

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2016-000262

RECEIVED

MAR 23 2017

S.C. SUPREME COURT

David Dwight Smith,Petitioner,

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- I. Did Petitioner failed to satisfy his burden of proving Counsel was ineffective for withdrawing his objection to the admission of Otis Hyder's former testimony given in Petitioner's first trial in 1997?
- II. Did Petitioner fail to satisfy his burden of proving Counsel was ineffective for not presenting Morgan Simmons Orteza as a witness?
- III. Did Petitioner fail to satisfy his burden of proving Counsel was ineffective for failing to specifically cross-examine Angie Smith regarding whether she was ever charged for involvement in Petitioner's case?

STATEMENT OF THE CASE

David Dwight Smith ("Petitioner") is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. He was indicted at the April 1997 term of the Spartanburg County Grand Jury for murder and possession of a weapon during the commission of a violent crime (97-GS-42-1639, counts 1 and 2). Petitioner was first tried on these charges in 1997 before the Honorable J. Derham Cole and a jury. T. Louis Cox, Esquire, represented him at that trial. On December 4, 1997, the jury found him guilty of both charges as indicted. Judge Cole sentenced him to imprisonment for concurrent terms of thirty-five years for murder and five years for possession of weapon during the commission of a violent crime.

Petitioner appealed his conviction to the South Carolina Supreme Court. The court dismissed the appeal in an Order dated December 2, 1999 and denied the Applicant's Petition for Rehearing in an Order dated April 6, 2000. Petitioner then filed an application for post-conviction relief ("PCR") on June 7, 2000. An evidentiary hearing was held before the Honorable Donald W. Beatty on November 6, 2002, and January 27, 2003, at the Spartanburg County Courthouse. E. P. "Bill" Godfrey, Esquire represented Petitioner and Douglas E. Leadbitter of the South Carolina Attorney General's Office represented Respondent. Then Circuit Judge, Chief Justice Beatty granted relief by written Order dated May 23, 2003. Respondent filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on December 1, 2004. The Remittitur was returned on December 17, 2004.

Petitioner then proceeded to trial for a second time on these charges. E. P. "Bill" Godfrey, Esquire ("Counsel"), represented him at his second trial. On November 1, 2005, the jury found Petitioner guilty as indicted. The Honorable Doyet A. Early III sentenced Petitioner to concurrent terms of thirty-five years for murder and five years for possession of a weapon

during the commission of a violent crime.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed Petitioner's conviction and sentence and remanded the case for a new trial. State v. Smith, Op. No. 2008-UP-194 (filed March 20, 2008). Respondent filed a Petition for Rehearing and a Petition for Rehearing En Banc, both of which were subsequently denied on May 27, 2008. Respondent then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Court granted certiorari, reversed the decision of the Court of Appeals and reinstated the Petitioner's convictions and sentence. State v. Smith, Op. No. 26926 (filed February 7, 2011). The Remittitur was returned on February 24, 2011.

Thereafter, Petitioner filed an application for PCR on March 17, 2011, amended application of March 18, 2015, and a superseding amended application on June 11, 2015, challenging his second conviction. A hearing into the matter was convened on June 11, 2015, before the Honorable R. Scott Sprouse. Judge Sprouse issued an order dismissing Petitioner's PCR application signed December 10, 2015, and filed December 14, 2015. Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on January 4, 2016. By written order signed January 11, 2016, and filed January 13, 2016, Judge Sprouse denied the motion. Petitioner then filed a timely Notice of Appeal and Petition for Writ of Certiorari with this Court.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

I. Petitioner failed to satisfy his burden of proving Counsel was ineffective for withdrawing his objection to the admission of Otis Hyder's former testimony given in Petitioner's first trial in 1997.

