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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000770

JOHN WAYNE BRANNON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
Bar No. 102524

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT'S QUESTION PRESENTED

Is there any probative evidence in the record to support the PCR court's finding that Counsel's investigation and decision not to hire or present an expert witness was reasonable and Petitioner failed to prove he was prejudiced by any alleged failures?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In July 2011, the Spartanburg County Grand Jury indicted Petitioner for attempted murder (2011-GS-42-4694). Public Defender Tanya Jones, Esquire, represented Applicant. On December 13-15, 2011, Petitioner was tried before the Honorable Roger L. Couch and a jury. The jury found Petitioner guilty of the lesser-included-offense of assault and battery of a high and aggravated nature. Judge Couch sentenced Petitioner to life without parole pursuant to S.C. Code Ann. § 17-25-45.

A timely Notice of Appeal and Anders[1] brief were filed on Petitioner's behalf. Petitioner also filed a *pro se* brief. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Brannon, Op. No. 2013-UP-362 (Ct. App. filed October 2, 2013). The Remittitur was returned on November 5, 2013.

On December 5, 2013, Petitioner filed an application for post-conviction relief alleging his trial counsel was ineffective for failing to properly investigate or hire an investigator or expert. Respondent made its return on or about August 18, 2014, requesting an evidentiary hearing be convened. On June 17, 2016, an evidentiary hearing into the matter was convened at the Spartanburg County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and represented by J. Brandt Rucker, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. Judge Cothran denied and dismissed the PCR application by order dated February 22, 2017 and filed February 28, 2017. Petitioner filed a timely notice of appeal. On September 29, 2017, Petitioner filed a petition for writ of certiorari. This return follows.

[1] 386 U.S. 738 (1967).

STANDARD OF REVIEW

The proper standard for reviewing a PCR court's ruling 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 action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, . First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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**." Id. at 117-18 (emphasis added). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

ARGUMENT

I. There is probative evidence in the record to support the PCR court's finding that Counsel's investigation and decision not to hire or present an expert witness was reasonable and Petitioner failed to prove he was prejudiced by any alleged failures.

There is ample, probative evidence in the record to support the PCR court's findings. First, Petitioner argues Counsel did not interview the significant witnesses which could have made a difference. (PWC p. 11). One of those witnesses was the victim. Petitioner claims Counsel could not locate the victim, but the State could. (PWC p. 11). However, Petitioner fails to mention the State, too, had problems locating the victim. (App. p. 282, ll. 24-25). Petitioner further argues there was no evidence Counsel used an investigator because an investigator would have been able to locate the victim. (PWC p. 11). Counsel, a public defender at the time, testified during the PCR hearing that "**we** also tried to locate him." (App. 283, l. 1) (emphasis added). Although there was no evidence presented that Counsel used an investigator, there was no evidence offered by Petitioner, who has the burden of proof in a PCR action, that Counsel did not use an investigator. Regardless, Counsel testified she had an opportunity to speak with the victim prior to trial, but he refused to speak with her. (App. p. 283, ll. 2-4). Therefore, the record supports the PCR finding of reasonableness in Counsel's attempts to interview the victim.

Additionally, Petitioner failed to establish the requisite prejudice for relief. "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 Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Petitioner's argument that had Counsel located and interviewed the victim earlier, the result of the trial, or even the interview of the victim, would have been different is

based on mere speculation. Petitioner presented no evidence to show prejudice as a result of Counsel's inability to locate and interview the victim prior to trial.

Counsel testified Petitioner's version of events had inconsistencies, which was concerning to her. (App. p. 280, ll. 5-16). She testified in detail regarding the dagger and her reasoning for not confronting the victim with it. Counsel testified,

> Obviously, there was a self-defense claim. However, he, one, would have to take the stand in order to do that, or conversely, I could confront the complaining witness, Ronnie Brannon, and see if he would acknowledge having that dagger or confronting Mr. Brannon with it. You know, sometimes I've had some success with that. And we had the dagger at trial.
>
> But Ronnie Brannon was a terrible witness, just awful. And I don't know if it comes across in the transcript, but he just had a poor demeanor. He didn't speak real well. He was very, very inconsistent. He kept calling me honey.
>
> And so then I thought, well, maybe we could just go with the defense of he-doesn't-know-what-happened-or-who-hit-him.
>
> Additionally, I got cold feet in getting that dagger and putting it in front of him, because it was such a nice dagger. I was worried, because I hadn't spoken with him, that I was opening the door or Pandora's box to something that was going, you know, to be awful, that, oh, yea, my client stole this from me, it was my father's. I don't know. I just had a real bad vibe. They normally if I get - - and we're going to get those bad vibes, I got it, and so I just decided not to do that.

(App. p. 284, l. 9 – p. 285, l. 6). It is a common rule of thumb when performing cross-examination not to ask a question for which you do not already know the answer. This is a valid strategy. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Also, it is not unreasonable to change trial strategies based on how witnesses testify. It is also not unreasonable for an attorney with fifteen years' experience with criminal

defense to follow her gut reactions when those responses are based on her experience and professional judgment.

Petitioner also argues Counsel should have asked more in-depth questions of Petitioner's mother. (PWC p. 11). There is no evidence in the record to support this contention. The testimony from Counsel regarding her discussions with the mother is probative evidence supporting the PCR court's findings. Counsel testified she spoke to Petitioner's mother who was in possession of the dagger, but did not know much about it other than Petitioner had given it to her.

Furthermore, Petitioner's contention is based on pure conjecture and speculation. Petitioner must present evidence to show what counsel could have discovered had she more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990). Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). A petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Because Petitioner failed to produce the testimony of his mother to show how Counsel failed to ask the right questions of the mother or failed to call her

as a witness, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative. Regardless, the probative evidence in the record support the PCR court's finding counsel was not deficient and Petitioner was not prejudiced.

With regard to the claim Counsel was ineffective for failing to consult an expert witness, again, this allegation is based on speculation. Petitioner failed to produce the testimony of an expert witness to show how Counsel's failure to consult an expert was deficient and prejudiced him. See Clark, 315 S.C. at 388, 434 S.E.2d at 267. (Mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice). Therefore, the PCR court did not err in finding Counsel was not ineffective.

Because the record contains probative evidence supporting the PCR judge's finding that counsel's performance was not deficient and that Petitioner failed to show that but for counsel's alleged deficient performance, the result of the proceeding would have been different, certiorari should be denied.

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,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
Bar No. 102524

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 5, 2018

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000770

John Wayne Brannon, ... Petitioner,

v.

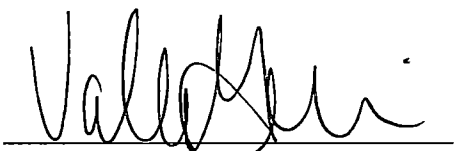
State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 5th day of January, 2018.



Valerie Garcia Giovanoli
S.C. Bar # 102524
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

January 5, 2018

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

Re: **John Wayne Brannon v. State of South Carolina**
Appellate Case No. 2017-000770
Lower Court Case No. 2013-CP-42-4797

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.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General
SC Bar #102524

VGG/lm
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)