STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-001177

TERRY L. MCCARRELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective in his representation where he articulated a valid trial strategy in choosing not to move to sever the charges.

STATEMENT OF THE CASE

Petitioner is presently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Petitioner was indicted by the February 2013 term of the Greenville County Grand Jury for second-degree criminal sexual conduct (2012-GS-23-00967) [1] and lewd act upon a child (2012-GS-23-00968). Petitioner was subsequently indicted by the June 2014 term of the Greenville County Grand Jury for contributing to the delinquency of a minor (2012-GS-23-01662) and grand larceny (2012-GS-23-02622). Alex Stalvey, Esquire, represented him on the charges. On July 7, 8, and 10, 2014, Petitioner proceeded to a jury trial at which he was found guilty as indicted on all charges. The Honorable Robin B. Stilwell sentenced Petitioner to confinement for twenty years for first-degree criminal sexual conduct, fifteen years for lewd act upon a child, three years for contributing to the delinquency of a minor, and five years for grand larceny. The sentences run concurrently.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal after review. State v. McCarrell, Op. No. 2016-UP-005 (filed on January 13, 2016). Remittitur was issued on January 29, 2016.

Petitioner filed a timely application for post-conviction relief on February 22, 2016, alleging that he is being held in custody unlawfully for the following reasons:

1. "All of the charges were tried together, the trial should have been severed to separate the Grand Larceny charges from the others. His attorney failed to sever the trial." (sic)
    a. "Because the Defendant pled guilty to Grand Larceny, his guilt of that charge spilled over into the jury's perception and assessment of his

[1] Respondent's previous filings refer to this charge as criminal sexual conduct with a minor, first degree. This was a clerical error, and the indictments in the record show this charge was actually criminal sexual conduct with a minor, second degree.

innocence of the charges he did not plead guilty to."

2. "The victim of Grand Larceny was shown a photographic line up, and his identification was tainted by law enforcement's use of unnecessarily suggestive identification procedure. Additionally, this line up was introduced at trial and was prejudicial to the Defendant. His attorney failed to prevent the admission of this evidence and testimony."
    a. "The line up included photographs that were clearly mugshots and the other mens' appearance in regard to skin tone, age, weight and hair style (including facial hair), varied widely. Therefore, the Grand Larceny victim and witness only had to choose from two photographs to identify the Defendant, instead of six. The admission of this line up at trial was also prejudicial to the Defendant because the mugshots of the Grand Larceny charge spilled over into the jury's perception and assessment of his innocence of the charges he did not please guilty to."
3. "His attorney failed to object at various instances of prejudice to the Defendant at trial."
    a. "Evidence and testimony were introduced that were unduly prejudicial to the Defendant."

Respondent submitted its Return and Motion for More Definite Statement on August 16, 2016. An evidentiary hearing was convened on February 23, 2017, at the Greenville County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present at the hearing and was represented by William G. Yarborough, III, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from Trial Counsel Alex Stalvey ("Trial Counsel"), and Brooklin Pollard. Judge Goldsmith denied and dismissed the application in an Order signed April 20, 2017, and filed May 10, 2017.

Petitioner filed a timely Notice of Appeal on May 15, 2017. Petitioner's Petition for Writ of Certiorari and Appendix were filed on January 19, 2018. This Return to Petition for Writ of Certiorari follows.

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, 422 S.C. 174, 174, 810 S.E.2d 836, 839 (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

Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective in his representation where he articulated a valid trial strategy in choosing not to move to sever the charges.

Petitioner argues the PCR court incorrectly applied the Strickland standard and erred in finding Trial Counsel was not ineffective because he articulated a valid strategic reason for failing to move to sever the charges. However, this issue is meritless, as probative evidence supports the PCR court's ruling that Trial Counsel strategically chose not to move to sever the charges, and his strategy was valid under reasonable professional norms. Accordingly, this Court should affirm the PCR court's denial of post-conviction relief.

