STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SUMTER COUNTY

Court of Common Pleas
Hon. George M. McFadden, Circuit Court Judge

Appellate Case No. 2018-001224

RECO ANTONIO GODBOLT,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUE ON CERTIORARI

I.

The PCR court correctly found trial counsel provided competent representation despite decisions not to object to alleged improper testimony and Petitioner suffered no prejudice from counsel's alleged errors.

STATEMENT OF THE CASE

Petitioner was indicted by the January 2012 term of the Grand Jury for Sumter County for kidnapping, first-degree burglary, attempted murder, armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy (2012-GS-43-0227). Petitioner was represented by Grant Smaldone, Esquire. Petitioner proceeded to a jury trial before the Honorable George C. James, Jr. and was convicted of kidnapping, first-degree burglary, armed robbery, possession of a weapon during a violent crime, and criminal conspiracy. Judge James sentenced Petitioner on December 6, 2012 to twenty-five years' imprisonment for kidnapping, twenty-five years for burglary, twenty-five years for armed robbery, five years for possession of a weapon during a violent crime, and five years for criminal conspiracy, to be served concurrently.[1]

Petitioner filed a timely notice of appeal. An Anders brief was submitted, and the South Carolina Court of Appeals dismissed Petitioner's appeal in an opinion filed May 6, 2015. State v. Godbolt, Op. No. 2015-UP-229 (S.C. Ct. App. 2015). The Remittitur was returned on May, 26, 2015.

Petitioner filed a post-conviction relief (PCR) application on May 20, 2016. Respondent submitted its Return on February 28, 2017. An evidentiary hearing was convened on November 16, 2017, before the Honorable George M. McFaddin at the Sumter County Courthouse. Petitioner was present at the hearing and was represented by Thurmond Brooker, Esquire. At the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from Grant

[1] Petitioner also pled guilty to a separate charge of first-degree burglary stemming from an incident the same day as the current charges (2012-GS-43-1314). On February 19, 2013, Petitioner was sentenced by the Honorable George C. James, Jr. to ten years' imprisonment to be served concurrently with his sentence from December 6, 2012. Petitioner does not challenge in this conviction in his current application.

Smaldone, Esquire ("Trial Counsel") and Solicitor John P. Meadors ("Solicitor"). The PCR court denied relief in an order dated April 30, 2018.

Statement of Facts

Petitioner and a confederate burglarized the home of Dr. and Mrs. Bryan Funke, a former Air Force command surgeon then practicing family medicine at Shaw Air Force Base in Sumter. App. 144-46. On October 31, 2011, Dr. Funke drove home from work to eat lunch. App. 147. When he arrived, he noticed a strange car parked in his driveway. App. 148. Dr. Funke looked into the car and saw some electronics which he recognized as his own. App. 150. One of the items he saw was a laptop which he believed to be his son's, but he later learned that it belonged to a neighbor. App. 150. Trial counsel did not object to this testimony. Dr. Funke noticed that a door to his home was open. App. 151. He called 911. App. 151. He removed the keys from the strangers' car and threw them into the woods. 152. He then went into the house to investigate. App 152.

When he entered the home, his dogs did not greet him as usual. Dr. Funke heard noises upstairs and got the feeling that the burglars were still inside the home, and called out to them ordering them to get out. App. 155-56. He then exited the house. App. 155. He walked to the house next door and heard gunshots. App. 156. He looked back and saw two black makes chasing after him shouting "We have a gun" and "we are going to kill you!" App. 156. The two men caught up to him, tackled him to the ground, and started beating him with a pipe. App. 158-59. Dr. Funke identified the two men as Petitioner and his codefendant. Dr. Funke stated he and Petitioner were face to face, one foot apart, and identified Petitioner in court. App 182-84. The two men demanded to know where the keys to their car were. App. 161. Dr. Funke stated that he didn't know. App. 161. Petitioner then pulled out a handgun and told Dr. Funke to give him

the keys or he was going to kill him. App. 161. Petitioner reached into Dr. Funke's pockets and took his cell phone. App. 163. The two men forced Dr. Funke at gunpoint to walk back to the house. App. 164. Dr. Funke showed the men the area where he had thrown the keys. App. 165. One of the men was able to find the keys. App. 166. The men got into their vehicle and began backing out of the driveway, but the car got stuck on a cable box. App. 166. Just then, police cars arrived. App. 166. Petitioner and his codefendant exited the car and began to run away. App. 166.

Police chased Petitioner and his codefendant. App. 208. An officer apprehended Petitioner behind a neighboring house. App. 207-08. Police recovered Dr. Funke's cell phone from Petitioner. App. 212; 174. Petitioner later gave a statement admitting involvement in the crime as a driver but shifting the majority of blame towards his confederate. App. 266-70.

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).

ARGUMENT

I.

The PCR court correctly found trial counsel provided competent representation despite decisions not to object to alleged improper testimony and Petitioner suffered no prejudice from counsel's alleged errors.

At the hearing below, Petitioner alleged his trial counsel was ineffective because he did not object at several occasions at trial. The PCR court correctly found trial counsel provided competent representation and that Petitioner was not prejudiced by counsel's alleged errors. The PCR court's findings will be taken up in turn.

