STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
Honorable Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2016-002269

ALFONZO J. HOWARD, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS'S ISSUES PRESENTED

I. **Did the PCR court properly find Trial Counsel's behavior and motions regarding requests for funds during trial had no effect on the trial court's rulings, and did not lessen confidence in the outcome of the trial, where these discussions took place outside the presence of the jury, where Trial Counsel diligently represented Petitioner, where the trial judge exhibited patience and ensured Petitioner was happy to proceed with Trial Counsel, and where there was overwhelming evidence on which the jury to base the verdict?**

II. **Did the PCR court properly find that the statements of Lorenzo Hicks ("Codefendant") implicating Petitioner in the crime were not the sole basis of the judge's finding at the Schmerber hearing that the State had probable cause to obtain Petitioner's DNA, where the State had also submitted ample evidence including a police affidavit, where there was no evidence of a Brady violation, and where Trial Counsel adequately prepared for the hearing?**

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. During its June 2006 term, the Beaufort County Grand Jury indicted Petitioner for two counts of kidnapping (2006-GS-07-1093, -1094), carjacking (2006-GS-07-1095), criminal sexual conduct, first-degree (2006-GS-07-1097), two counts of armed robbery (2006-GS-07-1098, -1099), and possession of a weapon during the commission of a violent crime (2006-GS-07-1096). The charges arose from a May 2006 incident in which Petitioner and a codefendant abducted a married couple visiting Beaufort from Tennessee. (App. p. 270). Petitioner and codefendant Lorenzo Hicks ("Codefendant") proceeded to force the husband to drive them to an ATM while Petitioner the wife at gunpoint from the backseat. Afterwards, they forced the husband to drive them all to the Beaufort High School football field parking lot, where Petitioner ordered the wife, along with a codefendant, to tie up her husband with clothing from the vehicle. Petitioner then forced the wife down a nearby path where he raped her while her husband was bound and guarded by the codefendant. (App. p. 273). Fortunately, the husband was eventually able to untie himself and escape to the nearest house where he called 911. Petitioner and the codefendant then drove off, leaving the wife alone. After encountering a sheriff's deputy responding to the 911 call, a chase ensued in which Petitioner and the codefendant briefly swam in the river before attempting to run across a bridge to their car. The codefendant was apprehended at the base of the bridge, but Petitioner was caught shortly thereafter on the balcony of a nearby inn. (App. p. 274). Petitioner's codefendant pleaded guilty in this case.

On April 23, 2007, a hearing was held before the Honorable Howard P. King pursuant to Schmerber v. California, 384 U.S. 757 (1966). James Brown, Esquire, ("Trial Counsel") represented Petitioner at the hearing. Angela McCall-Tanner, Esquire, represented the State ("Tanner"). Judge King ("Schmerber judge") concluded there was sufficient probable cause to require Petitioner's sample to be given, and did so order. (App. p. 1464).

On February 23, 2009, Petitioner proceeded to trial before the Honorable Carmen T. Mullen. James Brown, Esquire, represented Petitioner at trial as well. Angela McCall-Tanner, Esquire, prosecuted the case. The jury found Petitioner guilty of all charges. Based on the State's prior notice of intent to seek life without parole, Judge Mullen sentenced Petitioner to life without parole for each charge, with the sentence for possession of a weapon during the commission of a violent crime being subsumed in the other life without parole sentences. (App. p. 1298). Pursuant to Trial Counsel's request, Judge Mullen entered alternate consecutive sentences of thirty years for each of the two armed robbery charges, thirty years for each of the two kidnapping charges, twenty years for carjacking, and five years for the possession of a weapon charge, totaling one hundred and seventy-five years. (App. p. 1300).

A timely notice of appeal was filed and an appeal was perfected on Petitioner's behalf. Appellate Defender LaNelle Durant, of the Office of Appellate Defense, represented Petitioner on appeal. On February 22, 2011, the South Carolina Supreme Court affirmed Petitioner's convictions and sentences pursuant to Rule 220(b)(1), SCACR. State v. Howard, Op. No. 2011-MO-006 (2011). The remittitur was issued March 10, 2011.[1]

On July 14, 2011, Petitioner filed a pro se application for post-conviction relief. Appointed PCR Counsel Scott Lee, Esquire, ("PCR Counsel") then filed an amended application

[1] Trial Counsel also later appealed the denial of excess attorney's fees for the representation of indigent Petitioner. In Ex Parte Brown, 393 S.C. 214, 711 S.E.2d 899 (2011), the South Carolina Supreme Court affirmed the denial of excess fees, finding the trial court acted within its discretion.

on March 22, 2013. An evidentiary hearing into the matter was convened on April 2, 2013, before the Honorable Perry M. Buckner, III. Petitioner was present at the hearing. Assistant Attorney General Ashleigh R. Wilson represented the State. Judge Buckner denied and dismissed the application with prejudice by order of dismissal filed September 23, 2016. Petitioner filed a motion to alter or amend the judgment on October 12, 2016, pursuant to Rule 59(e), SCRCP. Judge Buckner denied the motion in its entirety and affirmed the order of dismissal by order filed October 27, 2016.

