

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Clarendon County
Clifton Newman, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-000027

GEORGE SMITH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

- I. Whether probative evidence supports the PCR court's ruling that Trial Counsel was not ineffective for eliciting evidence of flight where his actions were reasonable under the circumstances and Petitioner cannot establish any resulting prejudice under the Strickland standard.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The convictions at hand arose from a shooting that took place on April 6, 2008, in Clarendon County. The victim had known Petitioner ("Chips") for a long time. The victim was walking home from a bar in the very early morning. He heard a gun click. He looked and saw Petitioner behind him. Petitioner shot him in the leg, and demanded and took his silver and gold neck chains. He also demanded the victim's money. Petitioner aimed the gun at the victim's face; it clicked but didn't fire. Finally, Petitioner said, "Tell the police this is what I do." App. 23-37.

Petitioner was true bill indicted at the August 2008 term of the Clarendon County Grand Jury for assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime (2008-GS-14-0352). Harry Devoe, Esquire represented him. Petitioner proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. On December 8, 2009, Petitioner was found guilty as indicted. Judge Cothran sentenced Petitioner to twenty years' imprisonment for assault and battery with intent to kill,¹ twenty five years for armed robbery, and five years for possession of a weapon during a violent crime, with all sentences running concurrently.

A timely notice of appeal was filed on Petitioner's behalf. Elizabeth A. Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense, filed a brief on Petitioner's behalf raising the issue of whether the trial judge erred in sentencing Petitioner to twenty-six years for assault and battery with intent to kill, which only carries a maximum sentence of twenty years. The South Carolina Court of Appeals affirmed the lower court's conviction. State

¹ Although Judge Cothran originally sentenced Petitioner to twenty-six years' imprisonment for ABWIK, at some point the sentence was changed to twenty years. See sentencing sheet.

v. George Smith, Op. No 2012-UP-350 (S.C. Ct. App. filed June 6, 2012). The remittitur was sent on June 25, 2012.

Petitioner filed a timely application for post-conviction relief on August 22, 2012, alleging he was being held unconstitutionally based on the following allegations:

1. Ineffective assistance of counsel.
 - a. Failure to prepare and investigate.
 - b. Failure to utilize witnesses.
2. Ineffective assistance of appellate counsel
 - a. Failure to raise all meritorious issues on appeal.

Respondent made its return on February 12, 2013. Petitioner filed an amendment to his post-conviction relief application on September 4, 2014, adding the following allegations:

1. Ineffective assistance of trial counsel for failure to make a pretrial motion and/or trial objection to the identification of Applicant.
2. Ineffective assistance of trial counsel for failure to advise Applicant of conflict of interest due to representation of Kelvin and Broaddus Black.
3. Ineffective assistance of trial counsel for failure to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant.
4. Ineffective assistance of trial counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess.
5. Ineffective assistance of trial counsel for his comments in mitigation prior to sentencing.
6. Ineffective assistance of trial counsel for failure to object to Applicant's illegal sentence.
7. Ineffective assistance of appellate counsel for failure to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal.

An evidentiary hearing into the matter was convened on September 10, 2014, before the Honorable Clifton Newman at the Sumter County Courthouse. Petitioner was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. At

the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from Investigator Pete Skidmore. The State presented testimony from Harry Devoe, Esquire (hereinafter "Trial Counsel"). The PCR court had before it a copy of the trial transcript, the Clarendon County Clerk of Court records, Petitioner's South Carolina Department of Correction records, the PCR application, appellate records and return. During the evidentiary hearing, various exhibits were introduced, including a statement from Tasha Cannon, a case history report for case J124620, and a motion for discovery for case J124620 filed by Trial Counsel. Additionally, both parties stipulated to the introduction of a sworn affidavit by Elizabeth Franklin-Best, Esquire, Appellate Counsel.

