

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable John C. Hayes III, Circuit Court Judge

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Appellate Case No. 2017-000268

S.C. SUPREME COURT

TRICO LADSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 investigate the facts and circumstances surrounding the attempted robbery?

- II. Is there evidence of probative value in the record to support the PCR judge's finding Petitioner's trial counsel was not ineffective during the guilt or innocence phase as his performance was reasonable and not prejudicial?

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 May 2015 term, the Greenville County Grand Jury indicted Petitioner for one count of Criminal Conspiracy nonviolent (2015-GS-23-3556), one count of Attempted Armed Robbery (2015-GS-23-3557), one count of Attempted Murder (2015-GS-23-3555). Kenneth C. Gibson, Esquire, represented Petitioner. On November 4, 2015, Petitioner proceeded to trial before the Honorable R. Scott Sprouse and a jury. The jury convicted Petitioner of conspiracy and attempted robbery and acquitted him of attempted murder. Judge Sprouse sentenced Petitioner to five years for conspiracy, and ten years for attempted robbery concurrent. Petitioner did not appeal his convictions or sentence.

On March 28, 2016, Petitioner filed an application for post-conviction relief. Additionally, Petitioner filed an Amended Application on May 31, 2016. Respondent made its return on September 6, 2016, requesting an evidentiary hearing be convened. An evidentiary hearing was held on December 9, 2016, at the Greenville Courthouse before the Honorable John C. Hayes III. Petitioner was present at the hearing and was represented by William G. Yarborough III, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Petitioner testified at the hearing. Additionally, trial counsel Kenneth C. Gibson, Esquire, and Jamie Childress, the jury foreman testified. Petitioner's father Larry Ladson and his uncle Michael Ladson also testified. Thereafter, Judge Hayes denied Petitioner's PCR application by written order filed October 21, 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

On December 3, 2013, Petitioner and an unidentified masked person attempted to rob Leroy Thomas in front of Petitioner's home. Mr. Thomas alleged Petitioner aided the unidentified person in the robbery. During the incident the unidentified person shot at Mr. Thomas with a handgun, striking his vehicle. As Mr. Thomas tried to escape, Petitioner started to grab and fight him against his will to prevent his escape while continuing to demand money.

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 investigate the facts and circumstances surrounding the attempted robbery

Petitioner alleges the PCR judge erred in holding trial counsel was not ineffective when trial counsel failed to adequately investigate the facts and circumstances surrounding the attempted robbery committed by Petitioner. Specifically, Petitioner argued trial counsel should have investigated the scene of the crime which would have revealed the existence of a separate, sheltered lane near the driveway where this incident took place. This lane the Petitioner argues could have easily sheltered the unknown masked gunman of this case, supporting the Petitioner's story that the unknown man acted alone. This argument is without merit.

During the evidentiary hearing, Petitioner alleged counsel failed to investigate the scene of the crime. The PCR court found Petitioner failed to carry his burden of proof and failed to prove trial counsel was ineffective. At the evidentiary hearing, trial counsel testified though he did not visit the scene of the crime, he looked up the area via Google Maps and saw an overhead view of it. He testified because of this he knew what the terrain was like and testified he corroborated this information with Petitioner. (AppII.p.274). Moreover, trial counsel testified there were trees all around the property. (AppII.p.275). However, trial counsel testified the trees surrounding the property actually worked against the case as in order for Petitioner's story to work, the jury would have to believe there was some guy hanging out in the woods waiting for some random person to drive up into his yard.(AppII.p.275). Trial counsel went on to testify he did not make a big deal about the woods because of this. The PCR court found trial counsel testified extensively to what he learned about the evidence and possible witnesses. The PCR court noted while trial counsel did not visit the crime scene, he did review a Google map of the

scene. (Supp.App.p.6). Additionally, James Childress, the jury foreman from Petitioner's trial testified. As the PCR court noted, Mr. Childress testimony focused on his post-trial concerns Petitioner did not receive a fair trial based on his individual investigation of the location where the attempted robbery took place. Mr. Childress testified he went out to the location of the attempted robbery and discovered there was potentially a road or lane a robber could hide down. (AppII.p.337). He went on to testify he did not think Petitioner's trial counsel was aware of the road. (AppII.p.p.338). After hearing testimony from the foreman of the jury who testified Petitioner's trial counsel was ineffective in his representation of Petitioner, the PCR court found the foreman's testimony was not relevant to the issue before the court. (Supp.App.p.4). The PCR court noted a juror, no matter how sincere and diligent cannot offer guidance to the court in its analysis of trial counsel's representation under the Strickland and Cherry standard. (Supp.App.p.5).