Subsequently, Petitioner filed a timely notice of appeal. On November 10, 2016, the case was transferred to the Supreme Court of South Carolina pursuant to Rule 204(a), SCACR. Petitioner filed a petition for writ of certiorari on September 8, 2017. This return follows.

RELEVANT PCR HEARING TESTIMONY

At the PCR hearing convened on April 2, 2013, Petitioner was asked whether there was anything Trial Counsel did that should have been done differently, and Petitioner testified Trial Counsel "had a few, you know, problems or whatnot," which resulted in Trial Counsel calling counsel of his own. (App. p. 1331, ll. 4-12). Petitioner testified he felt as though Trial Counsel took the case "a little personal." (App. p. 1331, ll. 12-14). Petitioner testified Trial Counsel felt like he was not being fairly compensated for his representation and appeared that Trial Counsel was "maybe in a little trouble with the judge." (App. p. 1331, ll. 18-25 – p. 1332, ll. 1-10). Petitioner felt that Trial Counsel's dissatisfaction with his lack of compensation affected his performance and the outcome of the trial. (App. p. 1332, ll. 11-21). Petitioner conceded he did want Trial Counsel to get paid. (App. p. 1332, ll. 22-23). When questioned whether there would have been a better result had Trial Counsel known he was going to get paid, Petitioner testified, "Yeah, I guess." (App. p. 1333, ll. 5-8).

Trial Counsel testified he was paid the statutory maximum of $3,500 for his representation, but a judge can exceed that statutory cap if so inclined. (App. p. 1337, ll. 10-18). Trial Counsel testified he spent 291.7 hours on Petitioner's case. (App. p. 1338, ll. 12-13). Using the *statutory* rate for appointed counsel of indigent clients, Trial Counsel testified the total for attorney's fees would have totaled approximately $13,000, but would have totaled approximately $60,000 using his private attorney fee rate. (App. p. 1338, ll. 12-20). Trial Counsel testified that given the public nature of the trial, he probably would have requested approximately $80,000 to $100,000 to represent Petitioner as a retained client. (App. p. 1338, l. 25 – p. 1339, ll. 1-3). Regarding his issue with Judge Mullen over compensation, Trial Counsel testified Judge Mullen issued a written order, which was appealed partly because the quoted language in the order was not part of the transcript. (App. p. 1338, ll. 1-4). Trial Counsel recalled the Supreme Court found a takings issue but affirmed Judge Mullen's order. (App. p. 1340, ll. 3-8).

Petitioner testified he met with Trial Counsel quite a few times before trial. (App. p. 1333, ll. 20-23). Petitioner testified the trial judge told Trial Counsel they would talk his funding after trial. (App. p. 1335, ll. 7-13). Petitioner testified the discussion about the compensation was not a long discussion. (App. p. 1335, ll. 14-17). When asked whether he recalled, after the compensation discussion, telling the court that he was satisfied with his representation, Petitioner testified he was not actually satisfied but was ready to proceed. (App. p. 1335, ll.22-25 – p. 1336, ll. 1-5).

Trial Counsel testified he contacted his own counsel on two occasions, with the first occurrence taking place during a pretrial hearing with Judge Mullen, which postdated a motion to halt prosecution in anticipation of exceeding the statutory cap. (App. p. 1340, ll. 9-17). About a month later, Trial Counsel testified, he requested an order to grant compensation exceeding the

statutory cap. (App. p. 1340, ll. 18-20). Trial Counsel testified he had already met the statutory cap before trial and further uncompensated representation would be costly to his private clients, and therefore could not proceed as a fiduciary to his private clients' fees. (App. p. 1341, ll. 2-15). According to Trial Counsel, the judge told him his options were to go forward or be incarcerated. (App. p. 1341, ll. 17-18).

Trial Counsel testified he always tries to get as many copies of discovery as possible to ensure nothing is missing. (App. p. 1343, ll. 3-8). Trial Counsel testified he was appointed March 7, 2007, just over a month prior to the April 23, 2007 Schmerber hearing. (App. p. 1343, ll. 9-20). When questioned whether he had completely reviewed and received all of the discovery before the Schmerber hearing, Trial Counsel testified he was sure he had not and explained there was a substantial amount of discovery in this case. (App. p. 1343, ll. 24-25 – p. 1344, ll. 1-3).

As to the substantive law surrounding Schmerber, Trial Counsel recalled the factors used to determine whether probable cause exists for the acquisition of evidence through bodily intrusion. (App. p. 1348, ll. 16-24). Trial Counsel also recalled courts are entitled to consider the seriousness of the crime and the importance of evidence to the investigation under In re Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992). (App. p. 1348, l. 25 – p. 1349, ll. 1-7).

