

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
William H. Seals, PCR Judge
Deadra L. Jefferson, Trial Judge

Appellate Case No. 2017-002198

ANTONIO D. PATTERSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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STATEMENT OF ISSUES

- I. **The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective regarding Petitioner's decision not to testify in his own defense during his trial, where counsel thoroughly discussed the issue with him and Petitioner made his own decision not to testify.**

- II. **The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for not requesting a jury instruction on lesser included offenses, where counsel credibly testified he discussed this issue with his client and elected not to request and lesser included offense instructions as part of a valid trial strategy.**

STATEMENT OF THE CASE

Procedural History

During its September 2006 term, the Charleston County Grand Jury indicted Petitioner Antonio D. Patterson for first-degree criminal sexual conduct (2006-GS-10-9248). Assistant Public Defender Reese Stidham of the Charleston County Public Defender's Office represented Petitioner. The case was prosecuted by Assistant Solicitors Jennifer Shealy and James Stack of the Ninth Circuit Solicitor's Office. On August 30, 2010, Petitioner proceeded to a jury trial before the Honorable Deadra L. Jefferson, circuit court judge. The jury convicted Petitioner as indicted. Judge Jefferson sentenced Petitioner to twelve years imprisonment.¹

Petitioner filed a timely notice of appeal and Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense—Office of Appellate Defense represented him on appeal. Following the submission of an Anders² brief, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Antonio Patterson, Op. No. 2013-UP-254 (Ct. App. filed June 19, 2013). The remittitur was returned to the circuit court on July 17, 2013.³

¹After he was convicted, Petitioner also pled guilty to the third-degree criminal sexual conduct and Judge Jefferson sentenced him to a concurrent ten year sentence. Petitioner challenged this conviction in a separate post-conviction relief application, dismissed on January 18, 2012.

² Anders v. California, 386 U.S. 738 (1967).

³ Petitioner subsequently filed an application for post-conviction forensic DNA testing filed on August 2, 2013. On October 6, 2014, a hearing on this application was held before On October 6, 2014, a hearing was held before the Honorable Roger M. Young, Sr. Assistant Solicitor Jennifer Shealy represented the State and Petitioner proceeded *pro se*. On October 7, 2014, Judge Young entered an order denying the application, finding Petitioner failed to meet his burden of proof as required by S.C. Code Ann. § 17-28-90 to show by a preponderance of the evidence that any further DNA testing would be appropriate. He subsequently appealed this ruling and was

Thereafter, on February 24, 2014, Petitioner filed an application for post-conviction relief, alleging he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for failing to file a motion to quash the indictment and insufficient evidence to support the conviction. The State (Respondent) served its return on May 22, 2015, requesting an evidentiary hearing. An evidentiary hearing was convened on January 11, 2017, before the Brooks P. Goldsmith, circuit court judge. Petitioner was present and represented by Christopher L. Murphy, Esquire. Respondent was represented by Assistant Attorney General Alicia Olive of the South Carolina Attorney General's Office. At the hearing, Petitioner testified and presented testimony from trial counsel. At the start of the evidentiary hearing, Petitioner informed the court he was proceeding forward on two grounds of ineffective assistance of counsel: failure to properly advise him about testifying in his own defense and failure to ask for jury instructions on lesser-included offenses. Following the hearing, the court issued an order of dismissal denying both allegations of ineffective assistance of counsel, which was filed on September 20, 2017. Petitioner filed a timely notice of appeal.

Summary of Facts Adduced at Trial

This case arose from a sexual assault occurring on April 8, 2006, at a home in Charleston. T.G. (the victim) testified she had been invited to a cookout at Petitioner's home and, while there, they grilled food, drank alcohol, and smoked marijuana with members of Petitioner's family. (App. pp. 88, 96-97). Later that evening, the victim told Petitioner she wanted to go

represented on this appeal by Appellate Defender Tiffany L. Butler of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. Petitioner filed a petition for a writ of certiorari on October 26, 2015. The State filed its return to this petition on November 25, 2015. By order dated June 7 2016, the South Carolina Court of Appeals denied certiorari. The Remittitur was issued on June 27, 2016.

home; however, Petitioner told her he wanted to have sex and when she refused, Petitioner went upstairs and returned with a gun. (App. p. 98). The victim testified Petitioner forced her into the bathroom, where she again told him she did not want to have sex. (App. p. 99). The victim stated she was crying and screaming, but Petitioner would not let her leave—locking the front door and taking her cell phone. (App. pp. 100; 101; 101). The victim testified Petitioner grabbed her arm, twisted it behind her back, and took her to the living room, where he bent her over the arm of the sofa. (App. p. 103). The victim stated Petitioner pulled her underwear and pants down, she saw him put on a condom, and he sexually assaulted her. (App. p. 104). When Petitioner was finished, the victim testified she escaped and ran to a neighbor's house to call police. (App. p. 107).

