STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lee County
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2016-002135

JAMES KEION SPANN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

I. **Did trial counsel render ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to present an alibi defense through an available and willing alibi witness?**

II. **Did trial counsel render ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to call an available and willing witness to impeach the state's only eyewitness where no physical evidence connected Petition to the crime?**

STATEMENT OF THE CASE

James Keion Spann ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. Petitioner was true bill indicted during the June 2009 term of the Lee County Grand Jury for murder, first-degree burglary, and possession of a firearm during a crime of violence (2009-GS-31-73). Petitioner was represented by Deborah Butcher, Esquire. Petitioner proceeded to a jury trial and was found guilty. On March 31, 2010, the Honorable R. Ferrell Cothran sentenced Petitioner to life without parole for murder, life without parole for first-degree burglary, and five years' imprisonment for possession of a weapon during a violent crime, with all sentences to be served concurrently. A timely notice of appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Spann, Op. No. 2012-UP-207 (Ct. App. filed April 28, 2012). The Remittitur was issued April 13, 2012.

Petitioner subsequently filed an application for post-conviction relief (PCR) on December 31, 2012 (2012-CP-31-311). Respondent submitted its Return on June 28, 2013, requesting an evidentiary hearing. An evidentiary hearing was held on April 16, 2015, at the Sumter County Courthouse before the Honorable George C. James, Jr. Petitioner was present at the hearing and represented by Bertila I. Boyd, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. Testimony was presented from John Davis, Mabel Spann, and Trial Counsel Deborah Butcher, Esquire.

Following the hearing, Judge James reopened the record to hear the testimony of Clayton Antonio Plowden and Michael Spann. A second evidentiary hearing was convened on April 26,

2016, over Respondent's objection.[1] Mr. Gourley and Julie A. Coleman, Esquire, appeared for Respondent.

Judge James issued an Order of Dismissal signed on September 29, 2016, and filed on September 30, 2016, denying and dismissing the application with prejudice. Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on October 15, 2016. Petitioner's Appendix and Petition for Writ of Certiorari were filed on June 16, 2017. This Return to the Petition for Writ of Certiorari follows.

[1] Respondent objected to the record being reopened and convening a second hearing, as Applicant failed to meet his burden of proof by presenting the testimony of Plowden and Spann at the first hearing. The objection was overruled.

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), SCRCP; Butler, at 441, 334 S.E.2d at 814. 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, at 442, 334 S.E.2d at 814.

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, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry v. State, at 118, 386 S.E.2d at 625.

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 sufficiently articulated a valid strategy in choosing not to call a potential alibi witness at trial.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to call alibi witness Clayton Plowden at trial. However, the PCR court correctly relied on probative evidence in making its finding that Trial Counsel relied on a valid strategy in choosing not to call this witness, and thus could not be found ineffective, and this Court should affirm its findings.

At trial, the State's eyewitness, Mary Ann Lovely, testified that a man she recognized as Petitioner by his nickname "Duc" knocked on her door with a gun in his hand before breaking into her home and shooting and killing her son. App. 64-89. Trial Counsel originally notified the State of her intention to call alibi witness Clayton Plowden, but she did not call his as a witness at trial because he was unavailable. The Solicitor explained to the trial court that her witness was quarantined in a state prison facility because of an illness, and he would not be transported. App. 105, line 18-23. Trial Counsel did not request a continuance, but told the trial court "I don't think that's a problem. I don't anticipate us calling him anyway." App. 105, line 24-25. The trial court affirmed, "So you're telling me you're not planning on calling this person any way?" App. 106, line 4-5. Trial Counsel responded, "That's correct." App. 106, line 6.

At the evidentiary hearing, Petitioner presented testimony from Clayton Plowden, who claimed he was with Petitioner on the night of the crime. App. 335-345. Plowden testified that he was with Petitioner from around 10:00 P.M. until at least 1:00 A.M. in Sumter on the night in question, and they were all drinking gin and smoking marijuana. App. 340, line 6-7; App. 341,

line 17-20. He stated he gave a statement to an investigator, but Trial Counsel never contacted him. App. 341, line 21- App. 342, line 16.