Trial Counsel testified that after reading the transcript, it "appears" the Schmerber judge based his finding of probable cause from the Schmerber hearing on the statement of codefendant Lorenzo Hicks ("Codefendant") which identified Petitioner as the other perpetrator. (App. p. 1350, ll. 3-14). Trial Counsel testified he did not think he talk to any other witnesses before the hearing. (App. p. 1351, ll. 22-25). However, Trial Counsel testified he did have and use contradictory statements from Codefendant as a rebuttal to the State's assertion of probable cause. (App. p. 1352, ll. 3-9).

Trial Counsel testified in hindsight it might have been fruitful to look into Codefendant's mental health history, as it later turned out there were what Trial Counsel referred to as "substantial mental health questions." (App. p. 1352, ll. 23-25 – p. 1353, ll. 1-9). Trial Counsel testified reports from a 2005 domestic dispute incident in which Codefendant had made disconcerting statements were released a week or so before trial (App. p. 1354, ll. 12-25 – p. 1355, ll. 1-2). Trial Counsel also noted it was only a week or so before trial he found out Codefendant would be a witness against Petitioner. (App. p. 1355, ll. 13-22). Trial Counsel once again testified he did not introduce evidence of potential mental health issues at the hearing, adding that he was not aware of the issues. (App. p. 1357, ll. 9-13). Petitioner reminded Trial Counsel of a February 2005 incident involving a fire truck at a hospital in which Codefendant was committed to the mental health wing of the hospital rather than jail. (App. p. 1358, ll. 9-18). However, Trial Counsel testified he does not know he had reason to suspect Codefendant's mental health. (App. p. 1360, ll. 22-24).

Trial Counsel reaffirmed the fact he presented to the Schmerber judge a contradictory statement made by Codefendant claiming Petitioner did not commit the crime with him. Trial Counsel argued this contradictory statement showed a "fifty-fifty tie" and lack of probable cause. (App. p. 1363, ll. 22-25 – p. 1364, ll. 1-11). The Schmerber judge advised Trial Counsel it would be a subject for cross-examination. (App. p. 1364, ll. 13-19).

Trial Counsel recalled there were relevant pieces of evidence with unknown male DNA for which the State wanted to test Petitioner's blood: the fingernail scrapings of the female victim, a glove found at the scene, and the inside of the getaway car. (App. p. 1366, ll. 14-19). Trial Counsel testified his argument regarding the getaway car was the presence of Petitioner's

DNA in his father's car proves nothing other than Petitioner having access to his father's car. (App. p. 1374, ll. 19-24).

Petitioner questioned Trial Counsel regarding the funds for his investigator in the case. Trial Counsel testified he had funds approved for an investigator but recalled having to ask for excess payment, partially related to tracking down a doctor Trial Counsel believed was "ducking" subpoena service. (App. p. 1383, ll. 6-16). At this point, Trial Counsel added he had funding issues with "every single person, including the DNA person and the denial of the handwriting person." (App. p. 1383, ll. 18-20).

Regarding the credibility of Codefendant, Trial Counsel testified he does not believe Codefendant to be credible as Codefendant claimed guilt in his guilty plea but denied guilt during Petitioner's trial. (App. p. 1386, ll. 19-23). Trial Counsel recalled Codefendant admitting to him that he lied to the judge. (App. p. 1386, l. 25 – p. 1387, l. 1).

Trial Counsel testified he met with Petitioner "a lot." (App. p. 1399, ll. 20-23). Trial Counsel testified he filed a Brady motion any time he thought something might have been missing. (App. p. 1400, ll. 9-13). Trial Counsel explained the "gist" of his defense was third party guilt. (App. p. 1401, ll. 1-10).

Regarding the investigator, Trial Counsel testified they tried to get copies of all relevant reports as well as copies of depositions taken in a civil suit involving the complaining parties and victims, located witnesses, and tried to track down a doctor related to Codefendant's mental health evaluation. Trial Counsel explained searching for the doctor was a "burner on our time," at a cost of approximately $1,500 at a rate of fifty dollars per hour. (App. p. 1401, ll. 16-25 – p. 1402, ll. 1-17). Trial Counsel testified he did not have enough time to prepare for Petitioner's trial and would have liked to have had a handwriting expert, but having a DNA expert did help.

(App. p. 1402, ll. 20-25 – p. 1403, ll. 1-4). Moreover, Trial Counsel testified some more time could have benefitted him, but admitted he cannot say what he would have uncovered. (App. p. 1403, ll. 5-9).

Trial Counsel recalled his bases for challenging probable cause at the Schmerber hearing: (1) the State needed to exactly identify which items were unknowns and probative; and (2) Codefendant's statement that Petitioner involved was not probable cause. (App. p. 1404, ll. 12-22). Trial Counsel did not recall the State presenting the affidavit from the police officer to support their claim of probable cause. (App. p. 1405, ll. 8-16).

