun because it had distinguishing characteristics. (App.p.301). In particular, Petitioner's gun was made by a company named Hi-Point and was black with a gray stripe down the side, just like the gun used in the robberies. (App. p.301).

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

I. There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to cross examine witnesses in regard to the height of the robbers

Petitioner asserts the PCR judge erred in refusing to find trial counsel ineffective for failing to cross-examine witnesses in regard to the height of the robbers when the witnesses described the robbers as shorter than Petitioner. This argument is without merit.

At the evidentiary hearing, Petitioner made a number of allegations focusing on trial counsel's failure to introduce evidence and call witnesses to prove his height was not the same as that of the assailant in the three armed robberies. More specifically, Petitioner alleged trial counsel did not properly cross-examine witnesses. Initially, the PCR court found Petitioner's general allegation trial counsel was ineffective for failing to present evidence with respect to height was without merit. The PCR court noted counsel's credible testimony and the record, ultimately finding trial counsel focused on what he believed to be more fruitful issues pursuant to a valid trial strategy. See Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). The PCR court also noted trial counsel testified his theory of the case was that there was no physical evidence of Petitioner's involvement in the robberies, and the clerks did not identify him as the assailant. At trial, trial counsel argued none of the State's physical evidence was unique to Petitioner. Further, trial counsel testified rather than focus on height in cross-examining several of the State's witnesses, he wanted to highlight coercion. The PCR court found trial counsel vigorously attacked the credibility of the only witnesses who were able to identify Petitioner. Moreover, PCR court found trial counsel's focus was objectively reasonable given the circumstances of the case. The PCR court noted trial

counsel's testimony and the record reflected trial counsel also explored the issue of identity as a general matter, including height. The PCR court found trial counsel elicited testimony and argued the descriptions given by the victims and as seen on the videos were inconsistent with Petitioner's physical characteristics. Furthermore, the PCR court found the jury heard testimony that the assailant was "between five eight and six foot," and Petitioner was "six-one." The PCR court noted trial counsel further instructed the jury to "go back and look at it and see how tall this guy is" during their deliberations asking that the jurors "[l]ook at the difference in height between [Petitioner] and the six-one that they talked about and this alleged robber.". The PCR court concluded because these issues were before the jury and they still found Petitioner guilty, Petitioner has failed to show prejudice.

It is clear from the PCR record there is evidence of probative value to support the PCR court's finding that trial counsel did not render Petitioner ineffective assistance of counsel. As discussed above, trial counsel testified his theory of the case was there was no physical evidence which tied the Petitioner to the robberies. Additionally, the PCR court noted trial counsel focused on the victims' inability to identify Petitioner. The PCR court found trial counsel was able to do this by eliciting testimony from one of the victims on cross-examination, that the assailants could have been a former employee of the gas station based on his knowledge of the "drop" system, in which clerks deposit excess money from the cash registers into the safe at various intervals. Moreover, trial counsel testified he wanted to focus on coercion rather than height in cross-examining several of the State's witnesses. The PCR court noted trial counsel accomplished this by attacking the creditability of Petitioner's ex-girlfriend and her mother, the only witnesses who were able to identify him.

Petitioner argues trial counsel was deficient because he failed to properly cross-examine the State's witnesses about the height of the robbers. As Petitioner has noted, the two victims from the robberies testified during trial. However, trial counsel never asked either victim about the height of the robber. Right after a short break after the testimony of the last victim of the robbery, trial counsel told the court he wanted to recall the victims as they mentioned height descriptions in their testimony. Trial counsel noted he wanted to have his client stand up to show how tall he was. Trial counsel testified he ultimately did not recall the victims as he did not want to lose last argument. In finding trial counsel was not ineffective for failure to request Petitioner stand, the PCR court made the following finding:

> It appears that the jury saw Petitioner standing at least twice. At the evidentiary hearing, Counsel testified that he thought he remembered Petitioner standing up at some point before the jury was sworn. The record also reflects counsel asked Petitioner to stand during closing argument. Regardless, as discussed previously, the jury heard testimony as to the issue of height and still found Petitioner guilty.

