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JAN 24 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO Horry COUNTY

Court of Common Pleas
Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000496

ZACHARY BULLOCK,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

I.

The PCR court correctly held Petitioner failed to show deficiency in trial counsel's alleged failure to subpoena Petitioner's phone records.

STATEMENT OF THE CASE

In October of 2012, an Horry County grand jury indicted Petitioner for first degree burglary. Applicant proceeded to trial before the Honorable Steven H. John and a jury on October 7, 2013. John M. Hilliard, Esq. represented Applicant. The jury found Applicant guilty as indicted on October 8, 2013. Judge John sentenced Applicant to imprisonment for a term of 15 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq. By unpublished opinion decided December 2, 2015, the Court of Appeals affirmed Applicant's convictions. State v. Bullock, Op. No. 2015-UP-549 (S.C. Ct. App. 2015). The Remittitur was issued on December 22, 2015.

Petitioner filed an application for post-conviction relief on April 21, 2016. Applicant thereafter amended by filing on March 6, 2017. The Court convened an evidentiary hearing into the matter on Monday, November 27, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Lacey M. Thompson, Esquire. Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel also testified.

Petitioner's sole issue raised on appeal concerns the allegation that trial counsel was ineffective for failing to subpoena Petitioner's cell phone records. Petitioner alleged that his codefendants (who testified against him at trial) called him after the burglary. App. 307. PCR counsel argued that had trial counsel obtained Petitioner's phone records showing these communications, he may have been able to obtain a more favorable plea deal. App. 350.

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 Petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an Petitioner 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 Petitioner 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.

The PCR court correctly held Petitioner failed to show deficiency in trial counsel's alleged failure to subpoena Petitioner's phone records.

Petitioner claims that trial counsel ignored his requests to subpoena his cell phone records, but trial counsel had no memory of such a request. App. 318. Although Petitioner now claims in his petition that the phone records would have revealed exculpatory text messages, he testified at the PCR hearing that his codefendants called him, not texted. App. 307, line 10. Therefore, even if trial counsel had obtained the phone records, they would not have revealed text messages or the content of any phone calls. Furthermore, Petitioner did not testify as to when he asked his attorney to obtain the records, or provide proof of his provider's data retention policy. The PCR court had no basis to determine whether trial counsel was ever in a position to obtain any text messages or other data. Furthermore, Petitioner offered no explanation of the cell phone's current location, merely that he no longer had the phone. App. 307, line 23-24. If any text messages ever existed, they would presumably still be on the phone. But Petitioner did not provide the phone to the court or explain why he failed to do so.

The foregoing facts show that Petitioner failed to prove trial counsel was deficient and failed to show how any of his allegations would have made a difference at trial. The court was left to speculate as to the existence and substance of the communications. See Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (explaining speculation is not enough to establish deficiency). Petitioner's conclusory and self-serving testimony at the PCR hearing did not provide the PCR court with nearly enough evidence to warrant overturning his conviction. The issue is meritless and certiorari should be denied.

CONCLUSION

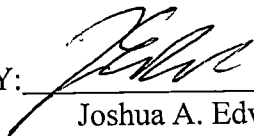
For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BY: 

Joshua A. Edwards
Bar # 101188

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ATTORNEYS FOR RESPONDENT

January 24, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000496

ZACHARY BULLOCK,

Petitioner,

v.

THE STATE,

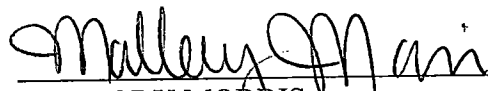
Respondent.

PROOF OF SERVICE

I, Mallory Morris, certify that I have served the within Return to Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the U.S. Mail, addressed to:

Lacey M. Thompson, Esquire
516 29th Avenue North
Myrtle Beach, SC 29577

I further certify that all parties required by Rule to be served have been served.
This 24th day of January, 2019.


MALLORY MORRIS
Legal Assistant

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JAN 24 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

January 24, 2019

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

RE: Zachary Bullock v. State of South Carolina
Appellate Case No. 2018-000496
Lower Court Case No. 2016-CP-26-2627

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,

Joshua A. Edwards
Assistant Attorney General
S.C. Bar No. 101188

JAE/mm
Enclosures

cc: Lacey M. Thompson, Esquire