

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO SUMTER COUNTY
W. Jeffrey Young, Trial Judge
George M. McFaddin Jr., Post-Conviction Relief Judge

Appellate Case No. 2018-000693

ALEXANDER WILSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE

I.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for not objecting to the testimony of Jerome Wilson regarding Petitioner's mental state, when trial counsel immediately clarified that the witness was not testifying as an expert and where trial counsel deliberately did not object to Jerome Wilson's testimony as part of his overall trial strategy and where the testimony did not prejudice Petitioner because of expert testimony presented by both sides?

STATEMENT OF THE CASE

Petitioner Alexander Wilson is presently confined in the South Carolina Department of Corrections following his conviction at trial in Sumter County. On November 29, 2010, Jerome Wilson arrived at his mother, Elizabeth Wilson's home at approximately 5:00 PM. Petitioner is Jerome Wilson's brother and Elizabeth Wilson's son. Upon arrival, Jerome saw his other brother, Terry in the driveway, who stated that Petitioner had killed their mother. The two brothers went inside and witnessed their mother lying in a pool of blood with Petitioner standing over her with a baseball bat in his hand. The two brothers tackled Petitioner and subdued him until law enforcement could arrive. Petitioner was arrested without incident. Petitioner was charged with Murder. When law enforcement served a warrant on Petitioner he stated that the person he killed was not his mother, but rather was someone impersonating her. In 2013, Petitioner sent his brothers a letter in which he acknowledged killing their mother because she would not give him 45 cents to buy a stamp. Petitioner stated that he thought the person he killed was not his mother on the date of the offense, but he now realized that he had in fact killed their mother.

During its May 2011 term, the Sumter County Grand Jury indicted Petitioner for murder (2011-GS-43-0698). He was represented on this charge by Charles T. Brooks, III, Esquire. Solicitor Ernest Finney and Assistant Solicitor John Meadors of the Third Circuit Solicitor's Office prosecuted the case.

On December 4, 2014, Petitioner was convicted by a jury in the Sumter County Court of General Sessions before the Honorable W. Jeffrey Young. The jury found Petitioner guilty but mentally ill. The trial judge sentenced Petitioner to a term of life imprisonment.

Petitioner filed a notice of appeal challenging his conviction and sentence on December 5, 2014. Petitioner was represented in his appeal by Susan Hackett, Esquire. Appellate counsel

filed an Anders brief and a motion to be relieved as counsel with the Court of Appeals. The Court of Appeals dismissed Petitioner's appeal and granted appellate counsel's motion to be relieved on June 22, 2016. The Remittitur was returned to the circuit court on July 8, 2016.

On July 21, 2016, Petitioner filed a *pro se* application for post-conviction relief (2016-CP-43-1333), alleging four grounds for relief. Petitioner alleged that plea counsel was ineffective for: (1) failing to advise Petitioner of whether he should testify until three weeks before trial (2) failing to object to a lay witnesses' testimony regarding Petitioner's mental state (3) compelling Petitioner to be a witness against himself, and (4) that Defendant's mental state was determined by a lay witness. Respondent served its return to the application and requested an evidentiary hearing on the application on February 14, 2017. An evidentiary hearing was convened November 15, 2017, before the Honorable George M. McFaddin, Jr. Petitioner was present alongside counsel Timothy L. Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and Respondent presented testimony from trial counsel. At the conclusion of the evidentiary hearing, Judge McFaddin denied relief to Petitioner.

On March 20, 2018, Judge McFaddin issued a written order denying the application in full. This order was filed with the Sumter County Clerk of Court on April 9, 2018. Petitioner filed his notice of appeal to this Court on April 18, 2018. On appeal, Petitioner challenges only the denial of one claim raised in his post-conviction relief application. Specifically, Petitioner asserts that the post-conviction relief judge erred in denying him relief on the ground that trial counsel should have objected to a lay witness giving an opinion on Petitioner's mental state.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. 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). The questions presented to this Court in the current appeal are questions of fact.

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for not objecting to the testimony of Jerome Wilson regarding Petitioner's mental state, when trial counsel immediately clarified that the witness was not testifying as an expert and where trial counsel deliberately did not object to Jerome Wilson's testimony as part of his overall trial strategy and where the testimony did not prejudice Petitioner because of expert testimony presented by both sides.

Petitioner claims the post-conviction relief court erred in denying him relief because trial counsel was ineffective for failing to object to the testimony of Jerome Wilson regarding Petitioner's mental state. Petitioner specifically takes issue with Jerome's unsolicited comment that Petitioner knew the difference between right and wrong. Petitioner's argument is without merit. Jerome's opinion on Petitioner's mental state was an isolated comment that was not presented in the guise of expert testimony. Trial counsel immediately clarified that Jerome's opinion was offered only as a member of Petitioner's family and not as an expert. Trial counsel was not deficient in failing to object, because he used Jerome's testimony as part of a larger trial strategy to convince the jury that Petitioner was insane. Finally, Jerome's testimony did not prejudice Petitioner, because the jury was later presented with opinions from two different expert witnesses regarding Petitioner's mental state that ultimately influenced their verdict. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. 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). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he 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, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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). Petitioner 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 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

Moreover, “counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500, 505 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Here, Petitioner complains that trial counsel was ineffective for failing to object to an unsolicited comment made by Jerome on cross examination. The following exchange took place between trial counsel and Jerome:

Mr. Brooks: When he's not sober and he's not on his medication, is what you're saying that he's a problem?

