STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Aiken County
Maité Murphy, Circuit Court Judge

Appellate Case No. 2017-000809

LONDON DEVONTA WOODEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

I. Whether probative evidence supports the PCR court's finding that there was no resulting prejudice from Trial Counsel opening the door to the admission of evidence of prior bad acts on cross-examination of a witness for the State based on the strength of the evidence of Petitioner's guilt.

II. Whether probative evidence supports the PCR court's finding that Petitioner's guilty plea was entered knowingly and voluntarily.

III. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to prepare for trial and communicate a defense strategy with Petitioner.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was true bill indicted at the April 2012 term of the Aiken County Grand Jury for murder (2012-GS-02-473) and possession of a weapon during a violent crime (2012-GS-02-474). Petitioner was subsequently indicted for first-degree burglary (2013-GS-02-906) by the June 2013 term of Aiken County Grand Jury. De Grant Gibbons, Esquire, and Andrew Smith, Esquire represented Petitioner. On November 15, 2013, Petitioner proceeded to a jury trial before the Honorable James R. Barber, III on the murder and possession of a weapon charges. Petitioner was found guilty on both charges. Following the trial, Petitioner entered a guilty plea to first-degree burglary. Judge Barber sentenced Petitioner to a thirty-five year term of imprisonment for murder and first-degree burglary, and five years for possession of a weapon. The sentences run concurrently.

A Notice of Appeal was filed on Petitioner's behalf for the murder and weapons charges. By Order filed March 24, 2015, the South Carolina Court of Appeals dismissed the appeal pursuant to Petitioner's request. The Remittitur was issued on April 14, 2015. Due to a filing error by Mr. Gibbons, Petitioner did not appeal the burglary guilty plea or sentence.

Petitioner filed his application for post-conviction relief on April 1, 2015, alleging he was being held unconstitutionally based on the following allegations:

1. Ineffective assistance of counsel.
    a. Failed to challenge the probative value of states DNA expert opinion being substantially outweighed by the danger of unfair prejudice.
2. Involuntary guilty plea.

Petitioner filed amendments to his application on December 2, 2015, and on April 5, 2016, adding the following allegations:

(a) Ineffective assistance of counsel for advising Applicant to submit a DNA sample for the Burglary, First charge while advising Applicant it would have no effect in his murder case.

(b) Ineffective assistance of counsel for failing to discuss and put forth a defense.

(c) Ineffective assistance of counsel for opening the door to prior bad acts by the Applicant.

(d) Ineffective assistance of counsel for failing to adequately cross-examine the State's DNA expert.

(e) Trial counsel's ineffectiveness rendered his subsequent guilty plea involuntary.

(f) Ineffective assistance of counsel for failing to challenge the reliability of DNA expert.

Respondent submitted its Return and Partial Motion to Dismiss on August 27, 2015, moving to dismiss any claims regarding Petitioner's first-degree burglary guilty plea as untimely. A hearing was held on May 26, 2016 at the Aiken County Courthouse before the Honorable Diane Goodstein. Petitioner was present and represented by Lance S. Boozer, Esquire. Assistant Attorney General Julie A. Coleman, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Judge Goodstein denied the State's Partial Motion to Dismiss because the testimony showed Trial Counsel intended to file an appeal of both the trial convictions and the guilty plea convictions, but due to an error, the guilty plea was not appealed. Judge Goodstein granted Petitioner a belated appeal of his guilty plea. Subsequently, Petitioner communicated to counsel that he did not wish to pursue a belated appeal and wanted only to continue forward with his post-conviction relief allegations.

The full evidentiary hearing was heard over all allegations at the Bamberg County Courthouse on January 23, 2017, before the Honorable Maité Murphy. Petitioner was present and represented by Mr. Boozer. Assistant Attorney General Coleman represented Respondent. At

the hearing, Petitioner testified on his own behalf. Respondent presented testimony from De Grant Gibbons ("Trial Counsel"). Judge Murphy issued an Order of Dismissal denying post-conviction relief signed on March 13, 2017, and filed March 27, 2017.

Petitioner filed a timely Notice of Appeal on April 4, 2017. The Petition for Writ of Certiorari and Appendix were filed November 13, 2017. This Return to 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 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, 286 S.C. 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, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 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. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for opening the door to prior bad acts and allowing the State's witness to testify about Petitioner punching her where Petitioner could not prove prejudice in light of the strong evidence against him.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for opening the door to prior bad acts during the cross-examination of a witness for the State. However, this issue is meritless, as probative evidence supports the PCR court's ruling that Petitioner can show no prejudice based on the strength of the evidence against him. Accordingly, the PCR court's ruling should be affirmed.