Trial Counsel testified at the evidentiary hearing that she could not remember her investigation of Plowden or others as an alibi witness. When asked when she investigated him, she responded, "I cannot remember. I don't know if they came over and then I spoke with them, and it wasn't as good as I thought. I just cannot remember. But I do know that if I had had a good alibi witness, I would have wanted them to testify." App. 276, line 25 – App. 277, line 4. She testified that she could not exactly remember speaking with Plowden prior to the trial. App. 277, line 17-19. Trial Counsel testified that she could not verify that the alibi witnesses could state Petitioner was with them at the time of the incident, but if she had felt like Plowden was a good alibi witness, she certainly would have requested a continuance in order to have him present at trial. App. 279, line 12-23.

Based on Trial Counsel's testimony, the PCR court held "Trial counsel's explanation for not calling [Plowden] to testify at trial, while not specifically articulated, was that she simply did not feel he was a good alibi witness. All in all, trial counsel's decision not to call him to testify at trial was a valid strategy and the strategy was sufficiently articulated by trial counsel." App. 370. The PCR court based this finding on Trial Counsel's explanation of why she chose not to call Plowden as a witness as well as Plowden's testimony and demeanor at the evidentiary hearing. The PCR court, after hearing Plowden's testimony, held his credibility was "suspect." App. 369. The PCR court specifically noted the fact that Plowden was incarcerated at the time of trial following a forgery conviction, and that forgery is a crime of dishonesty. App. 369. It explained that the substance of his testimony regarding drinking gin and smoking marijuana on the night of the crime would not have put him in a good light before the jury, and his credibility was easily

called into question by his lack of sobriety and the possibility that he could not remember the time accurately. App. 369-370. All of this testimony is probative evidence supporting the PCR court's finding that Trial Counsel had a valid strategic reason in choosing not to call Plowden as a witness.

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, the PCR court found that the strategy Trial Counsel articulated was valid, and her choice could not be found deficient. The PCR court relied upon several reasons why Plowden was not a credible or necessary witness, as well as Trial Counsel's opinion that he was not a good alibi witness. Trial Counsel testified that the issue in this case was that she could not verify that Plowden would be able to testify that he was with Petitioner at the time of the crime. App. 279, line 12-23. Her choice not to call this witness was clearly a valid strategy, and this Court

should not second guess her tactics. Therefore, because Trial Counsel was not deficient, and Petitioner has failed to prove either prong of the Strickland test, this Court should affirm the PCR court's ruling.

II. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to call witness Michael Spann to impeach the State's eyewitness.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for choosing not to call Michael Spann as a witness at trial. However, the PCR court correctly relied on probative evidence in making its finding that Spann's testimony would not have changed the outcome of the trial, and this Court should affirm its findings.

At trial, the State's witness, Mary Ann Lovely, testified that she witness the shooting of her son, Lindsey. She testified that she was awake in her home on the night of the crime when she heard a knock at the door. App. 66. When she went to the door, she saw Petitioner, who she knew as "Duc," through the peephole; she recognized him because she had seen him before. App. 66. She saw Petitioner holding a gun and heard him cock it before running down the hall to warn Lindsey that "the boy" was at the door. App. 69-70. She then ran into her other son's bedroom, who is disabled, to protect him by hiding him under the bed. App. 70. She heard a gunshot, saw Petitioner coming in the door, and ran back to her disabled son. App. 70-71. When the commotion stopped, she came out and saw Lindsey lying on the floor with two bullets in his chest and blood gushing out his side. App. 71.

At the evidentiary hearing, Petitioner presented testimony from Michael Spann. Spann testified that he and Petitioner were distant cousins and he has known Petitioner since he was a child. App. 346, line 1-15. He stated he was a friend of the victim and his family, and he "had some dealings" with Mary Ann Lovely. App. 346, line 16 – App. 347, line 6. He testified that he

spoke about the case several times with the family and they told him their side of the story. App. 347, line 6-14. He stated that Mary Ann Lovely told him that on the night of the crime, they never saw who shot her son because she was too scared to come out of her room. App. 348, line 4-14. He stated she told him she heard a loud noise and gunshots, waited about five minutes, and when she came out she saw her son lying dead on the floor. App. 348, line 4-14.

At the first evidentiary hearing, Trial Counsel testified that she did investigate Michael Spann as a witness, but she could not recall speaking to him. App. 280. Although it appears from her testimony that Trial Counsel may have incorrectly recalled Michael Spann as an alibi witness rather than a witness to impeach the state's witness, Trial Counsel generally explained her choice not to call Michael Spann because she did not believe he was a credible witness. App. 304.