Judge Newman issued an Order of Dismissal signed on September 21, 2016, and filed on November 3, 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 January 9, 2017. Petitioner's Appendix and Petition for Writ of Certiorari were filed on October 2, 2017. This Return to the Petition for Writ of Certiorari follows.

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), SCRPC; 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, 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, 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.

ARGUMENT

I. The PCR court correctly held that Trial Counsel was not ineffective for allegedly introducing evidence of Petitioner's flight on cross-examination of Investigator Burgess where his testimony was not evidence of flight and where Petitioner can show no resulting prejudice.

Petitioner alleges the PCR court erred in failing to find Trial Counsel ineffective for unintentionally opening the door to evidence of Petitioner's flight while cross-examining Investigator Burgess. However, this issue is meritless, as the testimony in question did not constitute evidence of flight so Trial Counsel was not deficient in eliciting the testimony, and Petitioner failed to establish any resulting prejudice from this alleged deficiency.

First, the PCR court properly found Trial Counsel was not deficient for eliciting testimony from Investigator Burgess about law enforcement's two-month search for their suspect that resulted in obtaining the assistance of United States Marshals to put Petitioner in custody because this is not evidence of flight. The testimony to which Petitioner refers appears during the cross-examination of Burgess, after Burgess testified on direct that he knew immediately the identity of the shooter. App. 81. On direct, the solicitor asked Burgess what occurred when he met the victim at the hospital:

Burgess: And the first question I try to ask is, "Who shot you." I want the basic information.
Solicitor: And did you ask [the victim] that?
A: Yes, I did.
Q: And what was his answer?
A: "Chips. Chips shot me."
Q: Was there any hesitation or doubt in your mind?
A: No. He just said, "Chips." Chips shot him. That's what I began to put it together. On my way to the scene, the officers were already talking about "Chips." And as you know, he mentioned something to one of the officers that Chips was the possible shooter. I was familiar. At that point, I left and went to the office, because they were working on it for a while. And put together a lineup.
Q: Did you know who Chips was?

A: Yes, ma'am.

App. 81, line 3-22. Later, in response to a question about how a gun was never apprehended, Burgess stated, "No ma'am. We did not apprehend the suspect for 2 months." App. 93, line 1-2.

On cross-examination, Trial Counsel asked for clarification on this statement:

Trial Counsel: You also mention at the very end, you say there were no suspects for two months.

A: No, I do not say no suspects.

Q: I thought you said that.

A: I said we did not take him in to custody for 2 months. We were looking for him. And I had to actually have the assistance of marshal services to take him into custody.

Q: So you misspoke when you said no. You meant looking for the suspect.

A: I never said we had no suspect, no.

App. 99, line 4-14.

Petitioner asserts Burgess's testimony constitutes evidence of flight that convinced the jury of Petitioner's guilt. However, this testimony is not evidence of flight. Evidence of flight is evidence that an accused fled from or purposefully evaded law enforcement to avoid apprehension when he had knowledge that he was being sought by authorities. See State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. McDowell, 266 S.C. 508, 224 S.E.2d 889 (1976). Evidence of particular acts of flight is used to show consciousness of guilt. State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013). Our supreme court has identified the "critical factor to the admissibility of evidence of flight" as "whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities ... [and his] actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." Id., (citing State v. Pagan, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006)).

This Court has held that evidence of flight from prosecution is admissible as evidence of guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). However, in order for the evidence to be relevant, there must be a nexus between the flight and the offense committed. State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct.App.2004). “To establish this causal chain, there must be evidence that the defendant fled or attempted to flee and that supports inferences that (1) the defendant's flight was the product of consciousness of guilt, and (2) his consciousness of guilt was in relation to the crime with which he was ultimately charged and on which the evidence is offered.” Martin, at 29, 742 S.E.2d at 47 (citing United States v. Obi, 239 F.3d 662, 665 (4th Cir.2001)).

