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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Roger M. Young, Trial Judge
Michael G. Nettles, Post-Conviction Relief Judge

Appellate Case No. 2017-002269

DEONTE BROWN

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUES

I.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to interview Chavis Heyward and properly prepare for his testimony when trial counsel objected to the evidence offered by the State to impeach Heyward and even if trial counsel had spoken to Heyward before trial, trial counsel's trial strategy would not have changed and the evidence still would have been admitted?

II.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to object to the prior statement of Dario Teran being read into the record by the solicitor when there was no legitimate basis on which to object to the statement being read into the record?

III.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for challenging the bias of Detective Lawrence when Lawrence was not called as a witness by the State and he was only peripherally involved with the investigation against Petitioner. Even if trial counsel was deficient in not calling Lawrence as a witness, Petitioner suffered no prejudice from this failure?

IV.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to object to the introduction of a surveillance video that had been enhanced by SLED where trial counsel believed the video benefitted Petitioner and aided his defense and where even if trial counsel had objected to the introduction of the video, any objection would likely have been overruled because there was no reasonable basis to object to the video?

V.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to adequately advise Petitioner about testifying on his own behalf when trial counsel did advise Petitioner about his right and ultimately it was Petitioner's decision as to whether he would testify and not trial counsel's?

STATEMENT OF THE CASE

Petitioner, Deonte Brown is presently confined in the South Carolina Department of Corrections following his conviction at trial in Charleston County. In the late hours of July 14, 2012 and into the early hours of July 15, 2012, Petitioner went with some friends to Frazier's nightclub in Charleston. At approximately 4:00 AM on July 15th after the nightclub closed, Petitioner and his friends went to a Waffle House restaurant on Savannah Highway. At Waffle House Petitioner began a verbal confrontation with Quinton Allen and threw a drink in his face. A scuffle began between Petitioner, Quinton Allen and other patrons of the restaurant. Waffle House employees attempted to remove Petitioner from the restaurant. As Petitioner was being pushed through the doorway of the restaurant, he fired one shot inside the restaurant that struck Quinton Allen in the arm. Petitioner fired a second shot into the restaurant that struck and killed Dontaye Reed.

During its February 2013 term, the Charleston County Grand Jury indicted Petitioner for murder, attempted murder, and possession of a weapon during the commission of a violent crime (2013-GS-10-0535, 2013-GS-10-0536, and 2013-GS-43-0537). Petitioner was represented on all charges by James Smiley, Esquire. Assistant Solicitors Stephanie Linder and Jessica Baldwin of the Ninth Circuit Solicitor's Office prosecuted the case.

On September 19, 2014, Petitioner was convicted on all charges by a jury in the Charleston County Court of General Sessions before the Honorable Roger M. Young. The trial judge sentenced Petitioner to a term of fifty years' imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for possession of a weapon during the commission of a violent crime. All sentences were to run together concurrently, resulting in an aggregate sentence of fifty years' imprisonment.

Petitioner did not file an appeal. However, Petitioner was subsequently granted a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) which was granted by Judge Nettles on September 11, 2017. The State consents to Judge Nettles ruling granting Petitioner a belated appeal.

On July 15, 2015, Petitioner filed a *pro se* application for post-conviction relief (2015-CP-10-3935), alleging the following grounds for relief:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. ". . . Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

On July 25, 2017, Petitioner amended his application to allege ineffective assistance of counsel regarding:

- a. Failure to adequately question Det. Christina Smith's testimony that she was able to ID client behind the muzzle flash.
- b. Video enhancement by SLED.
- c. Sequence of shooting.
- d. Failure to adequately present the possibility of two shooters.
- e. Failure to adequately present the issue of two people present with red shirts.
- f. Failure to adequately question regarding Gun Powder Residue test.
- g. Failure to properly investigate:
 - i. Defendant said the shooter was Derrick Brown. Derrick Brown was not arrested or charged. Derrick Brown's Mother was in a relationship with Detective Charles Lawrence.
 - ii. Witness Chavis Heyward originally said that he did not see anything. Two years later he testifies and identifies people on the video.

- iii. The waitress at the restaurant gave a statement that she did not see anything. However, at trial she remembers seeing a gun come out of a red sleeve.
- h. Failure to talk to witnesses before trial. No analysis of the videos and no Private Investigator.
- i. Failure to have a suppression hearing regarding the videos.
- j. Failure to bring up the information regarding Detective Charles Lawrence and his relationship with Derrick Brown's Mother.
- k. The Applicant did not testify based on bad advice from Defense Counsel.
- l. Defense Counsel had no theory of Defense.
- m. There was a ten (10) year plea offer, which was not properly explained to the Applicant.
- n. Defense Counsel did not get closing argument because he put in a picture of shattered window as evidence.
- o. Defense attorney did not file an Appeal, after he told Applicant that he would.