Petitioner contends that Counsel was ineffective for withdrawing his objection to the admission of Otis Hyder's testimony from Petitioner's first criminal trial in 1997. (Pet. for Writ of Cert. at 6). Specifically, Petitioner argues that Counsel was ineffective for withdrawing his objection because (1) Hyder was not unavailable to testify at Petitioner's second trial in accordance with Rule 804(a), SCRE, and (2) Hyder was never specifically cross-examined during Petitioner's first criminal trial about an investigator's notes. *Id.* Respondent submits the record contains substantial evidence of probative to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving this allegation.

Where a PCR applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must show 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." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." *Walker v. State*, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014).

First, the applicant must show that counsel's performance "fell below an objective standard of 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). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, the applicant must show that Counsel's deficient performance prejudiced him 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.

Petitioner raised forty-four allegations in his superseding amended application for post-conviction relief. (App. pp. 471-77). Among those, Petitioner asserted several allegations arising from Counsel's conduct with respect to the admission of the former testimony of Otis Hyder, which was elicited at Petitioner's first trial. (App. pp. 472-75). Petitioner alleged in his PCR application that Counsel was ineffective for withdrawing his objection to the admission of Hyder's testimony at the first trial where Hyder was not cross-examined concerning several matters. (App. p. 472, para. 13). Counsel raised this issue at the 2005 trial and couched it as a Crawford¹ issue. Judge Early reviewed Cox's cross-examination of Hyder from the first trial, Hyder's statement, and Exhibit 1, and considered the arguments of Counsel and the State. Judge Early stated that Hyder's statement "pretty much does mirror Court's Exhibit 1." (App. p. 157, lines 9-20). Judge Early further stated he would give counsel the evening to further research the issue but that "unless [they] [came] up with something different, it appears . . . that it falls within all four corners" of Rule 804(b)(1) "provided [the State] satisf[ied] [the Court] that [Hyder] [was] dead." (App. pp. 146-60). The following morning, the solicitor's office brought Hyder's son into the courtroom, and he confirmed Hyder was in fact alive but homebound. (App. p. 160). Counsel informed the Court he had agreed to withdraw his motion. (App. pp. 160-61).

¹ Crawford v. Washington, 541 U.S. 36 (2004).

Counsel testified he initially objected to the introduction of Hyder's testimony under 804(a)(4), but that he withdrew his objection. (App. p. 505). Counsel testified the State told him Hyder was dead and that Counsel's own investigator also told him Hyder was dead. (App. p. 506). When asked whether there was a particular reason he did not object to the testimony coming in, Counsel testified he did not remember why he withdrew his objection. (App. p. 518, lines 3-15). Counsel testified he did not remember whether Hyder "vehemently denied having ever told law enforcement that" Petitioner and the victim had scuffled. (App. p. 508, lines 15-21). Counsel agreed that "Cox did not cross-examine Mr. Hyder's assertion that there had not been a scuffle preceding the shooting based on the crime scene photos that showed part of the doorjamb had been broken off and the shattered pieces were right there," even though he also stated he did not "have any personal knowledge of that now." (App. p. 510).

The PCR judge found Counsel's decision to withdraw his objection to be part of Counsel's trial strategy and within the range or reasonableness for criminal representation. (App. pp. 706-07). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984). In making a fair assessment of attorney performance, the court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 446 U.S. at 689. Further, Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland v. Washington, 466 U.S. at 681-82. 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).

Rule 804(b)(1), SCRE, provides that if the declarant is unavailable as a witness, former testimony " given as a witness at another hearing of the same or a different proceeding, . . . if the party against whom the testimony is now offered. . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" is not excluded as hearsay. Rule 804(a)(4), SCRE, provides that a witness is unavailable if that witness "is unable to be present or to testify at the hearing because of death *or then existing physical or mental illness or infirmity.*" (emphasis added).

