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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BERKLEY COUNTY

Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-000339

WILTON Q. GREENE,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

I.

Petitioner failed to show he would have been acquitted had trial counsel requested the court perform an on-the-record balancing test and limiting instruction regarding the admissibility of his prior felony conviction.

STATEMENT OF THE CASE

Wilton Greene (Petitioner) is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Petitioner was indicted by the April 2013 term of the Charleston County Grand Jury for armed robbery and kidnapping. Chad D. Shelton, Esquire, represented him on the charges. On May 23, 2013, Petitioner proceeded to a jury trial and was found guilty as indicted. The Honorable J.C. Nicholson, Jr. sentenced Petitioner to confinement for twenty years for each charge. 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, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Greene Op. No. 2015-UP-086 (filed on February 25, 2015). The Remittitur was issued on March 18, 2015.

Petitioner filed a PCR application on August 19, 2015. An evidentiary hearing into the matter was convened on December 4, 2017, at the Berkeley County Courthouse. Petitioner was present at the hearing and was represented by Rodney Davis, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Relevant Facts Adduced at Trial

Petitioner approached Bing Ho Zhang (Victim) at a gas station in Goose Creek and asked for a ride to McDonald's. App. 81-82. Victim agreed. While en route, Petitioner pulled out a knife and held it against Victim's side, demanding Victim drive him to his bank. App. 83. Victim told Petitioner he did not have a bank account. App. 83. When Petitioner continued to demand money, Victim gave Petitioner his wallet, which contained a small amount of money.

App. 83. Petitioner continued to insist Victim drive to his bank. App. 83. Victim saw a police car driving in the opposite direction. He stopped the car in the middle of the road, blew the horn, rolled down his window and yelled that he was being robbed. App. 85-86. His car came to a stop approximately five feet from the officer's car. App. 134. Victim exited the driver's seat yelling "he robbed me!" App. 135. Petitioner then exited the passenger's side and began to run away. App. 135.

According to Victim, when Petitioner saw the police, he exclaimed "shit!" and then opened the car door and ran away. App. 125. The officer pursed Petitioner in his patrol car, at one point driving next to Petitioner as he ran down the sidewalk. App. 135. The officer never lost sight of Petitioner. App. 138. The officer was able to cut Petitioner off in a parking lot. App. 135. Petitioner ran into the side of the officer's car and fell to the ground. App. 138-39. He stood up and began running again, and attempted to pull the knife out of his pocket. App. 139. However, Petitioner tripped and fell again and dropped the knife. App. 139. The officer was then able to take him into custody. App. 139-40. Police recovered the knife. App. 140. Police also recovered the victim's wallet and twenty two dollars from Petitioner's pants pockets. App. 152, lines 17-24.

Petitioner testified and claimed the interaction with Victim was a drug deal gone wrong. He claimed Petitioner wanted to buy crack cocaine from him but didn't have enough money and gave Petitioner his wallet as collateral. App. 179-80. He claimed the knife was in Petitioner's car when he got in and that he used it to cut crack cocaine into smaller pieces. App. 180. This contradicted what Petitioner told police at the time of the incident, and Petitioner denied making the earlier statement. App. 195. He claimed Victim stopped the car because he was in the process of trying to snatch a separate knife from Petitioner's hands. App. 183. He denied

robbing Victim and claimed he ran from Victim's car in order to dispose of the drugs on his person. App. 183. He claimed he told this story to an investigating officer, contradicting the officer's testimony. App. 198; 219.

Before Petitioner's testimony, the court inquired whether Petitioner had any prior convictions. Defense counsel informed the court Petitioner had a prior conviction for strong-armed robbery. App. 164. The court responded by stating: "So that would be an impeachable offense, correct?" Defense counsel responded that it would. App. 164-165. The court advised Petitioner that the State would be able to inquire about the conviction on cross-examination, and Petitioner stated that he understood and still wished to testify. App. 165-66. Defense counsel inquired into Petitioner's prior strong-armed robbery conviction during his direct examination. App. 183-84.

PCR Hearing

At the PCR hearing, trial counsel testified he could not remember why he did not request that the court conduct a balancing test. App. 414. He testified he elicited testimony regarding the prior conviction in order to reduce to impact that would result if the State impeached Petitioner with the conviction on cross-examination. App. 414-15. He further testified Petitioner admitted to him that he committed the armed robbery. App. 406. The court denied relief in an order dated June 23, 2018. App. 457.

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, 466 U.S. 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 petitioner 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, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the petitioner 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, 466 U.S. 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

I.

Petitioner failed to show he would have been acquitted had trial counsel requested the court perform an on-the-record balancing test and limiting instruction regarding the admissibility of his prior felony conviction.

Petitioner failed to show the result of his trial would have changed had trial counsel requested the court perform a balancing test and limiting instruction regarding the admissibility of his prior felony conviction. When the court inquired about Petitioner's prior record and learned of the prior conviction, he asked: "So that would be an impeachable offense, correct?" App. 164. This implies the court believed the conviction was admissible for impeachment and was inclined to allow it for that purpose. The conviction was a felony dating within ten years of trial, and was therefore eligible for impeachment under Rule 609 SCRE. While similar in nature, strong-armed robbery is a distinct and less serious crime than armed-robbery. The trial court likely would have allowed impeachment with the conviction over counsel's objection. Furthermore, the experienced trial judge likely conducted a balancing test in his mind despite the fact that he did not place it on the record. Petitioner failed to show the court would have excluded the conviction had his attorney asked the court to perform a balancing test on the record.

Furthermore, the PCR court found the evidence against Petitioner was "clearly overwhelming." App. 470. This factual finding is within the province of the PCR court and should not be disturbed on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018), reh'g denied (Mar. 29, 2018) (explaining the PCR court's factual findings should not be overturned if they are supported by evidence). Evidence supports the PCR court's ruling. The State's case against Petitioner was extremely strong. He was essentially caught in the act of committing an armed robbery, with the weapon and Victim's wallet being recovered from his

person as he fled from police. This was far from a swearing match. The stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. Smalls, 422 S.C. at188, 810 S.E.2d at 843.

The PCR court found Petitioner failed to show the result of trial would have been different had evidence of his prior conviction been excluded, or if trial counsel had requested a limiting instruction. Petitioner asks this Court to overturn the PCR court's factual finding. To do so would violate the applicable standard of review. Finally, Petitioner's admission to his attorney that he committed the armed robbery shows a just result was achieved. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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January 8, 2019

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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 via interagency mail, addressed to:

Joanna K. Delany, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia SC 29201

This 8th day of January, 2019.

Jennifer Jennison
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

January 8, 2019

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

RE: Wilton Q. Greene v. State of South Carolina
Appellate Case No.: 2018-000339

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,

Joshua A. Edwards
Assistant Attorney General
S.C. Bar # 101118

JAE/jaj
Enclosures

cc: Joanna K. Delany, Esquire
Victim Advocacy Division