Trial Counsel testified he asked for a hearing to challenge Hick's competency and was granted a hearing pretrial, and he recalled the judge ruling that he was competent. (App. p. 1408, ll. 18-25 – p. 1409, ll. 1-7). However, Trial Counsel recalled being able to cross-examine Codefendant about a lot of things that were put in his evaluation report. (App. p. 1409, ll. 8-10).

Trial Counsel testified some funds were granted for his investigation, but had to work the investigator over the statutory cap. (App. p. 1410, ll. 11-22). Trial Counsel also requested money for a handwriting expert to review a fifth letter purporting to exculpate Petitioner but the request was denied. (App. p. 1411, ll. 16-21).

The State began the presentation of its case by calling Tanner, who prosecuted the case, to the stand. Tanner characterized this as a "big case, as far as the amount of evidence in the case." (App. p. 1422, ll. 7-8). Tanner explained while most of the evidence was circumstantial, "it was one of those that there were building blocks," with direct testimony from the codefendant as well as Petitioner's DNA found on evidence related to the crime. (App. p. 1422, ll. 8-13).

When questioned whether she received any Brady or Rule 5 requests from Trial Counsel, Tanner testified Trial Counsel was very thorough, would follow his request with specifics, and

even commented, "It might be easier to tell you what was not requested." (App. p. 1422, ll. 14-25). Tanner testified her file is full of correspondence with Trial Counsel, and she provided Trial Counsel with every possible report, statement, photograph, video, and DNA report. (App. p. 1423, ll. 3-8). The last piece Tanner recalled giving Trial Counsel was a form signed by the nurse involved with Petitioner's blood draw, which Tanner even transcribed for Trial Counsel because it was difficult to read. (App. p. 1423, ll. 15-21). Tanner testified Trial Counsel was provided with the evaluation and documents regarding Codefendant's mental health along with "anything else he could think of." (App. p. 1423, ll. 22-25 – p. 1424, l. 1).

Tanner testified she was contacted about DNA contamination in October of 2008 by SLED, and she contacted Trial Counsel about the issue either the day or the day after she was informed. (App. p. 1425, ll. 5-10). SLED had issued an updated report in July of 2008, but this was the first incident of contamination at the lab and there was no procedure or national standard to look to for guidance. Therefore, Tanner explained, SLED was just contacting her by telephone and doing "the best they could do with it." (App. p. 1424, ll. 8-21) Tanner testified she did not have this information about the contamination prior to her 2006 Schmerber motion or the 2007 Schmerber hearing.

The State asked Tanner what evidence was offered to prove probable cause at the Schmerber hearing. Tanner testified she provided the court with a standard Schmerber motion and attached a two-page affidavit from the investigating officer David Ott and the SLED report they had at the time. (App. p. 1426, ll. 16-25). Tanner explained some judges like witnesses and some accept affidavits, so she brought both, as well as the report from SLED. (App. p. 1426, ll. 23-24). The State questioned Tanner whether she had provided Trial Counsel with information regarding Codefendant's competency at that time, to which Tanner responded she did not recall

specifically if she had received the report at that time. However, Tanner testified Trial Counsel would absolutely have a copy if she had it and he requested it. (App. p. 1427, ll. 1-8).

Tanner also testified about the affidavit prepared by Investigator Ott. Tanner testified the affidavit was not only based on Codefendant, but also how Codefendant and Petitioner were caught together after the crime. Moreover, the affidavit detailed other pieces of evidence found such as Petitioner's vehicle which belonged to his father and was parked in the space beside the victim's vehicle where they were kidnapped, which corroborates the victim's account that the perpetrators came at them when they got to their car. (App. p. 1428, ll. 5-15). Furthermore, Tanner testified the State also had Petitioner's soaking wet wallet and the BB gun used in the crime lying on the rocks by the river, and both Petitioner and Codefendant were soaking wet when caught. (App. p. 1428, ll. 16-21). Tanner testified The State also had videotape from the convenience store of Petitioner buying pantyhose approximately an hour or two before the crime occurred, which corroborates the victim's account that the perpetrators wore pantyhose over their faces. (App. p. 1428, ll. 22-25 – p. 1429, ll. 1-4).

When questioned by Petitioner whether the Schmerber judge ruled that probable cause was from the codefendant's statement, Tanner explained the judge made what she believes to be a comment by way of example. (App. p. 1429, ll. 5-8). Tanner testified she did not believe the codefendant's statement was the sole thing the judge ruled on, and reminded Petitioner the Schmerber judge had before him the complete affidavit from the investigator and Tanner's motion. (App. p. 1429, ll. 7-16). Petitioner correctly observed that some facts were not actually included in the affidavit, such as the identification of the suspects by the bridge tender. (App. p. 1432, ll. 14-20). Tanner explained the affidavit did list how the two were arrested together, along

with various pieces of evidence which were collected not only from the victims' car but from other areas related to the crime. (App. p. 1433, ll. 8-15).