At trial, the State presented testimony from Erica Richardson. On cross-examination, Trial Counsel Andrew Smith asked the following question:

> Q: You don't like [Petitioner], do you?
> A: I don't have no issue with him.
> Q: Didn't you try to press charges against him about a month or two before this happened?
> A: Yes, sir, I did.
> Q: Okay. But you don't have anything against him?
> A: No, sir, I don't.

App. 321, line 7-13. On re-direct, the prosecution asked Richardson why she tries to press charges against Petitioner. Richardson explained:

> A: It was an incident – I guess he like tried to want to have intercourse with me and he blocked my car in there. I never ever gave him any reason to even try to have a crush on me or anything and I was going to see my guy friend and his friends blocked my car in when I was dropping people off at Ms. Mary's house. And he jumped in my car, in my back seat, and he told me – I kept telling him to get out my car because I was going to see my guy friend and he told me he was not going to get out of my car unless me or Candice gave him sex. He stayed in my car for at least 45 minutes. I kept telling everyone to get him out of my car. They thought it was a joke. He laid in the back seat of my car.

> So I just got out of my car and when I got out my car and I started – I did. I started trying to pull him out of my car and he was like, Man, if you pull me again, I'm going to knock you out. So I said forget it. So once I got out of the car and fixes to walk away, he turned and punched me. I got the scar right there to prove it and he knocked me out cold.
>
> ...
>
> I called the police. At the time he was 16. The police came. I went to the ambulance – I went to the hospital and got stitches. He told the police to lock him up because he did it, but at the time they could not lock him up because he was under age, so an investigator – I missed work and everything. The investigator, they came along and she was pursuing with the case and the case was going to take place but that's when this case happened to David Maple.

App. 332, line 24 – 324, line 3. Petitioner alleges Trial Counsel was ineffective for opening the door to allow this testimony in.

At the evidentiary hearing, Trial Counsel testified Erica Richardson was a "pretty damning witness," even before she testified about the prior bad acts. App. 677, line 20. He explained that Richardson testified "that she saw [Petitioner] running across the yard with a gun in his hand. And she IDed him; she said she knew him." App. 677, line 20-24. Trial Counsel testified "I talked to [Petitioner] before trial and I said, you know, what's up with her? And he said she didn't like him, that she had tried to get him arrested. And that's all he told me about that situation and that's all Mr. Smith knew about this situation." App. 677, line 25 – 678, line 5. He explained that his client never told him anything about the situation with Richardson other than saying that she tried to get him arrested for "some stupid stuff." App. 678, line 25.

When asked if this testimony was damaging to Petitioner in the eyes of the jury, Trial Counsel responded, "I can't say whether it was or it wasn't. I would have rather not had it in there. And if I had known that's what happened, I wouldn't have – neither one of us would have asked that question. But when we asked about their involvement with each other, he said that we had a – she doesn't like me, she tried to get me arrested for something." App. 681, line 2-8. He

further explained later that, given the evidence against Petitioner, even with this evidence of prior bad acts "I think once they have that person saying he was leaning over [the victim] with a gun to his head after he'd shot a bunch of times, threatening him and calling him names, I think that would have been astronomically hard to overcome." App. 688, line 23- 689, line 2.

In its Order of Dismissal, the PCR court found Trial Counsel was deficient under the first prong of Strickland for failing to investigate the prior bad acts before the trial and allowing the prosecution to examine them with the witness. App. 713. However, the PCR court found Petitioner failed to prove prejudice under the second prong of Strickland because, considering the "cumulative weight of the evidence supporting [Petitioner]'s conviction, this mistake was simply not significant enough to change the jury's verdict." App. 713. This finding is clearly supported by the probative evidence in the record before the Court.

The evidence against Petitioner presented at trial included the testimony of four eyewitnesses who were present and observed the shooting, some of whom saw Petitioner shoot the victim and identified him as the shooter, App. 52-102; App. 311-319; App. 325-332; App. 335-340, as well as touch DNA evidence from the gun used to kill the victim and 911 phone call recordings made during the shootout following the killing. App. 197, 198, 360; App. 54. Statements from witnesses given at the scene immediately following the crime showed Petitioner was involved in the shooting, that he chased one of the victims around a building, leaned down and threatened him, and shot the victim five times in the back while he was on the ground. App. 110. The eyewitnesses testified Petitioner went up to the victim as he laid on the ground, kicked him, made derogatory statements to him, then ran off. App. 85-86. The gun used to kill the victim was found thrown into the bushes nearby. App. 694.