Petitioner was charged with criminal sexual conduct with a minor in the second degree, lewd act upon a child, grand larceny, and contributing to the delinquency of a minor. All four of these charges arose from allegations regarding the same thirteen-year-old female Minor, who lived down the street from Petitioner. App. 210. Petitioner was involved in a social relationship with Minor and had been seeing her during the day when her mother was at work. App. 211. Minor testified at trial that Petitioner came over to her house every day while her mother was away, and after about two weeks, their relationship became sexual in nature. App. 212. She testified that, although she did not want to and was not comfortable with it, he had sex with her on multiple occasions at her house. App. 217-227. Minor testified that Petitioner told her he was thirty years old and had young children. App. 224-225. In reality, Petitioner was forty-eight years old.

On November 14, 2011, Minor and Petitioner went next door to visit their neighbors. App. 229-230. Minor testified that while they were inside the house, she saw Petitioner take two rings that were sitting on a table. App. 231. The neighbors did not see the ring being taken, and

when they were finished visiting, she went back home and did not say anything about the rings. App. 231-232. Later that night, the neighbors called the police, and Petitioner told Minor to flush the rings down the toilet. App. 233. When the rings would not flush, Minor hid them in her bathroom. App. 233. Eventually, Petitioner was arrested for the theft of the rings, and Minor met with Petitioner's daughter to return the stolen ring. App. 234-235. During a text message conversation with Petitioner's daughter, Minor lied to her about being pregnant with Petitioner's child so she would not get in trouble for the rings. App. 235.

Trial Counsel did not cross-examine Minor at trial. App. 243. At the post-conviction relief evidentiary hearing, Trial Counsel testified that his trial strategy was to show that Minor actually stole the rings and then fabricated the allegations of their sexual relationship in order to save herself. Trial Counsel explained why he chose not to sever the charges:

> Q: Why didn't you move to sever?
>
> A: Well, my thinking was with the grand larceny, with that still being in the case, and the victim being involved in the grand larceny, it really—I mean, that was part of my defense was that the only reason that the victim made up these allegations was the try to save herself or give herself some excuse to get out of the grand larceny charge. You know, she was – her whole story, if I remember correctly was, that she was with Mr. McCarrell, Mr. McCarrell influenced her in some way to steal these items from the neighbor. And that's why she stole the items.
>
> When they caught her, you know, they basically caught her red handed. And that's when the whole relationship with Mr. McCarrell came out. So, I basically figured, you know, the grand larceny was her way of – she was charged with grand larceny and in order to get out of it, she had to accuse Mr. McCarrell of these acts. So, she looked like the victim. It was not actually the Defendant in a grand larceny case.
>
> Q: Right. But I mean, didn't that, at trial, didn't that tend to tie Mr. McCarrell to something that he said he wasn't involved in?

A: It did. But I thought that was – that was less significant than what he was accused of, which was a lewd act.

Q: Right. But they clearly would have been severable?

A: Sure. Absolutely.

App. 381, line 11 – 382, line 14. Trial Counsel testified that he could not recall speaking to Petitioner about his decision not to sever the charges. He continued:

A: I felt like I was well prepared [for this case]. I did not feel like I needed more time to do anything. I mean, the decision not to sever the cases was certainly a decision that I made. And I didn't – and I'll tell you right now, even if I would have talked to Mr. McCarrell, he would have said, No, I want you to sever them, I probably still would have gone forward with not severing them. Because that would have been a trial strategy that was my decision and not his.

App. 383, line 16-24.

Trial Counsel could not specifically recall at the evidentiary hearing if he had cross-examined Minor at trial, but he assumed the State would have objected to him asking the juvenile about her criminal record, and he guessed that he probably asked Minor some credibility questions about her background. App. 401. Although Trial Counsel had not actually asked Minor any questions on cross-examination, he agreed at the evidentiary hearing that Minor testified on direct examination about her personal background and criminal history and she admitted that she lied about being pregnant in order to avoid the blame for the stolen rings. App. 401.

Petitioner now contends that Trial Counsel could not possibly have employed the trial strategy he testified about at the evidentiary hearing because he did not actually cross-examine Minor at trial, and therefore he could not have attacked her credibility in a way that he could not have done if the charges had been severed. This argument is meritless, as the record shows support for Trial Counsel's testimony about his strategy.