During Petitioner's closing argument, Petitioner restated their argument the Schmerber judge's probable cause determination was based solely on codefendant's statement and Trial Counsel did nothing to investigate the reliability or competency of the codefendant. (App. p. 1438, ll. 13-25). Petitioner also brought up Trial Counsel's issues with the court over funding and stated, "I think that affected [Petitioner's] right to a fair trial and his right to due process." (App. p. 1443, ll. 15-19). Petitioner argued the violations of some court rules were likely to have prejudiced the jury and judge against Petitioner. (App. p. 1443, ll. 19-23).

The State's closing argument reaffirmed that Trial Counsel was not deficient, and Petitioner's case was not prejudiced by Trial Counsel's performance. (App. p. 1444, ll. 3-6). Regarding the allegation of a Brady violation or prosecutorial misconduct, the State recounted Tanner's testimony that she turned over everything requested and notified Trial Counsel of the DNA contamination as soon as she learned of it. (App. p. 1444, ll. 7-12). Regarding the allegation that Trial Counsel failed to properly challenge probable cause at the Schmerber hearing, the State recounted Trial Counsel's argument that the State did not have reason to believe Petitioner's DNA was on the items and that several of the items the State wanted to test already related to Petitioner and therefore should not require such a DNA test. (App. p. 1444, ll. 21-25 – p. 1445, ll. 1-5). The State also rebutted Petitioner's argument that Trial Counsel failed to investigate for the Schmerber hearing by noting that there was no showing about what any more alleged witnesses would have testified to. (App. p. 1444, ll. 13-20).

The State noted Trial Counsel's motion for funds for an expert to assist in competency issues was denied, but Trial Counsel renewed all his motions several times throughout the trial.

Furthermore, Trial Counsel was able to successfully cross-examine Codefendant on his mental health issues at trial. (App. p. 1448, ll. 1-9).

The State closed by reasserting that the record reflects Trial Counsel spent hours preparing for the trial, and the transcript reveals Petitioner was satisfied with Trial Counsel, who provided excellent advocacy. (App. p. 1448, ll. 24-25 – p. 1449, ll. 1-4).

STANDARD OF REVIEW

This Court must affirm the PCR court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey, 363 S.C. at 368). This Court also gives great deference to the PCR court's credibility findings. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (Stating the court gives great deference to a PCR court's findings when matters of credibility are involved.).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 386 S.E.2d at 625. 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 errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR judge properly denied post-conviction relief where Trial Counsel met with Petitioner frequently prior to trial, devoted an abundance of hours and attention to the case, and any alleged misbehavior regarding Trial Counsel's requests for compensation took place outside the presence of the jury and had no demonstrable effect on the proceedings.

As the PCR judge correctly held, Petitioner received effective representation from Trial Counsel, and was not prejudiced regardless. (App. p. 1484). Petitioner has therefore failed to satisfy either prong of the two-prong standard set forth in Strickland.

A. Alleged Deficiency of Counsel

The PCR judge found Petitioner has failed to carry his burden of proving deficient representation, and this finding is supported by ample probative evidence. Petitioner's argument

that Petitioner was denied effective assistance of counsel because Trial Counsel made various requests to the trial court for funding is without merit. At the PCR hearing, Trial Counsel testified he devoted 291.7 hours to this case. (App. p. 1338, ll. 12-13). Moreover, Petitioner testified to having met with Trial Counsel "quite a few times" prior to trial. (App. p. 1333, ll. 20-23). Tanner testified Trial Counsel made "very thorough" discovery and Brady requests. In fact, Tanner explained, "It might be easier to tell you what was not requested ... He would send the normal request that all attorneys send for Brady and Rule 5, and then follow up." (App. p. 1422, ll. 19-25). She testified her file was full of correspondence with Trial Counsel. (App. p. 1423, ll. 1-2).

It should be recognized the PCR judge found the testimony of both Solicitor and Trial Counsel to be credible. (App. p. 1479). The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993).

While Trial Counsel did have disagreements with the trial court regarding compensation, Petitioner did not express concern at trial. While Andy Savage, Esquire, did appear on behalf of Trial Counsel at one point regarding the requests for funding, Trial Counsel's effective advocacy on behalf of Petitioner was reflected at trial when Petitioner told Mr. Savage that he was "very happy" with Trial Counsel's representation. (App. p. 669, ll. 22-24). The record reveals Petitioner believed Trial Counsel did an "excellent" job preparing for trial and was satisfied to go forward. (App. p. 670, ll. 1-13). Clearly, probative evidence supports the PCR judge's finding that Trial Counsel was not deficient, as the record as well as credible testimony indicates Trial Counsel's diligently represented Petitioner despite disagreements regarding compensation which were not even discussed in the presence of the jury. (App. p. 1484).