Law

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.

Failure to object to testimony regarding stolen laptop

Petitioner alleged below that trial counsel was ineffective for failing to object to the victim's trial testimony about a laptop from a neighbor's house that was found inside the car Petitioner and his co-defendant had parked in the driveway of his home while they were burglarizing his house. He claimed the comment was improper evidence of a prior bad act because it suggested the laptop had been stolen from another house in the neighborhood.

At the evidentiary hearing, Trial Counsel testified he did not feel the need to object to this testimony because he believed it was proper under the doctrine of *res gestae*, and he may have believed that if he objected to it, his objection would draw more attention to the testimony in front of the jury. The PCR court correctly found the victim's testimony regarding the laptop was admissible as *res gestae* because there was a sufficient nexus between the laptop and the burglary occurring inside the victim's home. "Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (citing Rules 401 & 402, SCRE). "The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. McGee, 408 S.C. 278, 287, 758 S.E.2d 730, 735 (Ct. App. 2014) (citing State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999)). "The evidence admitted must logically relate to the crime with which the defendant has been charged." Id. (citing Wiles, 383 S.C. at 158, 679 S.E.2d at 176). Accordingly, the court correctly found trial counsel was not deficient for failing to object. In any case, any prejudicial effect alleged error would have been insignificant and would have had no bearing on the result of trial.

Failure to object to Detective Kelly's alleged perjured testimony

Petitioner alleges Trial Counsel was ineffective for failing to object to Detective Kelly's alleged perjured testimony regarding her interrogation. Petitioner alleges Kelly committed perjury by testifying that she read Petitioner his rights, when in fact it was another officer. The allegation is meritless. The evidence shows the other officer conducted the interrogation and advised Petitioner of his Miranda rights, which he waived and proceeded to give a statement to law enforcement in which he admitted his involvement in the crime. Detective Kelly did not Mirandize Petitioner or ask him questions in the interrogation, but she was present throughout the entire interrogation and observed the other officer's interactions with Petitioner. At trial, she testified that she was present at the interrogation and she observed the other officer mirandizing and questioning Petitioner. App. 256. The prosecutor phrased his questions regarding the interrogation by asking, e.g. "did you read him his rights?" The questions were meant to elicit the questions the two investigators, working as a tandem, asked Petitioner. It was clear from the testimony that the other officer was the one actually asking the questions. App. 256 ("It was Detective Robbie Richburg, but I was in the room with him the whole time."). Petitioner's specious argument, in addition to being completely irrelevant to guilt or innocence, mischaracterizes the testimony. The PCR correctly found the allegation meritless.

Failure to object to Detective Kelly's alleged hearsay testimony

Finally, Petitioner alleges a confrontation clause violation resulted from Kelly's testimony because although Kelly was present and observed Petitioner's statement, she did not personally read him his rights or ask the questions. The officer who asked the questions did not testify. The PCR court correctly found that Kelly's testimony was not improper hearsay testimony. Kelly did not state anything the other officer directly said in the proceeding, and none

of her testimony was used to prove the truth of the other officer's statements. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003). The questions were not assertions at all— they were questions. Likewise the reading of Miranda rights is not an assertion because the State was not attempting to prove that Petitioner did in fact have the right to remain silent. Kelly properly explained to the jury that she was present and observed Petitioner being read his Miranda rights, waive them, and answer questions. Trial counsel was not deficient for objecting because the testimony did not constitute hearsay and no confrontation clause violation occurred. The PCR correctly found the allegation meritless.

Prejudice

The PCR court found Petitioner suffered no prejudice from any failure to object based on the strength of the evidence against him. Petitioner was arrested at the scene of the crime after a police chase on foot with the victim's cell phone in his pocket. The victim identified him as one of the two people who broke into and robbed his home and then chased him from the home, shooting at him as he ran. Petitioner also gave a statement to law enforcement admitting at least some involvement in the crime. The State's case was extremely strong and none of trial counsel's alleged error could possibly have affected the result. The PCR court correctly denied relief 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

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 27, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2018-001224

RECO ANTONIO GODBOLT,

Petitioner,

v.

THE STATE,

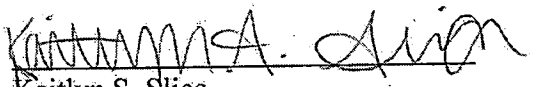
Respondent.

PROOF OF SERVICE

I, Kaitlyn S. Slice, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same by courier, addressed to:

Thurmond Brooker, Esquire
Brooker Law Firm
Post Office Box 1450
Florence, South Carolina 29503

I further certify that all parties required by Rule to be served have been served.
This 27th day of February, 2019.



Kaitlyn S. Slice
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

February 27, 2019

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

Re: **Reco Antonio Godbolt v. State of South Carolina**
Appellate Case No. 2018-001224
Lower Court Case No. 2016-CP-43-0975

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,

Joshua A. Edwards
Assistant Attorney General
SC Bar No. 101188

JAE/ks
Enclosures

cc: Thurmond Brooker, Esquire (2 copies)