Jerome Wilson: Yep.

Mr. Brooks: Okay.

Jerome Wilson: Big problem. One thing for sure, from working in mental health and dealing with a lot of different clients, he knows the difference between right and wrong.

Mr. Brooks: That's just your assessment of him-

Jerome Wilson: Right.

Mr. Brooks: -being his brother for long time? (sic)

Jerome Wilson: Yeah, uh-huh.

(App. 115, lines 4-16). After Jerome offered his unsolicited opinion on Petitioner's mental state, trial counsel responded by clarifying that Jerome's opinion was not based on Jerome's expertise, but rather his relationship with Petitioner as his brother.

Trial counsel was not deficient in failing to object to Jerome Wilson's testimony regarding Petitioner's mental state. Rather than object to Jerome's response, trial counsel chose to clarify that Jerome was not speaking as an expert witness. Not only did trial counsel immediately clarify Jerome's testimony, but trial counsel testified that he did not object to Jerome's testimony because of trial strategy. The State and the Defense each agreed from the outset of Petitioner's trial that Petitioner had in fact killed his mother. The only question presented to the jury was whether Petitioner was guilty but mentally ill or not guilty by reason of insanity. Therefore, trial counsel's main objective was to present evidence to prove that

Petitioner was insane at the time of the murder. With that goal in mind, trial counsel strategically chose not to antagonize Jerome in his questioning because he had been through the trauma of recently seeing his mother be beaten to death by his brother. (App. 558-67). Furthermore, counsel did not object to Jerome's testimony because he wanted to use Jerome's testimony to establish that Petitioner was mentally ill and required medication for his condition. Trial counsel knew that Jerome would not agree that Petitioner didn't know the difference between right and wrong, but he could still use Jerome's testimony to argue that Petitioner was insane. (App. 558-67). Trial counsel then called an expert on behalf of Petitioner to offer his opinion that Petitioner did not know the difference between right and wrong at the time of the murder. (App. 273-328). Ultimately trial counsel did not object to Jerome's testimony for a clearly articulated strategic reason and therefore was not deficient in his representation.

Trial counsel was not deficient for failing to object to Jerome Wilson's testimony regarding Petitioner's mental state. Petitioner also fails to satisfy the second prong of the Strickland test because he was not prejudiced by his brother's testimony. Even if the jury initially understood Jerome's testimony to be an expert opinion on Petitioner's mental state, trial counsel immediately clarified that Jerome was not speaking as an expert, but as a family member. (App. 115). Ultimately, the question presented for the jury's consideration was not whether Petitioner killed his mother, but rather whether Petitioner knew the difference between right and wrong when he killed his mother. Accordingly, the jury was tasked with determining which testimony they found more credible: Dr. Thomas Martin testifying on behalf of Petitioner or Dr. Marla Domino testifying on behalf of the State. Ultimately, the jury found Dr. Domino more credible and determined Petitioner knew what he was doing when he killed his mother. It is unlikely that a one comment from Jerome that was immediately clarified by trial counsel would influence the

jury's verdict more than either expert witness. Therefore, Petitioner cannot show there is any probability or likelihood that the result of his trial would have been different if trial counsel had objected to Jerome's opinion about Petitioner's mental state. The post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations warranting relief and these findings are supported by the record. This Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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SCOTT MATTHEWS
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By: 
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January 25, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2018-000693

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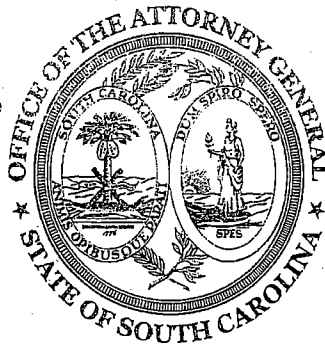
CERTIFICATE OF SERVICE

I, Kaitlyn Slice, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

**Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201**

I further certify that all parties required by Rule to be served have been served. This 28th day of January, 2019.


KAITLYN S. SLICE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

January 28, 2019

RECEIVED
JAN 28 2019
S.C. SUPREME COURT

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

Re: Alexander Wilson, Jr. v. State of South Carolina
Appellate Case No. 2018-000693
Lower Court Case No. 2016-CP-43-1333

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Scott Matthews
Assistant Attorney General
SC Bar No. 101464

JSM/ks
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)