While Petitioner argues that trial counsel was deficient for failing to cross-examine the State's witness about Petitioner's height, Petitioner cannot prove this was the dispositive issue in the jury finding him guilty. ("The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense attorney.... Absent a showing of a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial, a[n] [applicant] is unable to show prejudice necessary to satisfy the second prong of Strickland.") Fugate v. Head, 261 F.3d 1206, 1219 (11th Cir. 2001). The United States Supreme Court has also recognized,

> Strickland does not guarantee perfect representation, only a reasonably competent attorney. Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a

> reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. Harrington v. Richter, 562 U.S. 86, 110. (2011)

Furthermore, even Petitioner can show deficiency, Petitioner did not suffer any prejudice. In this case while trial counsel may have missed the opportunity to ask the victims about the height of the robber the PCR court found the jury heard testimony that the assailant was "between five eight and six foot," and Petitioner was "six-one.". Because of this, Petitioner suffered no prejudice. Accordingly, there is evidence of probative value to support the PCR court's ruling.

II. There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing trial counsel was ineffective for failing to call an expert witness.

Petitioner also asserts the PCR judge erred in refusing to find trial counsel ineffective for failing to call an expert witness to testify that the robbers depicted in the video tapes were shorter than Petitioner. This argument is also without merit.

The PCR court found that trial counsel was not deficient for failing to call an expert witness. (App.p.547). At the evidentiary hearing Petitioner's expert Mr. Spivack testified he was able to determine an object's real world "apparent height" – the straight line distance between its highest and lowest points – from a photograph or video still to a reasonable degree of certainty.[2] He found Petitioner's apparent height in the control video to be approximately six feet, three inches tall. He determined the assailant's apparent height in the armed robbery stills to be between five feet, eight inches, and five feet, nine inches. As a result, Mr. Spivack testified that did not believe Applicant was the assailant in the armed robberies.

[2] The actual analysis apparently involves "flattening out" three dimensional objects in a photo or video still frame, and thereby determining their actual size by referencing other "known" objects within that same photo or still frame. Mr. Spivack testified that he went to the scene of the robberies to take measurements of several "control" items from the video, and by comparison determined the height of the person in each of the video stills presented at the evidentiary hearing.

The PCR court found trial counsel gave a number of objectively reasonable justifications for deciding not to use an expert. (App.p547). The PCR court noted trial counsel testified he did not know how a jury would interpret an expert's findings on the issue. Trial counsel testified expert testimony sometimes does not stand up well on cross-examination, and that an expert could have ultimately ended up giving a different opinion on the witness stand. He said he did not think the science behind photogrammetry was perfect, and that he did not believe the jury would have been convinced. Because of this, the PCR court found Petitioner had failed to meet his burden to show deficient performance. Additionally, the PCR court found Petitioner had failed to show prejudice. The PCR court initial found the report and opinion rendered by Petitioner's expert at the evidentiary hearing did not rule out the Petitioner as the assailant in each of the videos of the robberies. (App.p.548). Moreover, the PCR court found the expert's findings to not be sufficiently clear or concrete to support his conclusion for the purposes of the hearing.

In this case, trial counsel articulated valid reasoning for not calling an expert witness noting he did not think the science behind photogrammetry was perfect, and that he did not believe the jury would have been convinced. Trial counsel explained expert testimony sometimes does not stand up well on cross-examination, and an expert could have ultimately ended up giving a different opinion on the witness stand. The United States Supreme Court held in Richter,

> Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, Strickland 466 at 689. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. *Ibid.* It can be assumed that in some cases counsel would be deemed ineffective for failing to

> consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it. Here it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts regarding the pool in the doorway to Johnson's bedroom. Harrington v. Richter, 562 U.S. 86, 106-107. (2011).

Here, trial counsel gave a valid reason why he did not call an expert to testimony. Additionally, the PCR court found counsel raised the issues of misidentification and height at trial. The jury heard testimony the assailant was "between five eight and six foot," and that Petitioner was "six-one." The PCR court found clearly the jury dispensed with the height issue in a way that was not favorable to Petitioner. The PCR court found Petitioner's expert analysis failed to clarify the issue beyond what was already presented at trial, and was too tenuous to throw the outcome of the proceeding into question. The jury clearly believed the identifications made by Ms. McCroskey and her mother despite the credibility issues counsel raised. Petitioner is not entitled to a new trial for the sole purpose of presenting a "fancier" case. Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). Accordingly, there is evidence of probative value to support the PCR court's ruling.

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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October 16, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-001851

William Anthony Butts, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Kathrine H. Hudgins, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 16th day of October, 2017.

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October 16, 2017

RECEIVED
OCT 16 2017
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **William Anthony Butts v. State of South Carolina**
Appellate Case No. 2016-001851
Lower Court Case No. 2015-CP-23-1027

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc
Enclosures

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)