Counsel testified he did not recall why he withdrew the objection. The record reflects that the trial judge indicated how he planned to rule on the objection, provided the State could satisfy the court that Hyder was dead. The court stated the testimony fell squarely within 804(b)(1). In this case, the State found Hyder's son who came to court prepared to explain to the court Hyder's medical conditions, and that he was homebound and not well. (App. p. 160). However, in light of that information, Counsel agreed to withdraw his objection to the testimony. (App. p. 161). Regardless of whether Counsel withdrew his objection, the Court had already indicated it was inclined to allow the testimony in. Even though Hyder was not dead, the State could have nevertheless shown that he was unavailable. Rule 804(a)(4), SCRE, provides that a witness is unavailable if he is dead *or physically infirm*. Hyder's son was present and prepared to inform the trial judge about Hyder's medical condition. In the absence of proof otherwise, the reviewing court must assume counsel acted reasonably. See Strickland v. Washington, 466 U.S. 668, 690 (1984). Therefore, Counsel's failure to recall why he withdrew the objection—especially under the circumstances related to Counsel's own health challenges at the time of the PCR hearing—did not preclude the PCR judge's factual finding that Counsel's performance in withdrawing his objection did not fall below an objective standard of reasonableness. Furthermore, because

Hyder, despite his being alive, was nevertheless unavailable within the meaning of 804(a)(4), and because the trial judge had already indicated how he was included to rule, Petitioner failed to demonstrate any prejudice resulting from Counsel's withdrawal of his objection. Furthermore, because Hyder was subject to cross-examination by Petitioner at Petitioner's first trial, Hyder's former testimony is not barred by the Confrontation Clause simply because Petitioner contends he could have been more fully cross-examined. See Crawford v. Washington, 541 U.S. 36 (2004).

Accordingly, the record contains evidence of probative value to support the PCR judge's findings, and this Court should deny review.

II. Petitioner failed to meet his burden of proving that Counsel was ineffective for not presenting Morgan Simmons Ortiz as a witness.

Petitioner contends that Counsel was ineffective for failing to present Morgan Simmons Ortiz ("Simmons") as a witness. (Pet. for Writ of Cert. p. 15). For the following reasons, Respondent submits that this issue is without merit and the record contains substantial evidence of probative value to support the PCR judge's findings.

As provided above, Petitioner was required to show that Counsel's performance was deficient and that but for the alleged deficiency, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

counsel's perspective at the time.” Strickland v. Washington, 446 U.S. at 689. Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland, 446 U.S. at 681-82. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to the result. Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). An Applicant's mere speculation as to what an alleged beneficial witness' testimony would have been does not satisfy the prejudice prong. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). See also Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))).

Petitioner argues Counsel was ineffective for failing to present Morgan Simmons as a witness at trial because she gave a written statement that the victim had said "he had tried to rob a drug dealer." (App. pp. 454-59). Counsel testified he did not know why he did not present Simmons as a witness, but that he employed an investigator who was responsible for interviewing any potential witnesses, including those who had given statements. (App. p. 527, lines 8-14). Simmons gave a statement and Counsel was aware of this. (App. p. 531). Simmons herself did not testify at the PCR hearing,² and only her statement was introduced as an exhibit. (App. p. 531).

The PCR judge found Counsel conducted an adequate investigation for Petitioner's case and his decision not to present Simmons as a witness to be part of Counsel's trial strategy, which was within the range or reasonableness for criminal representation. (App. pp. 708-09). In

² PCR counsel told the PCR judge she was unable to locate this witness to call her to testify at the PCR hearing. (App. p. 533-34).

addition, the PCR judge found that Petitioner failed to show prejudice. Given that Counsel could not recall why he did not call her, but did testify he had an investigator who was employed to interview potential witnesses and this witness was not introduced at the hearing, there is evidence in the record to support the PCR judge's finding that Petitioner failed to show deficiency or prejudice. Accordingly, because the record contains evidence to support the PCR judge's findings, this Court should deny review.

III. Petitioner failed to meet his burden of proving Counsel was ineffective for failing to specifically cross-examine Angie Smith about whether she was ever charged for involvement in Petitioner's case.