The evidence presented against Petitioner was extremely strong, if not overwhelming. Any mention of a separate event in which Petitioner may have punched someone has no bearing on the statements of the eyewitnesses and DNA evidence proving Petitioner shot and killed the victim on the date in question. Accordingly, because of the strength of the evidence of Petitioner's guilt presented at trial, Petitioner cannot show the result of the trial would have been different had Trial Counsel not opened the door to evidence of his prior bad acts. Therefore, because probative evidence in the record supports the PCR court's finding, this Court should affirm the Order of Dismissal.

II. Probative evidence supports the PCR court's finding that Petitioner's guilty plea was entered knowingly and voluntarily and Petitioner failed to prove otherwise.

Petitioner argues the PCR court erred in failing to find his guilty plea was involuntary where he pled immediately after his conviction in his murder trial and he believed his attorney could not get him a better result on the burglary charge. However, the PCR court properly relied on the guilty plea transcript and testimony presented at the evidentiary hearing in finding that Petitioner failed to prove reason why he should allowed to depart from his statements at the plea, and his plea was entered into voluntarily.

The morning after Petitioner was convicted of murder and possession of a weapon during a violent crime, he entered a guilty plea to his first degree burglary charge. He testified that he spoke with his attorney about the burglary charge and he had told him everything he knew about the matter. App. 595, line 5-10. He stated Trial Counsel had answered all his questions and done everything he asked him to do with respect to that charge, and he was satisfied with Trial Counsel's services. App. 595, line 11-17. Petitioner testified he understood he did not have to plead to the burglary charge, and he was waiving the right to a jury trial by pleading. App. 597, line 1-17. He informed the plea court that he was pleading freely and voluntarily, and no one had threatened, coerced, or pressured him into pleading guilty. App. 600, line 11-16. The plea court accepted Petitioner's plea and found Petitioner was represented by competent counsel, Petitioner was satisfied with the services of his attorney, and that Petitioner was pleading guilty "freely and voluntarily and his guilty plea [was] entered knowingly and intelligently." App. 602, line 6-11. The State recommended a concurrent sentence. Petitioner was sentenced to thirty-five years' imprisonment for murder and thirty-five years for burglary, to be served concurrently.

At the evidentiary hearing, Petitioner testified that he entered his guilty plea because he lost his trial and he felt as if Trial counsel could have done better. App. 655, line 4-13. He asserted that he plead because he did not believe counsel would have been the proper representation for a trial on his burglary charge. App. 655, line 10-13. Trial Counsel testified at the evidentiary hearing that he became very concerned about the burglary charge after Petitioner was convicted of murder. App. 689, line 16-18. He testified he advised Petitioner that the State had given some indication it would file for a life without parole sentence, and that sentence would be mandatory because Petitioner would have been convicted of two "most serious" crimes. App. 689, line 21 – 690, line 2. Trial Counsel advised Petitioner to plead guilty as soon as possible in front of the same judge at the same term of court because Petitioner would likely receive a concurrent sentence, rather than a consecutive sentence of life without parole. App. 690, line 3-10. Trial Counsel testified he believed Petitioner fully understood the plea and he understood their discussions following the plea and agreed with Trial Counsel's advice. App. 691, line 1-13. Trial Counsel explained, "I felt like he knew what he was doing. Was he upset? Was he kind of reeling from that sentence? I can't imagine anybody wouldn't be. But I felt very strongly we had to get that done before that term ended." App. 691, line 14-18.

The record clearly shows Petitioner's plea was entered knowingly and voluntary. The record shows a very thorough plea colloquy indicating Petitioner's understanding of the circumstances and the rights he was waiving by pleading guilty. The evidence against Petitioner was overwhelming, and included DNA evidence of Petitioner's blood on the broken glass at the crime scene. Trial Counsel opined that all they could do was "try and attack the DNA expert. And as you can see from this trial, they're going to give their story one way or the other, and that would be a tough one to win." App. 691, line 21-25. The record shows Petitioner was aware and

understood before his plea that if he chose to go to trial on the burglary charge at a later term of court, he would most likely be sentenced to a consecutive, mandatory sentence of life without parole. He chose instead to plea and get the State's recommendation of a concurrent thirty-five year sentence.

The PCR court found in its order that Trial Counsel was not ineffective in rendering advice on Petitioner's guilty plea. App. 713. It further found Petitioner had sufficient time to weigh the pros and cons of accepting the plea and Trial Counsel credibly testified he discussed these options with Petitioner. App. 713-714. The PCR court did not question the manner in which Trial Counsel advised his client in light of the strong DNA evidence against Petitioner, and found Petitioner's plea was not involuntary and Petitioner failed to prove otherwise.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should

be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Petitioner failed to present a valid reason why he should be allowed to depart from the truth of his statements given at the guilty plea. The guilty plea transcript and Trial Counsel's testimony from the evidentiary hearing is clearly probative evidence that supports the PCR court's finding. Accordingly, because the PCR court's finding is supported by probative evidence, this Court should affirm its decision.

III. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to prepare for trial and communicate a defense strategy with Petitioner.

Petitioner asserts the PCR court erred in finding Trial Counsel was not ineffective for failing to prepare for trial and communicate a defense strategy with Petitioner, and that Trial Counsel was ineffective because he repeatedly attempted to convince Petitioner to plead guilty. This allegation is meritless, as probative evidence supports the PCR court's finding that Trial Counsel did prepare for trial and discussed a defense strategies with Petitioner prior to trial.

In its order the PCR court made the following finding regarding this issue:

> The Court finds that Trial Counsel was not ineffective in failing to discuss and put forth a defense. Trial Counsel testified at the PCR hearing that he spoke with [Petitioner] about using a self-defense strategy. Trial Counsel also testified that a self-defense argument was negated by the evidence of mutual combat and the fact that the Victim was shot in the back. At trial, Trial Counsel called three witnesses for the defense, including a dispatcher, which allowed the jury to hear the 9-1-1 tapes to show that multiple shots were fired. Trial Counsel also called a coroner to show the Victim's suspected drug activity, and an expert on gang activity to testify as to the Victim's gang-related tattoos. The Court concludes that [Petitioner] failed to show Trial Counsel was deficient in using this defense strategy.

App. 714. Trial Counsel testified at the evidentiary hearing that he personally met with Petitioner at least fifteen times before trial, Petitioner met with counsel Andrew Smith a couple of times, and his investigator met Petitioner to review the evidence three or four times. App. 668, line 2-8. Trial Counsel testified they started coming up with a defense when they got closer to the trial, because he advised Petitioner up until that point that it was in his best interested to make a plea deal because he could not see any good viable defenses to present. App. 668, line 18-22.

Trial Counsel testified that their defense strategy was to show the jury that the victim was on drugs at the time of the incident and he was involved in a gang. He stated the 911 call, which was played at trial, showed there were 15-20 shots fired during a shootout when the crime

occurred, and he tried to establish others were shooting back at Petitioner and it might have been a self-defense case. App. 669, line 1-15. In the alternative, he testified his strategy was to say law enforcement did not speak to everyone at the scene of the crime and never questioned many witnesses. App. 669, line 15-19. Trial Counsel testified that he presented at trial the coroner who examined the victim and testified about suspected drug activity, as well as the 911 dispatcher to allow in the recording with evidence of multiple people shooting, and the police gang expert, who testified about the victim's tattoos and how they may be connected to a local gang.

Trial Counsel testified he could not specifically remember if he discussed his decision to call these three witnesses with Petitioner before trial, because it was during the late stage when they knew they had to come up with some defense material. App. 673, line 24-674, line 6. He explained that he discussed with Petitioner the pictures and the gang tattoos, as well as the potential witnesses that were never interviewed by law enforcement. App. 673, line 16-23.

The record before the Court shows Trial Counsel was clearly prepared for trial and presented a valid defense to the jury, which included three witnesses to call the character of the victim and the comprehensiveness of the investigation into question. Trial Counsel testified he believed their best defense was a self-defense strategy, although it was negated by evidence presented by the State, but Petitioner disagreed and refused to testify at trial in furtherance of a self-defense approach. The record supports the PCR court's findings that Trial Counsel discussed their strategies with Petitioner and fully prepared them for trial. Petitioner failed to show any deficiency by Trial Counsel in preparing for trial.

Furthermore, Petitioner failed to meet the prejudice prong of the Strickland test because he did not present any evidence of a valid defense strategy that Trial Counsel could have used at trial to change the jury's verdict. He presents only the mere speculation that, had Trial Counsel

prepared and discussed a defense further, it would have resulted in an acquittal. Petitioner's failure to present evidence to support his allegation aligns with the reasoning this Court used in deciding Glover and Bannister. Glover held that, in order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id. "This Court has repeatedly held a PCR applicant 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, 303, 509 S.E.2d 807, 809 (1998). Petitioner's failure to present evidence of a defense that would have changed the outcome of the trial results in his failure to prove the prejudice prong of Strickland.

Therefore, because Petitioner failed to prove either prong of the Strickland test regarding this allegation, and because the PCR court's findings are clearly based on probative evidence in the record, this Court should affirm its findings.

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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March 30, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

The Honorable Maite' Murphy, Circuit Court Judge

LONDON D. WOODEN, #357930

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 30TH day of March 2018.

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