Officers who interviewed the victim on the night of the incident testified she was shaking, visibly upset, crying, and so distraught she vomited twice. (App. pp. 153; 169). A Sexual Assault Kit, and the victim's underwear and clothes were collected and sent to SLED for DNA analysis. (App. pp. 274-275). Officers obtained a search warrant for Petitioner's home where they took into evidence two used condoms and a carpet cutting from the living room and sent them to SLED for DNA analysis. (App. pp. 207-208; 209-210; 226-227; 228). Further, officers obtained a search warrant for Petitioner's DNA, which was collected and sent to SLED for DNA analysis. (App. p. 259).

Prior to the trial in 2010, SLED analyzed the DNA from six items, including the samples from the victim and Petitioner.⁴ (App. pp. 35-38). In the DNA report dated April 30, 2010,

⁴ No semen was found in the swabs taken from the victim's mouth, vagina, or rectum during the sexual assault exam, and none was found in the victim's underwear. (App. pp. 35-36).

Lieutenant Robin Taylor reported: one of the condoms had a DNA profile that was a mixture of at least two people and Petitioner's DNA matched that of the major contributor, while the DNA profile of the minor contributor could not be matched to the victim. Taylor testified to and was cross-examined on the findings during Petitioner's trial. (App. pp. 253-71).

Petitioner asserted a defense of consent. He presented two witnesses on his behalf: his nephew Emanuel Patterson and his brother Timothy Patterson, who both testified about the cookout and seeing the victim at the cookout. Both denied seeing anything inappropriate occur between the victim and Petitioner.

Summary of Testimony Presented at the Evidentiary Hearing

At the evidentiary hearing, Petitioner testified on his own behalf. Petitioner testified he was represented by Reese Stidham of the Charleston County Public Defender's Office and never met with him the entire time he was released on bond. (App. pp. 464-465). He testified a different attorney, Tommy Bolus, represented him at his bond hearing. (App. p. 467). He testified he spoke with counsel once by telephone a week or two before trial. (App. pp. 465-466). He testified counsel never discussed plea offers with him. (App. p. 467). However, he testified he was aware of a plea offer to third-degree criminal sexual conduct. (App. p. 483).

Petitioner testified he told counsel he did not have sexual relations with the victim and he did not know the victim. (App. pp. 467-468, 473). He testified he recalled the trial judge asking him if he wanted to testify at trial and the judge giving him time to discuss the issue with counsel. (App. pp. 489-469, 485). He testified he discussed the issue with counsel and counsel advised him not to take the stand because the State would introduce his prior charges. (App. pp. 468-473). Petitioner testified that if he would have taken the stand in his defense, he would have

testified that he stopped by his family's cookout to eat and saw the victim, but did not converse with her. (App. pp. 473-475). However, he acknowledged he called two family members as defense witnesses who both testified they saw Petitioner conversing with the victim that day although they denied anything improper occurred. (App. pp. 484, 485). He testified he told counsel his version of events, but counsel still advised him not to testify because of his prior convictions. (App. pp. 475-476). He denied that his defense at trial was a consensual sexual encounter. (App. pp. 484-485).

Petitioner also testified counsel should have requested jury instructions on the lesser-included offenses. (App. p. 477). He testified he never discussed whether to ask for lesser-included offense with counsel and he would have wanted counsel to get instructions on lesser-included offenses because he "would be doing less than 50 percent of the time [he's] doing now." (App. pp. 477-78). He testified he pled guilty to an unrelated charge following his conviction and counsel did not discuss this with him. (App. pp. 480-481).

Counsel testified next. Counsel testified he was appointed to represent Petitioner and has been practicing law since 2006. (App. p. 487). He testified he met with Petitioner multiple times and also discussed his case by telephone. (App. pp. 488, 492). He testified he went to various locations, including the family home where the sexual assault occurred and the county jail, in an attempt to corroborate Petitioner's story that he gave the victim a ride to the jail to visit her boyfriend. (App. p. 488). He testified he discussed Petitioner's version of events "many times and at length" and "they were nothing similar at all to what he just testified to [at the evidentiary hearing]." App. pp. 488, 490). Counsel elaborated Petitioner advised him that he had known the victim for years, the two had partied together earlier before having consensual sex and that the

whole defense was premised around this. (App. pp. 489, 491-492). Counsel testified this defense needed Petitioner to testify and he prepared Petitioner to testify. (App. pp. 29, 32). He testified he put up two defense witnesses first and the assistant solicitor was “extremely effective at cross-examining” the witnesses, particularly Petitioner’s brother. (PCR Tr. p. 489, 492). He testified Petitioner was hesitant after that and he and co-counsel then spent a significant amount of time in a side room talking to Petitioner about whether he should testify. (App. pp. 490, 492). He testified he does not recall ever telling Petitioner whether or not he should testify and the decision would have been Petitioner’s choice. (App. p. 490). However, he testified he stressed the importance of Petitioner testifying “because he had to explain to the jury that it was consensual. And they needed to hear that from him.” (App. p. 490). He testified he does not think Petitioner would have done well on the stand, noting he had Petitioner evaluated by Dr. Burke prior to trial and Dr. Burke opined Petitioner would not be a good witness. (App. p. 490).