Petitioner's reliance on this Court's opinion in Ex Parte James A. Brown, 393 S.C. 214, 711 S.E.2d 899 (2011), is misplaced. In affirming the trial judge's denial of excess attorney's fees, this Court in Brown held the trial court did not abuse its discretion in refusing to award excess fees based on Trial Counsel's conduct. 393 S.C. at 220. However, the issue in that case was Trial Counsel's dispute with the trial court over attorney's fees, not Trial Counsel's conduct on behalf of Petitioner. The Court made no holding regarding Trial Counsel's conduct as it related to deficiency, nor did the Court consider Trial Counsel's conduct, *as the conduct related to Petitioner*. As noted above, the discussions at issue took place outside the presence of the jury. Trial Counsel did nothing to place Petitioner in jeopardy by requesting compensation for what the PCR judge rightfully called his "extensive representation." (App. p. 1484).

B. Prejudice

The PCR judge also correctly held Petitioner was not prejudiced by Trial Counsel's behavior in attempting to obtain compensation for his representation. (App. p. 1484). It is not enough for Petitioner to show Trial Counsel's performance was unreasonable; Petitioner must also show "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.". Cherry, 300 S.C. at 117. As the PCR judge properly observed, all discussions with the court regarding the compensation disagreement took place outside the presence of the jury. (App. p. 1484). "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id., at 695. There is no reasonable probability that conversations between Trial Counsel and the trial judge regarding compensation, which were not even held in the presence of the jury, had any bearing on whether the jury had reasonable doubt of Petitioner's guilt.

Not only did the trial court conduct discussions regarding Trial Counsel's compensation outside the presence of the jury, but the court also ensured that the issue would not prejudice Petitioner. As the PCR judge noted, the record reveals the trial court was "more than patient" with Trial Counsel when he raised the issue of compensation. (App. p. 1484). There is nothing in the record to indicate the trial court showed any resentment toward Petitioner or allowed Trial Counsel's request for compensation to influence any rulings. In fact, this Court in Ex Parte Brown recognized the "remarkable patience" of the trial court. 393 S.C. at 218. Moreover, the record reveals the trial judge demonstrated care for Petitioner throughout the discussions. The trial judge told Mr. Savage during such discussions her concern was whether Trial Counsel could effectively represent his client. (App. p. 664, ll. 16-20). Furthermore, the trial judge would not allow the court to proceed until Petitioner had confirmed he was satisfied with his representation and ready to proceed. (App. p. 669, ll. 18-25 – p. 670, ll. 1-13). Clearly, the trial court conducted proceedings professionally and objectively to ensure Petitioner received a fair trial, and Petitioner has failed to establish how any alleged tension would have influenced the verdict.

The jury's verdict was certainly rather a result of the overwhelming amount of evidence implicating Petitioner. Even where counsel's representation may be deficient, prejudice does not exist when there is overwhelming evidence of guilt. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (citing Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991)). In this case, the PCR judge properly observed that the State was able to account for Petitioner's actions and whereabouts in the moments preceding the attack. (App. p. 1487). The State produced video and electronic record of Petitioner and his codefendant purchasing stockings shortly before the robbery occurred, and the victims indicated the perpetrators were wearing stockings over their faces. (App. p. 1428, ll. 22-25). The State presented the clothing worn by Petitioner the night of

the attack, which was "soaking wet and muddy" and covered in sand when Petitioner was captured at the Beaufort Inn after attempting to evade capture in the river. (App. p. 560, ll. 1-16). The State presented Petitioner's wallet, which was recovered in "soaking wet" condition from the rocks under the bridge where Petitioner and his codefendant continued to run from police after exiting the water. (App. p. 1428, ll. 16-18). The wet wallet included Petitioner's identification, social security card, bank card, and a condom. (App. p. 711, ll. 14-21). The State also presented the B.B. pistol used in the crime which resembled a Colt .45. The B.B. pistol was recovered in close proximity to Petitioner's wallet and shirt. (App. p. 713, ll. 7-25 – p. 714, ll. 1-12). Furthermore, Petitioner's codefendant testified to Petitioner's guilt at trial, and DNA evidence linked Petitioner to the crime. (App. p. 1489).

For these reasons, there is ample probative evidence to support the PCR judge's finding that Petitioner has not met his burden of proving ineffective assistance of counsel because Trial Counsel rendered effective representation, in the absence of which Petitioner would have nevertheless been convicted.

II. The PCR judge properly denied relief where the Schmerber hearing judge based his finding of probable cause on ample evidence including an affidavit in addition to Codefendant's statement, where Trial Counsel adequately prepared for the hearing, and where Petitioner has failed to prove any alleged Brady violation or prejudice from the alleged violations.