Burgess’s testimony does not constitute evidence of flight. His testimony did not include any evidence that Petitioner was evading law enforcement or fled to avoid arrest. No evidence was presented that law enforcement knew Petitioner’s address or location but was not able to find him there because he fled. The solicitor did not argue to the jury that Petitioner fled from law enforcement and thus must be guilty. There was simply no evidence that Petitioner fled or attempted to flee. The only evidence Petitioner claims was “damning” is Burgess’s testimony that the officers were looking for the suspect for two months and needed assistance to take him into custody. It is a stretch of the imagination to consider this as evidence that Petitioner fled and that his flight was the product of consciousness of guilt in relation to this crime, as case law requires for evidence of flight. Accordingly, because this testimony is not evidence of flight, Trial Counsel cannot be deficient for eliciting evidence of flight at trial.

Furthermore, it was reasonable for Trial Counsel to ask this question on cross-examination, as his intention was clearly to weaken Burgess's credibility by contrasting his statement that he immediately knew who the shooter was while speaking to the victim with the fact that he could not find a suspect for two months after the incident. Trial Counsel testified at the evidentiary hearing that his trial strategy was to attack the ability of the witnesses to see and identify the shooter in the middle of the night in a dim area through a small, dirty window. App. 249, line 7-21. To question Burgess on his inability to find a suspect for two months would align with this strategy and suggest to the jury that the victims and law enforcement may not have been sure about their identification of the shooter, after all. Burgess's response, which included the statement about having United States Marshals assist in Petitioner's arrest, was not responsive to Trial Counsel's question, but simply a clarification on what he meant in his testimony on direct. The PCR court correctly held Trial Counsel's actions were reasonable under the circumstances and his representation while cross-examining Burgess was not deficient.

Second, even assuming *arguendo* that the testimony in question was evidence of flight, Petitioner can show no prejudice from any alleged deficiency by Trial Counsel because the testimony had no impact on the guilty verdict. This Court has held evidence of flight has very little probative value. State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) ("Evidence of flight tends to be only marginally probative.") (quoting State v. Jefferson, 11 Wash.App. 566,524 P.2d 248, 251 (1974)). This Court has also held that improper admission of evidence of flight is not prejudicial where the State presents other competent evidence of guilt. See Martin, at 31, 742 S.E.2d at 48 ("Nonetheless, we find the trial court's admission of the challenged evidence was harmless. While it is true the eyewitnesses in the bank could not identify the gunman and no forensic evidence linked Martin to the robbery, the State presented ample

competent evidence of Martin's guilt."); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (stating "an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached").

There was ample evidence of Petitioner's guilt to support the jury's guilty verdict. Petitioner was identified as the shooter by the victim, who had known Petitioner his entire life, knew him by his nickname, "Chips," identified him from a photo lineup, and identified him in the courtroom. The victim's wife, who saw the incident from inside her residence, also identified Petitioner as the shooter; she told law enforcement that the shooter was "Chips" before her husband told her who shot him, she identified him in a photo lineup, and identified him in the courtroom. Investigator Burgess recognized the nickname "Chips" and identified Petitioner as "Chips" immediately after the shooting. Both victims testified that Petitioner had a gun and shot at the victim. The shell casings found at the scene supported the testimony of Petitioner shooting at the victim. This evidence is clearly enough to support the jury's guilty verdict. Even if improper evidence of flight had been admitted at trial, there is no prejudice where there is ample competent evidence of Petitioner's guilt. Petitioner has failed to meet his burden of proving that the outcome of the trial would have been different but for Trial Counsel's alleged deficiency, so the second prong of the Strickland test is not met.

Because Burgess's testimony was not evidence of flight, Trial Counsel was not deficient, and because the testimony could not have changed the outcome of the trial, Petitioner can show no prejudice from any alleged deficiency by Trial Counsel on cross-examination of Burgess. Therefore, the Strickland test cannot be met, and this Court should affirm the PCR court's finding that Trial Counsel was not ineffective.

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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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 on Indigent Defense
Post Office Box 11589
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This 16th day of February, 2018.


CAROLINE COLLINS
Administrative Coordinator