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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-001173

ANTRELL RASHAWN FELDER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
S.C. Bar No. 102214

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

ATTORNEY FOR RESPONDENT

INDEX

RESPONDENT'S ISSUE PRESENTED

I. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for stipulating to the introduction of Petitioner's unredacted oral statement to law enforcement where there is no prejudice because the allusion to Petitioner's bond from a prior crime did not affect the outcome of the trial.

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was true bill indicted at the January 2009 term of the Sumter County Grand Jury for murder and possession of firearm or knife during the commission of a violent crime (2009-GS-43-0059). Shaun Kent, Esquire, and Ray Chandler, Esquire, represented Petitioner. On November 18, 2011, Petitioner was convicted as indicted. The Honorable Howard P. King sentenced Petitioner to a forty-two year term of imprisonment for murder and a five year term of imprisonment for possession of a weapon during commission of a violent crime with all sentences running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf. On appeal, Petitioner challenged the trial court's refusal to allow cross examination of the investigator about the scope of his investigation and the victim's pending burglary charges, as well as the trial court's denied of his directed verdict motion where the State allegedly failed to place him at the scene of the crime. App. 586. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Antrell Felder, Op. No. 2013-UP-437 (Ct. App. filed November 27, 2013). The Remittitur was issued on December 13, 2013.

Petitioner filed his application for post-conviction relief on July 23, 2014, alleging he was being held in custody unlawfully based on the following grounds:

1. Ineffective Assistance of Counsel
    a. "failing to articulate and argue dismissal of the criminal case at the pretrial hearing on the grounds of speedy trial rights violation."
    b. "failing to articulate and argue dismissal of the criminal case on the grounds of prosecutorial misconduct and the resulting prejudice as the result of solicitor Catherine Fant controlling and manipulating the trial docket of this case to gain an unconstitutional advantage."

c. "failing to compel the attendance of solicitor Catherine Fant at the pretrial evidentiary motions hearing where solicitor's Fant actions and inactions were the core of the prosecutorial misconduct allegations and where solicitor Fant is the only individual privy to the information that will answer her actions and inactions and which will justify the trial court granting dismissal of the case based on prosecutorial misconduct."
d. "failing to move for disqualification of recusal of the Third Circuit Solicitor's office for repeated actions of prosecutorial misconduct committed by Solicitor Catherine Fant which has prejudice the trial preparation and discovery defense development strategies of the Applicant."
e. "failing to conduct a reasonable investigation and interview Tavares Felder, while Tavares Felder's pretrial hearing testimony and trial testimony would have established grounds for suppression for the motion in limine and would have established a viable defense and rebuttal evidence against the law enforcement officers at trial who made an in-court identification of the defendant faked his identity to elude law enforcement which in turn alluded to defendant's guilty of this crime and the correctness of the law enforcement officers' identification of defendant."
f. "Trial Counsel Ineffective for stipulating to unredacted introduction of defendant's oral statement into trial evidence via detective Potteiger's report and trial testimony which emphasizes that the defendant was currently out on bond for a lynching charge," resulting in the unobjectionable introduction of inadmissible 'prior bad acts' and 'other crimes' to demonstrate defendant's propensity to violent and to chill defendant's willingness to exercise his right to testify in his defense."
g. "failing to conduct a reasonable investigation and interview of Stacey Caughman and Ida Mae Felder, where their pretrial hearing testimony and trial testimony will have established grounds for suppression for the pretrial motions and will have established a viable defense and rebuttal evidence against the law enforcement officers at trial who made in-court identification of Mrs. Ida Mae Felder's white automobile as being with tinted windows on the night of the crime, and who additionally testified that the tint on the windows were subsequently removed to obstruct and conceal from law enforcement that Mrs. Felder's white car is the 'tinted window' white car the eyewitness saw at the crime scene which in turn alluded to the defendant's guilt of this crime and to the integrity of law enforcement investigation of this case."