Petitioner's argument that the PCR judge erred in finding Codefendant's statements were not the sole basis of the Schmerber judge's probable cause determination is without merit. Petitioner alleges Trial Counsel was deficient in not adequately impeaching Codefendant's statements at the Schmerber hearing and these statements were the basis of the Schmerber judge's finding of probable cause. The PCR judge correctly found that Petitioner failed to carry his burden of proving Trial Counsel failed to properly challenge probable cause at the Schmerber

hearing. (App. p. 1480). The PCR judge also correctly found that Petitioner failed to carry his burden of proving prejudice from any alleged deficiency, as there was sufficient evidence to establish probable cause aside from Codefendant's testimony. (App. p. 1481).

A. Alleged Deficiency of Counsel

Petitioner's argument that Trial Counsel failed to properly prepare for the Schmerber hearing and challenge probable cause is without merit, because the PCR judge properly found, Trial Counsel adequately challenged the State's probable cause. (App. p. 1480). At the PCR hearing, Trial Counsel correctly recalled the standard for probable cause at a Schmerber hearing. (App. p. 1348, ll. 16-24). For probable cause to permit the acquisition of evidence by bodily intrusion, the following elements must be shown: (1) probable cause to believe the suspect committed the crime, (2) a clear indication that relevant evidence will be found, and (3) the method used to secure the evidence is safe and reliable. State v. Sanders, 388 S.C. 292, 696 S.E.2d 592 (2009). In this case, Trial Counsel challenged the State on elements in the Sanders standard at the Schmerber hearing. As Trial Counsel testified at the PCR hearing, he offered to the Schmerber judge a contradictory statement by Codefendant in order to argue lack of probable cause because the two statements by Codefendant, taken together, would amount to a "if anything, a fifty-fifty tie." (App. p. 1363, l. 25 – p. 1364, ll. 1-11). Trial Counsel argued items of evidence the State wanted to test were already related to Petitioner without his DNA. (App. p. 1480). For example, Trial Counsel argued Petitioner's DNA was not relevant to the State's case as it related to his father's automobile, because Petitioner would presumably already be associated with his own father's automobile. (App. p. 1456, ll. 14-19). Petitioner also noted some of the items in question did not have unknown male samples and brought into question the information available about the unknown samples. (App. p. 1457, ll. 12-19). As the PCR judge

noted, the record clearly reveals Trial Counsel advanced several arguments to challenge probable cause at the hearing.

Supported by Trial Counsel's thorough challenge of probable cause at the Schmerber hearing, the PCR judge also correctly found Trial Counsel was adequately prepared for the hearing. (App. p. 1481). As noted by the PCR judge, Trial Counsel met with the detective in the evidence room in preparation for the hearing. (App. p. 1481). Moreover, although the Schmerber hearing was held shortly after the appointment of Trial Counsel, the record reveals Trial Counsel was prepared to raise numerous arguments challenging the State's case of probable cause. (App. p. 1343, ll. 9-20). In fact, Trial Counsel acquired and offered a statement made by Codefendant contradicting Codefendant's statement the State was using to support their case for probable cause. (App. p. 1461, ll. 23-25 – p. 1462, l. 1). The PCR judge also found Trial Counsel conducted an adequate investigation of potential exculpatory witnesses. (App. p. 1485). The PCR judge found Trial Counsel credibly testified he received letters from jail indicating Codefendant had changed his story, and Trial Counsel attempted to track down at least one of the inmates through the inmate's lawyer. (App. p. 1485). Regardless, as the PCR judge observed, Petitioner has failed to present any evidence of what further investigation of these alleged witnesses would have uncovered. (App. p. 1485).

Petitioner's argument that Trial Counsel was not properly prepared for the Schmerber hearing because he did not challenge Codefendant's mental health is without merit, as the PCR judge correctly found Trial Counsel adequately investigated Codefendant's mental health history. (App. p. 1485). Furthermore, the PCR judge correctly found Trial Counsel did not even need to present evidence of Codefendant's mental health history to challenge his credibility at the Schmerber hearing. (App. p. 1480). At the PCR hearing, Trial Counsel testified, "I don't

know that I had reason to suspect [Codefendant's] mental stability..." (App. p. 1360, ll. 22-24). Again, the PCR judge found Trial Counsel's testimony to be credible. (App. p. 1479). As mentioned above, Trial Counsel came to the hearing prepared with a signed and notarized statement from Codefendant contradicting the statement offered by the State. (App. p. 1461, ll. 23-25 – p. 1462, l. 1). Moreover, the PCR judge noted Trial Counsel made several motions during trial to preclude Codefendant from testifying because of his mental health history. (App. pp. 1485-1486). The PCR judge also noted although Codefendant was found competent to testify at trial, Trial Counsel was able to cross-examine Codefendant and elicit testimony about his mental health. (App. p. 1486).

B. Prejudice

Notwithstanding the ample evidence of Trial Counsel's effective representation, the PCR judge properly found Petitioner has failed to carry his burden of proving prejudice resulted from Trial Counsel's alleged failure to properly challenge probable cause. (App. p. 1481). Petitioner's argument for prejudice is dependent on the allegation that the Schmerber judge not only based his finding *soley* on Codefendant's statement and no other evidence to support probable cause existed, but also somehow this finding of probable cause would have been different if Trial Counsel, who already offered a signed and notarized recantation from Codefendant, had further challenged Codefendant's mental health. As noted by the Schmerber judge, the DNA resulting from the hearing could have very well *exonerated* Petitioner in this case. (App. p. 1463, ll. 1-6).