Respondent served its return to the application and requested an evidentiary hearing on the application on February 18, 2016. An evidentiary hearing was convened on August 7, 2017, before the Honorable Michael G. Nettles. Petitioner was present alongside counsel Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie Coleman of the South Carolina Attorney General's Office. Petitioner presented testimony from himself and from his mother. Respondent called trial counsel, James Smiley

On September 11, 2017, Judge Nettles issued a written order denying the application in full, but granting Petitioner's request for a belated appeal pursuant to White v. State. This order was filed with the Charleston County Clerk of Court on September 26, 2017. Petitioner filed his notice of appeal to this Court on November 1, 2017. On appeal, Petitioner challenges the post-conviction relief judge's denial of relief for the allegation that trial counsel failed to: (1) interview Chavis Heyward and prepare for his testimony, (2) object to Dario Teran's statement being read into the record, (3) show the prejudice and bias of Detective Lawrence, (4) object to

SLED video enhancement, and (5) adequately advise Petitioner regarding testifying on his own behalf.

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).

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to interview Chavis Heyward and properly prepare for his testimony because trial counsel objected to the evidence offered by the State to impeach Heyward and even if trial counsel had spoken to Heyward before trial, trial counsel's trial strategy would not have changed and the evidence still would have been admitted.

Petitioner claims the post-conviction relief court erred in denying Petitioner relief for trial counsel's failure to interview Chavis Heyward and properly prepare for his testimony.

Petitioner's argument is without merit. Although trial counsel admitted that, in hindsight, he wishes he would have talked to Heyward, Petitioner failed to demonstrate that this would have changed the outcome of the trial in any way. 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 asserts trial counsel was deficient for failing to interview Heyward before trial. Petitioner’s argument fails on two counts. First, trial counsel was not deficient in failing to interview Heyward. Trial counsel testified if he had spoken to Heyward, he may “have strengthened the fact that he didn’t see anything, or that he had a conversation with Mr. Barfield.” (App. 663, lines 1-3). Petitioner’s defense at trial was already that no one saw him as the shooter. Therefore, using Heyward to “strengthen the fact that he didn’t see anything” was Petitioner’s defense to begin with. In fact, Petitioner elicited this information from Heyward on cross examination. (App. 197). Furthermore, trial counsel objected to Investigator Barfield’s impeachment testimony of Heyward. Therefore, trial counsel was not deficient for failing to speak with Heyward before trial.

Even if trial counsel were deficient for failing to talk with Heyward beforehand, Petitioner was not prejudiced by this failure. If trial counsel spoke with Heyward beforehand, Heyward may not have told trial counsel about his conversation with Barfield. If Heyward did tell trial counsel about his conversation with Barfield, trial counsel would have been unable to exclude Barfield's testimony. Trial counsel objected to Barfield's testimony and his objection was overruled. (App. 201). Therefore, Petitioner cannot prove the outcome of the trial would have been any different had trial counsel spoken with Heyward beforehand. This Court should deny certiorari.

II.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to object to the prior statement of Dario Teran being read into the record by the solicitor because there was no legitimate basis on which to object to the statement being read into the record.

Next, Petitioner contends trial counsel erred by failing to object to the previously recorded statement of Dario Teran being read into the record. Trial counsel was not deficient in failing to object to Teran's statement, because there was no reason to object to it. Even if trial counsel had been deficient, Petitioner was not prejudiced by trial counsel's failure to object to Teran's statement. This Court should deny certiorari.

Rule 803(5) SCRE provides:

A memorandum, or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted, by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Rule 803(5) SCRE.

At trial, Teran testified he gave law enforcement a statement on the morning after the shooting. (App. 257). However, Teran was involved in a motorcycle accident approximately three months after the shooting and his memory was “blurry” as a result. (App. 256-58). Teran said that reading his statement would refresh his recollection of the night in question. Therefore, the solicitor read his statement into the record pursuant to Rule 803(5) SCRE. Trial counsel conceded that Teran’s statement fit under the hearsay exception of Rule 803(5). (App. 259).

Trial counsel was not deficient in failing to object to Teran’s statement because there was no legitimate basis for trial counsel to object to the statement. Teran gave law enforcement a statement when the matter was fresh in his mind on the morning after the shooting. Teran testified that he did not remember everything he said in his statement because of the memory loss associated with the motorcycle accident. Therefore, his statement was properly read into the record pursuant to Rule 803(5) SCRE. Trial counsel was not deficient in failing to object to this statement and even if he were, Petitioner was not prejudiced by trial counsel’s failure to object because the objection was likely to be overruled regardless. This Court should deny certiorari.

