STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County
Honorable G. Thomas Cooper, Circuit Court Judge

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JUN 26 2018
SC Court of Appeals

Appellate Case No. 2016-000012

MICHAEL D. JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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There is probative evidence in the record to support the post-conviction relief court's finding Petitioner received effective assistance of counsel where there was no credible evidence Petitioner was shackled in the courtroom or any shackles, if present, were visible to the jury, and in any event, Petitioner was not prejudiced because of the overwhelming evidence against him. 6

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RESPONDENT'S QUESTION PRESENTED

Is there probative evidence in the record to support the post-conviction relief court's finding Petitioner received effective assistance of counsel where there was no credible evidence Petitioner was shackled in the courtroom or any shackles, if present, were visible to the jury, and in any event, Petitioner was not prejudiced because of the overwhelming evidence against him?

STATEMENT OF THE CASE

On February 5, 2007, Petitioner entered This Is It Video, an adult video store, and robbed the cashier, Michael Vazquez. App. pp. 131-37. Vazquez testified Petitioner told him he had something in his pocket, which Vazquez believed to be a weapon. App. pp. 135-37. Petitioner then hit Vazquez in the face and escaped with around one-hundred dollars. App. pp. 137-39. Law enforcement began an investigation into a series of robberies in the area, including the video store, and the robbery was captured on video surveillance, which was aired on multiple television stations. App. pp. 62, 68. Law enforcement then received a Crimestoppers tip that Petitioner was involved in the robbery of This Is It. App. p. 190. A photo line-up was compiled, and Vazquez identified Petitioner as the robber. App. pp. 141-42, 215. After Petitioner was arrested, he gave a full confession to law enforcement wherein he admitted to robbing the store but stated that the box cutter he carried did not have a blade in it. App. pp. 205-06, 228-32.

Petitioner was convicted of armed robbery after a jury trial held before the Honorable L. Casey Manning on June 22-25, 2009, in Richland County. App. pp. 1, 339. Petitioner was sentenced to life imprisonment without the possibility of parole. App. p. 347. Carol A. McCurry, Esquire, represented Petitioner at trial. App. p. 1. Kathryn Luck Campbell, Esquire, and Joanna McDuffie, Esquire, prosecuted the case on behalf of the State. App. p. 1. Petitioner appealed his conviction and sentence, and the Court of Appeals affirmed on December 1, 2011. State v. Jackson, No. 201 l-UP-522 (S.C. Ct. App. filed December 1, 2011).

Petitioner filed an application for post-conviction relief on September 4, 2013. App. pp. 349-53. Respondent filed a return dated January 7, 2014, and an evidentiary hearing was held on July 14, 2015, before the Honorable G. Thomas Cooper. App. pp. 354-59, 360. Petitioner was present and was represented by Anna R. Good, Esquire. App. p. 360. Respondent was represented by Assistant Attorney General J. Clayton Mitchell, Esquire. App. p. 360. Petitioner testified on his

own behalf at the hearing. App. pp. 360-401. On December 10, 2015, Judge Cooper issued an order denying and dismissing Petitioner's application for post-conviction relief. App. pp. 407-17.

Petitioner filed a timely notice of appeal, and a Petition for Writ of Certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988), was submitted on his behalf on June 6, 2016. On January 23, 2018, this court issued an order directing the parties to address the issue raised in the Johnson petition. Petitioner filed a Petition for a Writ of Certiorari to this Court on February 22, 2018. This Return to the Petition for a Writ of Certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant 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). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686 (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. First, a PCR applicant must prove counsel's performance was deficient. Strickland, 466 U.S. at 625; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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). A PCR 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 unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

There is probative evidence in the record to support the post-conviction relief court's finding Petitioner received effective assistance of counsel where trial counsel did not object to Petitioner being tried in shackles.

Petitioner asserts Counsel was deficient in failing to object to Petitioner being tried in front of the jury in shackles. However, the PCR court properly denied these allegations as Petitioner failed to establish counsel's performance was constitutionally ineffective. This Court should deny certiorari.

Petitioner relies on Deck v. Missouri, 544 U.S. 622 (2005), in support of his allegation the Counsel was constitutionally ineffective for failing to object to Petitioner wearing visible wrist shackles in the courtroom during trial. Deck held a criminal defendant has a right to remain free of physical restraints that are visible to the jury absent a trial court determination the restraints are justified by a state interest specific to a particular trial. 544 U.S. at 629. Further, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." Id. at 635.

In the PCR context, however, the Strickland standard still applies. Humbert v. State, 345 S.C. 332, 337-38, 548 S.E.2d 862, 865 (2001). ("[T]he record supports the PCR judge's finding counsel was deficient by allowing the trial to proceed while petitioner was dressed in prison clothing. . . . Nevertheless, as conceded by petitioner, in order to prevail in this PCR action, the Strickland analysis applies and petitioner must establish prejudice."). Therefore, even if this Court finds Petitioner was shackled and Counsel was deficient for failing to object, Petitioner is required to prove there was a reasonable probability the outcome of his trial would have been different had the alleged due process violation not occurred. Strickland, 466 U.S. at 694. ("The

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.")