The PCR court held Trial Counsel was deficient for failing to call Michael Spann as a witness because she did not articulate a valid strategy in her choice, even though many valid reasons might have existed for not calling him to testify.[2] App. 373. However, the PCR court ruled Trial Counsel was not ineffective because there was no prejudice:

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[2] Respondent does not concede Trial Counsel's deficiency, and maintains that her choice not to call this witness was not deficient. Respondent respectfully submits the PCR court applied an incorrect standard in its analysis. The PCR court found, somewhat begrudgingly, that it was constrained to find Trial Counsel deficient because she was unable to recall her strategy: "As noted in *Smith*, *supra*, the presumption of adequate representation disappears when trial counsel articulates no strategy...The court must therefore conclude that the Applicant has satisfied the first *Strickland* prong...even though many valid reasons might have existed for not calling Michael Spann to testify." App. 373. The PCR court then specifically listed at least three reasons why the failure to call Spann was not deficient.

The Smith citation to which the PCR court refers actually reads "The presumption of adequate representation **based on a valid trial strategy** disappears when trial counsel **acknowledged there was no trial strategy** in mind when he failed to object to the improper hearsay and bolstering testimony." Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (emphasis added). Respondent submits the PCR court misapplied this quotation to this case. First, this standard only affects the presumption of adequate representation based on a valid trial strategy. A valid trial strategy is not necessary to prove an action or inaction was not deficient. Under Strickland, trial counsel is presumed competent, even if they do not have a specific strategy in mind. However, articulating a valid strategic reason would automatically disprove deficiency. Finally, here, in contrast to Smith, Trial Counsel simply could not remember what her strategy was. She did not admit or acknowledge that there was **no** strategy in her decision. Therefore, this Smith standard does not apply.

> The question of prejudice in this case is close. However, after exhaustive reading of the trial transcript and after careful review of the PCR testimony, the court concludes that there is not a reasonable probability that the outcome of the trial would have been different if Michael Spann had been called to testify.

App. 374. The PCR court went on to list several specific reasons for its conclusion that Spann's credibility was "too suspect" and his testimony "would have been too tainted for a jury to have found him credible." App. 375. First, the order noted Spann was an admitted former gang member. App. 375. Spann testified in his statement to investigator Davis that he knew the victim "from being a part of the neighborhood [C]rip gang that hung around in the St. Mark area at Bishopville." App. 265, line 22-24. He went on to explain how he used to be part of the bloods in Lee County, and he "can respect both sides, [C]rips and [B]loods." App. 266, line 3-5. He explained, "That's how me and [the victim] became good friends, because I was one of the only bloods that could go to this area alone, and not catch problems." App. 266, line 5-8.

The order then noted Spann had a criminal record and was incarcerated at the time of the trial, which certainly would have been brought to the jury's attention, through both the State's cross-examination and Spann's own testimony. App. 375. For example, Spann explained in his statement to Investigator Davis, "Around the time this situation happened, I had just got out of some trouble similar to this one. So when it occurred, everyone was calling my phone asking me did I shoot someone else, because they got a person on the news. They are looking for the name Spann for a murder." App. 266, line 8-13. Spann noted he was currently incarcerated at Trenton Correctional Institution, App. 265, line 13-15, and testified he was in prison for armed robbery, App. 354, line 6-8.

The order finally pointed out that Spann was related to Petitioner and had known him for many years. App. 375. Spann testified he and Petitioner were distant cousins with the same last

name, and he had known Petitioner since he was a child. App. 346, line 1-15. This would certainly give him a motive to testify favorably for Petitioner, and cause the jury to doubt his credibility. The PCR court concluded Spann's testimony would have been too tainted for the jury to find him credible, and there is therefore not a reasonable probability that the jury would have found Petitioner not guilty had he testified. App. 375.

The reasons specifically stated above are clearly probative evidence supporting the PCR court's ruling. It is clear from the order of dismissal that the PCR court spent a good deal of time and effort reviewing the record before the court in making what it believed to be a close decision. Therefore, because probative evidence supports the PCR court's finding that there was no prejudice, this Court should affirm and uphold its ruling.

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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By: _____
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November 1, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lee County
George C. James, Jr., Circuit Court Judge

JAMES KEION SPANN,

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:

Susan B. Hackett, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 1st day of November, 2017

CAROLINE COLLINS
Administrative Coordinator, PCR

ALAN WILSON
ATTORNEY GENERAL

November 1, 2017

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

RE: **James Keion Spann, v. State of South Carolina**
Appellate Case No. 2016-002135
Lower Court Case No: 2012-CP-31-0311

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar # 102214

JAC/fvh
Enclosures

cc: Susan B. Hackett, Esquire