III.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for challenging the bias of Detective Lawrence when Lawrence was not called as a witness by the State and he was only peripherally involved with the investigation against Petitioner. Even if trial counsel was deficient in not calling Lawrence as a witness, Petitioner suffered no prejudice from this failure

Petitioner next contends trial counsel was ineffective for failing to challenge the bias and prejudice of Detective Lawrence. Lawrence was only peripherally involved in the investigation of Appellant and was not called as a witness at trial by the State. It was undisputed that Lawrence was fired from his job with the Charleston County Sheriff’s Department because he was dating Derrick Brown’s mother. Derrick Brown was present

at the scene of the shooting and trial counsel theorized that he may have been the shooter. However, trial counsel did not have enough evidence to present a third party guilt defense and therefore trial counsel agreed to not make any reference to Derrick Brown at trial. Lawrence did not testify and the State did not otherwise open the door to trial counsel admitting any evidence of the affair between Lawrence and Brown's mother.

Trial counsel was not deficient in failing to question the bias of Detective Lawrence because he had no reason to do so. Petitioner could not present a third party guilt defense against Derrick Brown because Petitioner had no proof that Derrick Brown was the shooter. Any third party guilt evidence Petitioner could have offered would have been casting a bare suspicion of guilt on Brown. Because there was no legitimate third party guilt defense for Petitioner to pursue, any evidence of Lawrence's relationship with Brown's mother was irrelevant. Lawrence wasn't called as a witness and he was only tangentially related to investigating Petitioner's case. This Court should deny certiorari.

IV.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to object to the introduction of a surveillance video that had been enhanced by SLED because trial counsel believed the video benefitted Petitioner and aided his defense and even if trial counsel had objected to the introduction of the video, any objection would likely have been overruled because there was no reasonable basis to object to the video?

Petitioner next contends that trial counsel was ineffective for failing to object to the enhanced video surveillance of the Waffle House provided by SLED. Trial counsel was not deficient in failing to object to because he wanted the video to be admitted as part of his trial strategy. Even if trial counsel had objected the admission of the video, it is unlikely trial counsel's object would be sustained because there was no basis for trial

counsel to object. Therefore, Petitioner was not prejudiced by trial counsel's failure to object to the video.

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)).

Here, trial counsel testified at the post-conviction relief hearing "I wanted the video in. The video, in my belief, and as it showed in trial, did not identify [Petitioner] as the shooter." (App. 677, lines 12-14). Trial counsel therefore did not object to the admission of the video, because he believed it aided in Petitioner's defense. Even if the State used the video to argue that Petitioner was the shooter, trial counsel felt that it proved the opposite. The video was ambiguous enough that both sides used it to their advantage. Therefore, trial counsel was not deficient in failing to object to the video. However, even if trial counsel had objected, his objection was unlikely to be sustained, because there was no reasonable basis to contest the video's admissibility. This Court should deny certiorari.

V.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for not adequately advising Petitioner regarding his right to testify on his own behalf because trial counsel did, in fact, advise Petitioner about his right to testify and ultimately it was Petitioner's sole decision as to whether he would testify and not trial counsel's

Petitioner's final contention is that Trial counsel was ineffective for his failure to adequately advise Petitioner about testifying on his own behalf. Petitioner's argument is without merit for two reasons: (1). Both trial counsel and the trial judge advised Petitioner about his right to testify and (2). It was Petitioner's sole decision whether he wanted to testify and not trial counsel's.

Here, trial counsel testified he did advise Petitioner against testifying because he believed most of the information that Petitioner would testify to was already in front of the jury. Trial counsel also thought the case was going well for Petitioner and there wasn't much to gain by Petitioner testifying but there was a lot to lose. (App. 672-73). Petitioner was also advised on two occasions by the trial judge that he had the right to testify on his own behalf and that right was his alone and not his attorney's. (App. 55-56, 400-01).

Trial counsel was not deficient in failing to adequately advise Petitioner of his right to testify, because trial counsel did adequately advise Petitioner. Even if we assume for the sake of argument that trial counsel failed to advise Petitioner of his right to testify, the trial judge twice advised Petitioner of his rights. Therefore, Petitioner was not prejudiced by trial counsel's advisement of rights because the trial judge explained Petitioner's rights to him as well. Finally, the decision as to whether to testify was Petitioner's decision to make and Petitioner's decision alone. Petitioner chose not to testify on his own behalf. Petitioner cannot claim he was

prejudiced by trial counsel for a decision that Petitioner alone could make. 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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April 1, 2019

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In the Supreme Court

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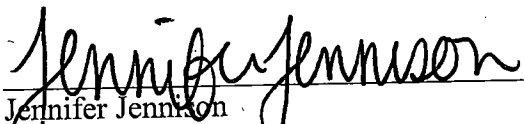
RESPONDENT

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 mailing two copies, postage prepaid, via United States mail, addressed to:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, SC 29063

This 1st day of April, 2019.



Jennifer Jennison
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 01 2019
S.C. SUPREME COURT

April 1, 2019

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

RE: Deonte Brown v. State of South Carolina
Appellate Case No.: 2017-002269

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari and the original and fifteen copies of the Brief of Respondent Pursuant to White v. State in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Scott Matthews
Assistant Attorney General
S.C. Bar # 101464

SM/jj
Enclosures

cc: Tommy A. Thomas, Esquire
Victim Advocacy Division