Petitioner's argument is reliant on the allegation that the Schmerber judge considered only Codefendant's statement in determining probable cause. However, the PCR judge correctly found the record indicates the Schmerber judge considered more than Codefendant's statement to support a finding of probable cause. (App. p. 1481). Petitioner relies on a misinterpretation of the

following statement by the Schmerber judge, "It further appears that from the statement made by [Codefendant], there is probable cause to believe that [Petitioner] could be involved in this crime." (App. p. 1463, ll. 1-6). This statement was made after the Schmerber judge explained the State had identified three specific areas that seemed relevant and gave them need to know Petitioner's DNA in the case. (App. p. 1462, ll. 22-25). As the PCR judge noted, the "Affidavit" submitted by the State in support of the Schmerber motion indicates the court was apprised of all the facts of the case including how both Petitioner and Codefendant were developed as suspects after a car and foot chase after an officer from the Beaufort County Sheriff's Department encountered them while responding to the incident. (App. p. 1481; p. 1469).

Furthermore, as the PCR judge found, it is unlikely further evidence about Codefendant's mental health by Trial Counsel would have resulted in a different outcome at the Schmerber hearing. (App. p. 1481). The record reveals Trial Counsel offered the aforementioned contradictory statement by Codefendant, but the Schmerber judge decided it was an issue for later cross-examination. (App. p. 1462, ll. 2-7). The Schmerber judge had evidently taken the statement offered by the State into consideration along with the other evidence, but would have allowed challenges to Codefendant's credibility to be made at trial rather than the hearing. Of course, as mentioned above, Trial Counsel was indeed able to cross-examine Codefendant about his mental health with leeway at trial. (App. p. 1486).

Finally, as the PCR judge found, Petitioner fails the second prong of Strickland because he would have been convicted even without the evidence challenged through PCR. (App. p. 1487). Again, prejudice does not exist when there is overwhelming evidence of guilt. Ford, 314 S.C. at 248. Excluding the DNA evidence, the State would have still presented the overwhelming evidence discussed in Section I of this argument. In this case, the overwhelming evidence

includes the video of Petitioner purchasing stockings apparently worn during the crime, Petitioner's wet clothing along with his wallet and identification recovered near the bridge where he ran from police, his Codefendant's testimony, and the B.B. pistol found near his wet clothing.

C. Brady Allegation

Petitioner's allegation of a violation of Brady v. Maryland, 373 S.C. 83 (1963), is also without merit. Petitioner argues the State withheld mental health evidence exculpatory to Petitioner regarding the Schmerber hearing. In evaluating post-trial Brady claims, the Petitioner must show the following: (1) evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) the suppressed evidence was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Furthermore, a Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. First, the PCR judge noted Tanner credibly testified she received thorough Brady and Rule 5 requests from Trial Counsel. (App. p. 1478). Indeed, Tanner testified, "It might be easier to tell you what was not requested." (App. p. 1422, ll. 14-25). Tanner testified her file is full of correspondence with Trial Counsel, and she provided Trial Counsel with every possible report, statement, photograph, video, and DNA report. (App. p. 1423, ll. 3-8). Tanner recalled giving Trial Counsel was a form signed by the nurse involved with Petitioner's blood draw, which Tanner even transcribed for Trial Counsel because it was difficult to read. (App. p. 1423, ll. 15-21). Tanner testified Trial Counsel was provided with the evaluation and documents regarding Codefendant's mental health along with "anything else he

could think of." (App. p. 1423, ll. 22-25 – p. 1424, l. 1). Second, as the PCR judge found, Petitioner has failed to show what would have been uncovered through further investigation of Petitioner's mental health issues or alleged exculpatory witnesses. (App. p. 1485-1486). Finally, as mentioned in the above discussions, the PCR judge correctly found that Petitioner cannot show how any alleged evidence would have changed the result of the proceedings. (App. p. 1487).

For these reasons, Respondent submits there is ample probative evidence to support the judge's finding that Petitioner has not met his burden of proof regarding all allegations arising from the Schmerber hearing.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

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January 26, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2016-002269

ALFONZO J. HOWARD, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 26 day of January, 2018.

Christian Saville

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ALAN WILSON
ATTORNEY GENERAL

January 26, 2018

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

Re: **Alfonzo Howard, #333399 v. State of South Carolina**
Appellate Case No. 2016-002269
Lower Court Case No. 2011-CP-07-02946

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville

Christian Saville
Assistant Attorney General
SC Bar No. 103272

CS/trb
Enclosures

cc: Robert M. Dudek, Esquire (2 copies)
Victim Advocacy Division