2. Due process violation

a. "for the repeated actions of prosecutorial misconduct committed by solicitor Catherine Fant which was prejudiced the trial preparation and discovery and defense development strategies of the Applicant."
b. "for prosecutorial misconduct and the resulting prejudice as the result of solicitor Catherine Fant controlling and manipulating the trial docket of this case to gain an unconstitutional advantage."

3. Ineffective Assistance of Appellate Counsel

"failing to evaluate and brief suppression of the phone records, the victim's pending burglaries, 'third party guilt' principles to impeach the investigation, and the trial judge's denial to dismiss the case on prosecutorial misconduct."

Respondent submitted its Return on September 29, 2014. An evidentiary hearing was convened on March 28, 2017, at the Sumter County Courthouse before the Honorable D. Craig Brown. Petitioner was present at the hearing and was represented by Timothy Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's trial attorneys, Shaun Kent, Esquire, and Ray Chandler, Esquire, also testified. The PCR court had before it a copy of the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Petitioner's records from the South Carolina Department of Corrections, and the pleadings. Judge Brown issued an Order of Dismissal signed May 2, 2017, and filed May 18, 2017, denying and dismissing the application with prejudice.

Petitioner filed a timely Notice of Appeal on May 8, 2017. Petitioner's Appendix and Petition for Writ of Certiorari were filed on December 4, 2017. This Return to the Petition for Writ of Certiorari follows.

Statement of Facts

Evidence revealed the circumstances that led to the death of Willie McKenzie began in the late evening of July 17, 2008 with the telephone call around 11:59 that advised Petitioner that four guys were breaking into Petitioner's house. App. 351-52 (Petitioner's Statement). At that point, Petitioner left a party on Broad Street and returned to his home on Harry Avenue. Petitioner reported to the police in his statement that when he left to go to Harry Street he was driving his car, a white vehicle titled to his mother, and his mother was following in a green car. App. 352, line 1-7. He identified his car as a white Buick. App. 353, line 1-14, 355, line 16 - 359, line 2. (State Exhibits 12, 13).

According to Petitioner, when he entered his home on Harry Street, he noticed things missing. App. 352, line 8-12. He stated that his girlfriend, Stacey Caughman, advised him to leave if he had something on him. Petitioner claimed he had marijuana on him "so he promptly left by himself driving his white four-door Buick." App. 352, line 14-15. This was prior to the police arriving at Harry Street. Petitioner also admitted in his statement that he had been wearing black shorts and a black shirt that morning of the 18th, but admitted that he had changed earlier from a white shirt. App. 353, line 10-13. (The eyewitness at trial later identified the shooter as wearing a white shirt and dark pants. App. 183, 195-96, 210-12, 228-29.)

Minutes later, Kayla McFadden testified that she and her cousin, Antrell McFadden, were walking to a convenience store and came upon a man who requested a cigarette. After they gave him the cigarette, they walked away from him. She then described a white car with tinted windows that pulled up, and someone got out of the car and fired shots and kicked the victim. App. 282-83. Kayla described the shooter as wearing a "hat, white shirt, and some dark pants." App. 183, line 24-25. Kayla identified the red hat (State Exhibit 17) as possibly the hat and

confirmed that this was the hat on the ground in State Exhibit 1 at the crime scene. App. 184. Kayla confirmed that the man who got out of the car initially shot the other man over the car. She confirmed that she saw the shooter go around the car and then kick the victim. App. 198-99. She stated that the white car had come off Broad Street.

Kayla's cousin, Antrell McFadden, testified that he gave the victim a cigarette that night and the victim was not wearing a hat. App. 209, 212. After they walked away, he stated a white car with tinted windows pulled up and a man got out of the car wearing a red and black hat, white shirt and blue jeans, about 5'7". App. 210-212. He stated he heard one shot, but did not see the shooter's face. App. 212. He said he then saw the hat on the ground and pointed it out to the police. App. 215-17. He identified State Exhibit 1 showing the hat as the hat he saw on the person who got out of the car. App. 216-17 (State Exhibit 17). He stated the shooting occurred after 12:30 that night. App. 220. McFadden testified that he heard the person who shot the victim say "I got you now." App. 255, line 17-18.