In this case, there is no credible evidence in the record to show Petitioner was in fact shackled or the shackles were visible to the jury. Thus, the PCR court correctly found no deficiency in Counsel's performance. Counsel provided Petitioner with a suit and the shackles on his feet/ankles were taken off in the beginning of trial. App. p. 379, PWC p. 4. Although Petitioner testified the jury saw his hands in shackles when he was told to stand up and face the jury panel, the PCR court expressly found this testimony was self-serving and not credible.[1] App. pp. 379, 410. See also Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (finding PCR court's credibility findings are entitled to "great deference" on review). Further, Petitioner did not offer the testimony of any juror to corroborate his claim members of the jury venire saw him in restraints and that the verdict was influenced thereby. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) ("[T]he trial judge did not find petitioner's testimony that one member of his jury saw him in chains credible. Petitioner did not offer the testimony or affidavits of any of the seated jurors that they saw petitioner in chains and petitioner was prejudiced thereby. Without this evidence, petitioner's claim is not supported by any probative evidence and is based on pure speculation. Accordingly, petitioner failed to meet his burden of proving counsel rendered ineffective assistance.") (citing Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding mere speculation and conjecture on the part of PCR applicant is insufficient to prove prejudice)).

[1] Petitioner argues "the fact [Counsel] could not show up for Petitioner's hearing or even take a telephone deposition. . . confirms. . ." Counsel's ineffectiveness. PWC p. 5. Counsel's absence at the evidentiary hearing, however, has no bearing on the credibility of Petitioner's testimony.

Petitioner has also failed to show he was prejudiced in any manner because there is overwhelming evidence of his guilt. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding a reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). See also Byers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (noting a defendant may advance a Fifth Amendment due process claim for improper visible restraints at trial based Deck, but to claim a violation of his Sixth Amendment right to counsel, he must also prove prejudice); Marquard v. Sec'y for Dep't of Corr., 429 F.3d 1278, 1313 (11th Cir. 2005) ("While Deck shifted the burden to the state *on direct appeal* to prove that routine shackling without a specific-needs inquiry did not contribute to the verdict, Deck did not address, much less alter, the burden and different required prejudice showing on Marquard's IAC-shackling claim. After Deck; Marquard still has the burden in his IAC-shackling claim to establish a reasonable probability that, but for his trial counsel's failure to object to shackling, the result of his sentencing would have been different.") (emphasis added).

In Humbert, this Court addressed the issue of whether the PCR court erred in finding no prejudice in a similar context, where the applicant was wearing a jail uniform during his trial. 345 S.C. at 336, 548 S.E.2d at 865. This Court held there was "not a reasonable probability that the outcome of the trial would have been different" had he not been dressed in a jail jumpsuit because there was overwhelming evidence of his guilt. Id. at 338, 548 S.E.2d at 866. The victim in Humbert identified him as the robber via a show-up shortly after the incident and again at trial. Id. at 335, 338, 548 S.E.2d at 864. The vehicle Humbert was driving when he was arrested matched the description of the get-away car given by the clerk, and items matching the description of those taken from the store were found in the backseat. Id. at 335-36, 548 S.E.2d at 864.

Similarly, in Petitioner's case, law enforcement received a Crimestoppers tip detailing Petitioner's involvement in the crime, and the victim identified Petitioner as the perpetrator both in a photo line-up and at trial. App. pp. 141-42, 154-55, 190, 215. Moreover, Petitioner gave a full confession upon his arrest. App. pp. 205-06, 228-32. Importantly, the significance of this evidence against Petitioner is in no way eroded by Counsel's alleged deficiency.

As this Court recently explained in Smalls v. State, "[T]he strength of the evidence must be considered along with the specific impact of counsel's errors. When potentially strong. . . is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018). "For the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice. . . the evidence must include something conclusive, *such as a confession*, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." Smalls, 422 S.C. at 191, 810 S.E.2d at 845 (emphasis added). In this instance, given Petitioner's confession and the strength of the victim's identification of Petitioner as the robber, the evidence against Petitioner meets the Smalls standard of overwhelming, notwithstanding Counsel's alleged deficiency.

Therefore, Petitioner has failed to meet his burden in proving Counsel was ineffective as his testimony that the jury panel saw him in wrist shackles is not supported by any credible evidence in the record, nor has he shown any prejudice due to the overwhelming evidence of his guilt. For these reasons, this Court should deny the Petition.

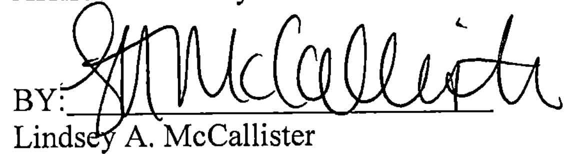
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient nor was Petitioner prejudiced due to the overwhelming evidence against him. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General



BY:______________________
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6/25, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

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JUN 26 2018
SC Court of Appeals

Appellate Case No. 2016-000012

MICHAEL D. JACKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

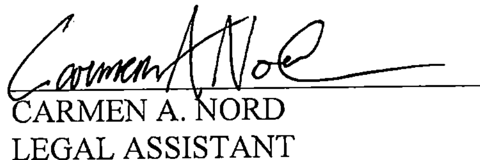
Respondent.

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:

Mr. Robert M. Pachak
S.C. Commission on Indigent Defense
1330 Lady St, Suite 401
Columbia, SC 29201

This 25th day of June, 2018



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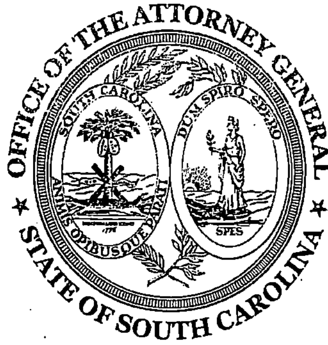

ALAN WILSON
ATTORNEY GENERAL

June 25, 2018

RECEIVED
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The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: **Michael D. Jackson, #294410 v. State of South Carolina**
Appellate Case No. 2016-000012
Lower Court Case No. 2013-CP-40-05285

Dear Ms. Kitchings:

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,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/can
Enclosures

cc: Robert M. Pachak, Esquire (2 copies)

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