STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-001778

Dayton Carando Frinks, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny relief from Counsel's alleged failure to request a jury charge on the lesser-included offense of burglary, second degree, where the evidence at trial showed only that the burglary occurred at night, with a gun?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the January 2013 term of the Horry County Grand Jury for burglary, first degree (2013-GS-26-00190). James C. Galmore, III, Esq., represented Applicant. Candace Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 16, 2013, Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury. The jury found Applicant guilty as indicted late that evening. Judge Cottingham sentenced Applicant to imprisonment for a term of 15 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Susan B. Hackett, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Frinks, Op. No. 2015-UP-157 (S.C. Ct. App. filed March 18, 2015). The Remittitur was issued on April 3, 2015.

Applicant filed his application for post-conviction relief on June 22, 2015 (2015-CP-26-04770). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that:
    a. "Trial Counsel's performance was deficient when he failed to request a jury charge (lesser included offense), when the only evidence before the court was Applicant's fingerprint on the exterior of the home's window, and a broken window pane was the only evidence of a crime."

Respondent made its return on December 6, 2016, and an evidentiary hearing into the matter was convened on May 23, 2017, before the Honorable Roger E. Henderson. Applicant was present at the hearing and represented by James K. Falk, Esq. Valerie G. Giovanoli, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own

behalf, and James C. Galmore, III, Esq., also testified. By written order dated August 7, 2017, and filed August 10, 2017, Judge Henderson denied and dismissed the application.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has 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). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

THE PCR COURT PROPERLY FOUND NO INEFFECTIVENESS FOR FAILING TO REQUEST A LESSER-INCLUDED CHARGE OF BURGLARY, SECOND DEGREE, BECAUSE THE EVIDENCE INTRODUCED AT TRIAL SUPPORTED ONLY A FINDING OF BURGLARY, FIRST DEGREE, OR ACQUITTAL

The PCR court properly denied relief because, as Counsel articulated, the uncontroverted facts at trial provided the burglary involved entering a dwelling at nighttime, while armed and threatening the use of said armament, such that charging the jury on burglary, second degree would have been entirely inappropriate.

"A trial judge's determination of what law should be charged is made from the evidence presented." State v. Goldenbaum, 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988) (citing State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976)). "If there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense." State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011) (citing Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005)). "[T]he presence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the mere contention that the jury might not accept the State's evidence in part and might reject it in part will not suffice." State v. Fields, 356 S.C. 517, 523, 589 S.E.2d 792, 795 (Ct. App. 2003) (citing State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976)). "A request to charge on a lesser included offense is properly refused when there is no evidence that the defendant committed the lesser rather than the greater offense." Id. (citing State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987); State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987)).

The different degrees of burglary are defined by statute. See S.C. Code Ann. §§ 16-11-311 (burglary, first degree); -312 (burglary, second degree). A person is guilty of burglary in the

first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling and either:

(1) When, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

a. Is armed with a deadly weapon or explosive; or

b. Causes physical injury to a person who is not a participant in the crime; or

c. Uses or threatens the use of a dangerous instrument; or

d. Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, a machine gun, or other firearm; or

(2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) The entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311(A). If a person enters a dwelling without consent and with intent to commit a crime therein, but *without* any three conditions above, then he or she is guilty of burglary in the second degree. S.C. Code Ann. § 16-11-312(A). Alternately, a person may be guilty of burglary, second degree if one or more of the above conditions are proven, but the structure entered is not a dwelling, but rather a building. S.C. Code Ann. § 16-11-312(B); see also State v. White, 349 S.C. 33, 39, 562 S.E.2d 305, 307 (2002) (citing S.C. Code Ann. §§ 16-11-10, -310) ("dwelling is defined to include any building in which there sleeps a tenant or person who lodges there with a view to the protection of property; for purposes of burglary statute, dwelling also means living quarters of a building used or normally used for sleeping, living, or lodging by a person").

At trial, Elias Michaels testified he and his wife "left the house about six, had dinner, and on the way home at nine o'clock, nine-thirty, is when this incident occurred." (Appx. 20, ll. 11-15; Appx. 46, ll. 1-24). Michaels testified he let his wife out of the SUV, pulled into and parked

in the garage, got out of the vehicle, and was thereafter confronted by a gun and three men. (Appx. 20-21; Appx. 47, ll. 2-5). Slowly backing towards the door to his house, Michaels determined the steel-encased door might offer some protection, so he pushed the gun away, fled inside, and slammed the door shut behind him, locking it. (Appx. 22, ll. 2-16). The victims called 911. (Appx. 22, ll. 14-16; Appx. 47-48). Subsequent investigation revealed a slashed window screen and damaged glass in a window in the back of the house. (Appx. 24-27).

These facts exclusively provide for burglary, first degree, or acquittal. There is no evidence to show that the crime was committed in a building, as opposed to a dwelling—the location was the victims' home. There is no evidence to show that the perpetrators were not armed, or did not threaten the use of a dangerous instrument, or did not display what appeared to be a pistol. There is no evidence to show that the crime was committed during the day, as opposed to night. Accordingly, there was no basis for Counsel to request a charge on burglary, second degree.

Petitioner argues "counsel's trial strategy was not sound or convincing." (PWC at 5). However, the decision to not object did not hinge on strategic considerations. The agreed upon conclusions of Counsel and the PCR court are that a lesser-included charge of burglary, second degree was not supported by the facts in evidence, which only showed nonconsensual, armed entry into a dwelling at night with intent to commit a crime.

Petitioner also argues the jury could have just disbelieved the uncontroverted evidence and therefore burglary, second degree could have been charged. Fields *explicitly* rejects this argument, and it has been rejected innumerable times. See Funchess, 267 S.C. at 430, 229 S.E.2d at 332 ("mere contention that the jury might accept the State's evidence in part and might reject it in part will not" support charging lesser-included assault and battery of a high and

aggravated nature in case of assault with intent to ravish); State v. Tyndall, 336 S.C. 8, 22, 518 S.E.2d 278, 285 (Ct. App. 1999) ("The possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of simple assault and battery does not entitle the defendant to have the lesser offense submitted to the jury" in an assault with intent to kill case); State v. Rucker, 319 S.C. 95, 459 S.E.2d 858 (Ct. App. 1995) ("contention that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found appellant guilty of the lesser offense of simple assault and battery does not entitle her to have the lesser offense submitted to the jury."). That the jury acquitted on kidnapping is irrelevant. As such, Counsel correctly surmised he had no basis upon which to request burglary, second degree.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
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10 Sept., 2018

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RECEIVED
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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 in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201

This 10th day of September, 2018.

MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

September 10, 2018

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

RE: **Dayton Carando Frinks, Jr. v. State of South Carolina**
Appellate Case No. 2017-001778
Lower Court Case No. 2015-CP-26-4770

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Wanda H. Carter, Esquire