At trial, Minor's mother, Jamey O'Neill, testified. Trial Counsel cross-examined O'Neill on her daughter's behavior and criminal record. App. 272- 279. He challenged her contention that Minor was a good mother to her newborn baby, which had been born with Minor was only thirteen years old, by pointing out that just two months after the child was born, Minor was stealing other people's property. App. 272. He had her admit that Minor had pled guilty to stealing property and served ninety days in juvenile jail. App. 272-273. He asked in detail about Minor's illegal tattoo, her disrespect and lies to the police during their investigation of the stolen rings, and her illegal possession and use of cigarettes. App. 273-276.

Trial Counsel crossed-examined Investigator Robert Perry at trial about Minor's lie that she was pregnant and the fact that Minor provided false information to the police when they initially investigated the stolen rings. App. 296-297. He asked him about his awareness of Minor's several prior encounters with police prior to this incident and the fact that she was on juvenile probation at the time. App. 300.

In his closing argument to the jury, Trial Counsel pointed out that months after her baby was born, Minor was "talking about selling drugs, selling marijuana to a neighbor to get Terry McCarrell out of jail," and that Minor had a history of lying to the police. App. 342. He criticized the State's investigation of the case and called out inconsistencies in Minor's testimony that would contradict her accusation of a sexual relationship with Petitioner just months after her baby was born. He reminded the jury that Minor's neck tattoo was illegal because she was only thirteen years old. App. 346. He criticized Minor's testimony:

> She said when she had her baby that her life changed. All right, well, let's see what she did after she had her baby. Her baby was born in September. In November, the rings were stolen. The rings were stolen when she went over there to get her neck tattooed by her own admission. Two months after her baby is born, two months after her baby is born, the police come and talk to her about it. She's changed her life, right? That's what she wants you to believe, she's changed

> her life. What did she tell the police about these rings? She lies. She says she didn't have anything to do with it. A month later, three months after her baby is born and her life has changed, the police come back. They say, We want to talk to you some more about these rings. By her own admission, her own testimony, she said, I lied again and I kept lying until they showed me the text messages. Then I told the truth because I knew I was caught.

App. 348, line 14 – 349, line 5.

These examples from the trial transcript clearly support the trial strategy that Trial Counsel articulated at the evidentiary hearing. It is clear that his intention was to show the jury that Minor was not a credible witness, and she was lying in order to save herself. Trial Counsel's strategy of keeping all four charges together in order to use the stolen rings to show Minor's motive for lying about a sexual relationship with Petitioner was certainly a valid trial strategy, given the facts and circumstances of this case.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Because Trial Counsel articulated a valid trial strategy in choosing not to move to sever the charges at Petitioner's trial, he cannot be found ineffective. The PCR court's finding that Trial Counsel's strategy was valid is supported by probative evidence in the record, including Trial Counsel's testimony and explanation of his actions at the evidentiary hearing and his cross-examination and closing argument at trial, which support this strategy. Accordingly, because the PCR court's ruling is supported by probative evidence in the record, and because Trial Counsel clearly articulated a valid strategic reasoning for his actions, he cannot be found ineffective under Strickland, and this Court should affirm the denial of post-conviction relief.

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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By: _____
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June 11, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-001177

Terry L. McCarrell, ... Petitioner,

v.

State of South Carolina,..... Respondent.

CERTIFICATE OF SERVICE

I, Julie A. Coleman, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville SC 29601

I further certify that all parties required by Rule to be served have been served. This 11th day of June, 2018.

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ALAN WILSON
ATTORNEY GENERAL

June 11, 2018

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

Re: **Terry Lemore McCarrell v. State of South Carolina**
Appellate Case No. 2017-001177
Lower Court Case No. 2016-CP-23-1089

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar #102214

JAC/jacc
Enclosures

cc: William G. Yarborough, III, Esquire
Victim Advocacy Division (without enclosure)