Counsel testified he did not request any lesser-included offenses because he “did not want to give the jury anything to compromise on and wind up with him getting a CSC second or third.” (App. p. 491). He elaborated there was an accompanying weapons charge of which the jury acquitted Petitioner. (App. p. 491). He testified he is certain “without a doubt” that he and co-counsel discussed lesser-included charges with Petitioner and they would not have gone forward without Petitioner’s permission not to request those lesser-included charges. (App. pp. 491, 494-495).

STANDARD OF REVIEW

When reviewing the rulings of a post-conviction relief court, the standard of review the reviewing appellate court employs depends on the specific issues before the court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, reviewing 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)). Particularly, the reviewing court must give great deference to a post-conviction relief court's findings where matters of credibility are involved since the reviewing court lacks the opportunity to directly observe the witnesses. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (citing S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct.App.1984)). 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).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to meet his requisite burden of proof of establishing any constitutional ineffectiveness as to counsel's representation.

Petitioner asserts trial counsel was constitutionally ineffective in his representation of him and that he is entitled to a new trial based on this ineffectiveness. He asserts the post-conviction relief court erred in failing to grant him relief as to two grounds: first, he asserts counsel erred in dissuading him from testifying in his own defense; and second, he asserts counsel erred in failing to request a jury instruction on the lesser included offense of second-degree criminal sexual conduct. However, as the post-conviction relief court correctly denied Petitioner's allegations after reviewing the record and observing the witnesses and testimony presented at the evidentiary hearing. There is evidence of probative value to support these factual findings. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; 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 that "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 v. Washington, 466 U.S. 668 (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, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; 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). The 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

I. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective regarding Petitioner's decision not to testify in his own defense during his trial, where counsel thoroughly discussed the issue with him and Petitioner made his own decision not to testify.

In its order of dismissal, the post-conviction relief rejected Petitioner's claims that counsel was ineffective for advising him not to plead guilty, finding counsel adequately conferred with Petitioner regarding his right to testify and ultimately it was Petitioner's decision not to testify. In denying relief, the post-conviction relief court specifically found counsel's testimony regarding this issue to be credible while finding counsel's testimony to not be credible. These findings are supported by probative evidence in the record. Certiorari should be denied.

At the evidentiary hearing, counsel testified that he stressed the importance of Petitioner testifying to support their defense of a consensual sexual encounter and that he had prepared Petitioner to testify, even having him evaluated with this purpose in mind, but Petitioner made the decision not to testify after observing the State's effective cross-examination of two defense witnesses. (App. p. 489-490). Moreover, the record from trial also supports the post-conviction relief court's findings, as the trial court thoroughly reviewed the right to testify with Petitioner and gave him ample opportunity to discuss this with counsel before Petitioner elected not to take the stand in his own defense. (App. pp. 307-309, 312-314, 351-352).

Petitioner appears to acknowledge there is evidence of probative value to support the post-conviction relief court's findings, as he notes in his petition, "[a]ctually, counsel admitted that he did advise Petitioner of the importance of testifying and getting his story out there." (PWC p. 4). There is evidence of probative value to support the lower court's finding, particularly its credibility findings. See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (internal quotations omitted) (stating the reason appellate courts give great deference to a PCR court's findings is because the PCR court has the opportunity to directly observe the PCR witnesses). Certiorari should be denied

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for not requesting a jury instruction on lesser included offenses, where counsel credibly testified he discussed this issue with his client and elected not to request and lesser included offense instructions as part of a valid trial strategy.

In its order of dismissal, the post-conviction relief rejected Petitioner's claims that counsel was ineffective for failing to request a jury instruction on lesser included offenses, finding counsel conferred with Petitioner regarding this decision and made a strategic decision

not to request a jury instruction on any lesser included offenses because they believed Petitioner had a better chance of an acquittal without a compromised guilty verdict to a lesser included offense. Again, the lower court specifically found counsel's testimony as to this allegation to be credible while finding Petitioner's testimony to not be credible. These findings are supported by probative evidence in the record. Certiorari should be denied

“Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546–47 (Ct. App. 2014) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 691. An attorney's decision not to request jury instructions on lesser-included offenses can be a valid trial strategy. Abney, 408 S.C. at 46-47, 757 S.E.2d at 546–47.

At the evidentiary hearing, counsel testified he specifically discussed this issue with Petitioner and that he did not request any lesser-included offenses because he “did not want to give the jury anything to compromise on and wind up with him getting a CSC second or third.” (App. pp. 490-491). He testified he is certain “without a doubt” that he and co-counsel discussed lesser-included charges with Petitioner and they would not have gone forward without Petitioner's permission not to request those lesser-included charges. (App. pp. 494-495). There is evidence of probative value to support the post-conviction relief court's findings that trial

counsel made a strategic decision not to request any lesser included instructions after adequately conferring with Petitioner. Certiorari should be denied.

CONCLUSION


For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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PETITIONER

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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 the applicant by hand-delivering two copies addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 23rd day of July, 2018.



Jennifer Jenkinson
Legal Assistant for Respondent



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July 23, 2018

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

RECEIVED

JUL 28 2018

S.C. SUPREME COURT

RE: Antonio D. Patterson v. State of South Carolina
Appellate Case No.: 2017-002198

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jaj
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division