Petitioner contends that Counsel was ineffective for failing to cross-examine Angie Smith regarding favorable treatment she may have received in exchange for her testimony at both Petitioner's trials. (Pet. for Writ of Cert. p. 17). For the following reasons, Respondent submits that this issue is without merit and substantial evidence of probative value exists to support the PCR judge's finding that trial counsel was not ineffective.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland v. Washington, 446 U.S. 668, 681-82 (1984). 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). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 446 U.S. at 689.

Counsel testified at the PCR hearing that he did not question any witnesses "concerning whether they had any hope for reward or gain in exchange for their testimony" because he "didn't see where the State could offer them anything" and that though he did not have the "NCICs with [him] anymore," he "[did not] think anybody had anything pending at that point in time that could be negotiated down" and did not "remember anybody that could have received a benefit from the State at that time." (App. p. 491, lines 1-11). PCR counsel specifically questioned Counsel about Angie Smith ("Angie"). (App. p. 491, lines 15-17). PCR counsel questioned Counsel about whether he pursued a theory that Angie was "in on it" and he testified that he "did not go in that direction" because "it never really came up that she possibly could be involved with it." (App. p. 492, line 19-p. 493, line 7). Counsel agreed with PCR counsel that "if he had made note of this reference to pulling up at [Hyder's] trailer," it "would have been proper" for him to use the portion of Angie's statement in discovery to impeach her claim that she did not know Hyder. (App. p. 497, lines 3-8). A copy of Angie's statement was introduced as an exhibit at the PCR hearing. (App. p. 497). PCR counsel questioned Counsel about Angie's acts following the shooting, specifically, that Petitioner gave her cocaine and told her to get rid of it, and that she gave the cocaine to someone else. (App. p. 498, lines 1-6). She questioned counsel about why he did not question her about any potential benefit she had received in exchange for her testimony, and Counsel stated "there was no charge[]." (App. p. 498, lines 10-14). Counsel conceded that he "should have" "pointed this out in impeachment for the benefit of the jury." (App. p. 498, lines 15-19). Counsel also agreed that he "could have" questioned her about "the fact that she had escaped being named in any charges for murder" under the theory of accomplice liability. (App. p. 499).

The PCR judge found Counsel's cross-examination of Ms. Smith to be within the range of professional norms of criminal representation and that Petitioner suffered no prejudice from Counsel's alleged deficient cross-examination. (App. pp. 703-06). Angie Smith was not produced as a witness at the PCR hearing. Counsel testified he did not cross examine Angie about any benefit she received for testifying because she was not charged with anything. Petitioner testified that to his knowledge there were never any charges against anyone related to the incident that were either dropped or not pursued. Petitioner failed to produce any evidence that Angie Smith faced any potential charges. Moreover, the record reflects that Counsel extensively cross-examined Angie Smith at trial and was even able to elicit favorable testimony from her on several points. Counsel testified that on cross-examination he highlighted inconsistencies in her testimony.

Counsel initially testified that the reason he did not question Angie concerning any "benefits" flowing from her testimony was that she had not been charged with anything. In addition, there is no evidence to suggest that she was ever charged with anything. Therefore, there is ample evidence in the record to support the finding that Counsel made a reasonable decision not to question a State's witness concerning what benefits she might have received from testifying where that witness was not actually charged with any crimes.

Accordingly, evidence of probative value exists within the record to support the PCR judge's finding that Petitioner failed to show either deficiency or prejudice concerning Counsel's decision not to pursue this line of questioning in cross-examining Angie Smith. Therefore, this Court should deny review.

CONCLUSION

For the foregoing reasons, Respondent submits the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues.

Respectfully submitted,

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v.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of
Certiorari has been served upon opposing counsel by mailing two (2) copies of the RPWC in the
United States mail, postage prepaid:

Laura R. Baer, Esquire
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Appellate Defense
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This 20th day of March, 2017


ASHLEY HAWORTH
PARALEGAL