The evidence also reveals that later that morning, McFadden identified the Petitioner's white Buick as consistent with the vehicle they had seen at the shooting. Kayla described that on their way home from the police station she saw a car that looked similar to the car that did the shooting. App. 191. She stated she was in the police car with her cousin as they were being brought home. App. 191, line 3-23. She stated that "I think it was the same car. It had tinted windows in it, it was white." App. 202, line 11-12. Antrell testified that he thought it was the same car, but was not positive. App. 221-22, 238. Law enforcement was able to identify the vehicle as belonging to Ida Mae Felder, the Appellant's mother and driven by Stacey Caughman, the Appellant's girlfriend. App. 257, line 12 - 258, line 12. Although the vehicle in the shooting allegedly had tinted windows, the white Buick belonging to Petitioner's mother was impounded

12 to 14 hours after the shooting. At that time, there was a tacky film-like substance on the windows. Detective Lyons testified that this was consistent with the tint being removed from the car windows. App. 269. Detective Potteiger also stated that the lines on the vehicle were indicative of tint being removed. App. 356-57. Similarly, Lt. Duggin opined that the marks left on the car at the time he took the photographs suggested the removal of tint. App. 446-47.

A red hat was found at the scene of the crime near the deceased victim's body. See App. 184; App. 218. Law enforcement agents testified at trial that the hat was collected from the scene of the crime and tested for DNA evidence and fingerprints. App. 386-387. Marie Hodge, an expert in the field of fingerprint processing and identification, testified at trial that she was able to identify the latent fingerprint of Petitioner on the hat found at the crime scene. App. 400. In addition, Petitioner's DNA was determined to be a major contributor to a swab from the baseball cap (State Exhibit 17) and the victim was excluded from the mixture. App. 452, line 11- 453, line 17.

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 810 S.E.2d 836, 839 (2018) (S.C. case cite not yet available), reh'g denied (Mar. 29, 2018). Pure questions of law are reviewed de novo without deference to the lower court. Id. 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. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 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. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for stipulating to the introduction of Petitioner's unredacted oral statement to law enforcement where there is no prejudice because the allusion to Petitioner's bond from a prior crime did not affect the outcome of the trial.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for stipulating to the admission of Petitioner's unredacted oral statement to law enforcement admitted he was on bond for a pending lynching charge. However, this issue is meritless, as probative evidence supports the PCR court's ruling that the evidence likely did not change the result of the trial. Accordingly, Petitioner failed to meet both prongs of the Strickland test, and this Court should affirm the PCR court's denial of post-conviction relief.

Petitioner gave an oral statement to law enforcement on July 19, 2008. See App. 113. In his statement, he admitted to the officer that he was out on bond for a lynching charge. After discussing the evidence and potential stipulation with Petitioner, Trial Counsel stipulated to the admission of the statement at trial, and he did not request the comment about Petitioner's bond or pending lynching charge be redacted. There was no other mention of the lynching charge or any other prior conviction at trial.

At the PCR hearing, Trial Counsel testified he could not recall the contents of the statement because of the length of time that had passed since the trial, but he very clearly recalled discussing their decision to stipulate to all the stipulations they made with Petitioner and Mr. Chandler before the trial. App. 691, line 23- 692, line 18. He testified that, based on common practice, he would be "shocked" if he had not reviewed the statement before stipulating to its admission at trial. App. 702, line 1-6. Although he could not recall failing to object to the entrance of the unredacted statement, Trial Counsel admitted that if he did not object, "that

would be a mistake." App. 702, line 7-15. However, Trial Counsel explained that he did not think excluding the statement's reference to Petitioner being out on bond for lynching would have changed the outcome of the trial. App. 702, line 22 – 703, line 2. He explained, "I mean, there was so many other things that I wish would have gone different; but I don't think that statement in and of itself would have been the difference, no, ma'am." App. 703, line 2-5.