After reviewing the PCR record, there is evidence of probative value to support the PCR court's finding trial counsel did not render Petitioner ineffective assistance of counsel. As mentioned above, trial counsel testified he did not visit the scene physically, but did a Google search and saw an overhead view and knew what the terrain was like where the robbery took place. (App.p.274). Additionally, trial counsel testified he talked to Petitioner about the location of the attempted robbery while also asking the Petitioner about it and the houses and trees surrounding the area. (App.p.274). Moreover, trial counsel testified he did not want to make a big deal about the terrain because he did not feel it was beneficial to the case. Petitioner's trial counsel's performance was well within what is expected of a criminal defense attorney. "[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 Moorhead 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). Here, trial counsel investigation was reasonable in Petitioner’s case. 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’s trial counsel was not ineffective during the guilt or innocence phase as his performance was reasonable and not prejudicial.

Petitioner also alleges the PCR judge erred in holding trial counsel was not ineffective when trial counsel’s performance was both unreasonable and prejudicial. Specifically, Petitioner argues trial counsel rested his case immediately after the State and failed to present an adequate defense. This argument is also without merit.

The PCR court found trial counsel provided to Petitioner representation within the range of competence required in criminal cases while also finding trial counsel’s performance in his representation of Petitioner reasonable under professional norms. (Supp.App.p.8). Trial counsel testified his strategy was to create as many inconsistencies in the victim’s testimony as possible so the jury would not believe he was credible. (AppII.p.356). He further testified he did not introduce the victim’s statement into evidence for two reasons. First, trial counsel testified generally it is not a wise idea to have a jury looking at a victim’s statement during deliberations and if he had introduced it they would be looking at. Secondly, trial counsel testified prior to the

State resting he did not know exactly what he was going to submit as far as evidence and if he had submitted the victim's statement as an exhibit to the case, he would have lost the ability whatsoever to have last closing. (AppII.p.356). The PCR court found Petitioner did not present any evidence to support his allegation trial counsel failed to bring out inconsistencies in the victim's testimony. Specifically, the PCR court noted Petitioner alleged trial counsel was ineffective for failing to use the victim's police statement to impeach the victim. The PCR court went on to find the only evidence presented on this issue was presented through the testimony of the jury foreman. The PCR court noted it could not rely on the foreman's assessment of an attorney's competence. (Supp.App.p.5-6). Additionally, during opening and closing arguments trial counsel argued to the jury Petitioner was not a participant in the robbery. (App.p.35-38 and p.177-186).

Moreover, the PCR court also noted trial counsel talked with Petitioner's father and uncle. The PCR court noted neither were present at the scene but both testified at the post-conviction relief hearing. The PCR court then found trial counsel testified he talked to both the father and uncle and after talking with the two, determined as witnesses at trial they "would do more harm than good" as trial counsel testified both had significant records which he believed would "rub off on Applicant" during trial because of they were all close relatives. (AppII.p.270). Moreover, Petitioner argued trial counsel failed to obtain his phone record which could have been crucial evidence to show Petitioner was talking on the phone with his father during the robbery. However, as the PCR court correctly noted Petitioner did not place any phone records into evidence at the evidentiary hearing so the court could not determine trial counsel was ineffective for not procuring the phone records.

In this case, trial counsel articulated a valid trial strategy. 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 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). Here, trial counsel testified his strategy at trial was to attack the victim's credibility by bringing out inconsistencies in his story. He accomplished this by cross-examining the victim about the events which took place. He also employed sound strategy by not calling Petitioner's dad and uncle. Trial counsel testified he believed having Petitioner's dad and uncle who had criminal records, testify would rub off on Petitioner and potentially make him look guilty. 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). In Jackson v. State, this Court held that counsel was not deficient for failing to call a witness at trial when corroboration of the defendant's

statement was more credible through the testimony of another witness and the witness' credibility would have been an issue if he testified. Jackson v. State, 329 S.C. 345, 351-52, 495 S.E.2d 768, 771 (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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October 16, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
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2016-CP-32-2039
Appellate Case No. 2017-000268

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CERTIFICATE OF SERVICE

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

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This 18th day of October, 2017



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