Counsel Ray Chandler, who also represented Petitioner on the charges and assisted Trial Counsel in his defense, testified at the evidentiary hearing that he recalled the oral statement and its mention of being on bond for lynching. App. 735, line 8-18. He testified that he, Trial Counsel, and "Flew," who also helped them prepare the case, all discussed the statement and exactly what impact it would have on the case before the trial. App. 735, line 10-14. Chandler testified that one could argue in retrospect that the mention of Petitioner's pending lynching charge in the statement changed the outcome of the case, but he noted that there were three very "compelling things" in this case which affected the outcome. App. 735, line 19 – 736, line 1. These three factors, in his opinion, were the red hat that allegedly belonged to Petitioner in the road near the dead body, the white car with tinted windows which called into question whether the witnesses could see Petitioner inside the car, and the fact that Petitioner placed a phone call to law enforcement from the other side of town as the murder within minutes of the crime.

In its Order of Dismissal, the PCR court found Trial Counsel was not ineffective for stipulating to the unredacted oral statement to law enforcement at trial. App. 766-767. The PCR court explained that the oral statement was a voluntary statement given to law enforcement and likely would have come into evidence even over a potential objection. App. 766. Although the statement about the pending lynching charge could possibly have been redacted, the PCR court

found there was no prejudice from the introduction of this evidence and that this particular mention of Petitioner's bond did not change the jury's verdict in his trial. App. 766-767.

Because the PCR court's finding that there was no resulting prejudice from the introduction of this evidence is supported by probative evidence in the record, its finding should be affirmed. Strickland provides: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela–Bernal, 458 U.S. 858, 866–867, (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland, 466 U.S. at 693 (1984). "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. Here, Trial Counsel testified at the evidentiary hearing that he did not believe that statement alone would have made a difference in the trial. App. 703, line 2-5. Chandler opined that the statement "*could* have" changed the outcome of the case, but explained that there were three "very compelling things in this case" that decided the question of Petitioner's guilt, none of which were the statement about Petitioner's bond. App. 735 (emphasis added).

Although Petitioner now stresses the testimony of counsel Ray Chandler that one could argue the admission of this unredacted statement changed the outcome of the trial "in retrospect," this Court should reject any assertion that a retrospective analysis should apply to the decision to stipulate. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6 (2003). Chandler's testimony makes it clear that, while one might pick apart their strategic decisions years later with the benefit of

knowledge of every detail of the case and what occurred at trial, at the time of his representation, he and Trial Counsel did not believe this would harm their client's chances of acquittal.

The evidence in the record of Petitioner's guilt is probative evidence that supports the PCR court's ruling that the admission of this statement did not change the outcome of the trial. There was both direct evidence and substantial circumstantial evidence establishing Petitioner was at the scene when the murder occurred. As noted at the evidentiary hearing by Mr. Chandler, the biggest evidence of Petitioner's guilt was the red hat found at the scene of the crime near the deceased victim's body containing Petitioner's DNA and fingerprints. See App. 184; App. 218. There was also evidence that Petitioner had recently had the tint removed from his car windows, and his vehicle otherwise matched the description of the car the shooter drove. Petitioner admitted to wearing a white shirt earlier that day, which matched the description of the clothing worn by the shooter.

All the evidence of Petitioner's guilt presented at trial is probative evidence supporting the PCR court's finding that the statement of Petitioner's bond for a pending lynching charge did not change the outcome of the trial. The record indicates there is clearly enough evidence to allow the jury to convict Petitioner of the charges regardless of any indication of unrelated pending charges. Therefore, Petitioner can show no prejudice under Strickland, and the PCR court's finding that Trial Counsel was not ineffective should be affirmed.

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,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
S.C. Bar No. 102214

By: _____
ATTORNEYS FOR RESPONDENT

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

April 23, 2018

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D. Craig Brown, Circuit Court Judge

ANTRELL FELDER, #309617

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:

David Alexander, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 23RD day of March 2018.

CHANDRA E. SQUIREWELL
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 23 2018
S.C. SUPREME COURT

April 23, 2018

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

RE: **Antrell Felder v. State of South Carolina**
Appellate Case No. 2017-001173
Lower Court Case No. 2014-CP-43-1492

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Victim Services (letter only)