STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari
Appeal from Aiken County
The Honorable R. Scott Sprouse, Post-Conviction Relief Court Judge
Appellate Case No. 2018-001091

DAVID E. ROSIER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S ISSUES PRESENTED

I. The record amply supports the Post-Conviction Relief Judge's finding that Trial Counsel was not ineffective for failing to file a motion to suppress the jail phone recordings in the appellate court because Petitioner failed to show any prejudice arising from the failure to file the motion.

II. The record amply supports the Post-Conviction Relief Judge's finding that Trial Counsel was not ineffective in relation to the "Golden Rule" objection during the solicitor's closing argument; and Petitioner's contention the proper objection was "an impermissible conscious of the community argument" is not preserved for appellate review.

STATEMENT OF THE CASE

In May 2013, the Aiken County Grand Jury on one count of murder and one count of possession of a weapon during the commission of a violent crime, arising from a shooting on November 10, 2012, which resulted in the victim's death. Petitioner and his son entered the victim's residence around 10:30 P.M. that evening, and following an altercation, Petitioner shot the victim in the center of his chest. The case was called for a jury trial before the Honorable Doyet A. Early, III, on October 7-10, 2013. Petitioner was represented by Wallis A. Alves, Esquire ("Trial Counsel"), and C. David Hayes, Esquire, represented Petitioner. Kevin Molony, Esquire, and David W. Miller, Esquire, of the Third Circuit Solicitor's Office prosecuted the case. Petitioner was found guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Judge Early sentenced him to imprisonment for thirty years for the voluntary manslaughter offense and five years for the possession of a weapon offense. The sentences run concurrently.

Prior to trial, Petitioner moved to suppress recordings of telephone calls he made from the Aiken County Detention Center, asserting the recordings constituted an illegal wiretap under the South Carolina Homeland Security Act, and law enforcement was only allowed to intercept communications with a court order. The State argued Petitioner consented to the recordings by using the jail telephones in light of signs posted at the telephones, as well as an audio recording advising the parties the call will be recorded. The circuit court denied the motion to suppress, finding the jail calls were not subject to the Homeland Security Act. (Appendix, pp. 42-60).

During closing arguments, the solicitor told the jury their verdict was important to the victim's family and friends, and to the community. Petitioner objected on the ground of "improper argument," and the circuit court told the solicitor to "go ahead." The solicitor than stated the verdict was important to the Petitioner. (Appendix, p. 417).

The jury convicted Petitioner of the lesser included offense of voluntary manslaughter on the murder charge, and possession of a weapon during the commission of a violent crime. The circuit court sentenced him to thirty years imprisonment on the voluntary manslaughter conviction, and five years imprisonment on the possession of a weapon conviction, with the sentences to run concurrently. (Appendix, pp. 444-445, 457).

Petitioner appealed his convictions. By unpublished opinion filed June 3, 2015, the South Carolina Court of Appeals affirmed the convictions, and the South Carolina Supreme Court denied certiorari by Order filed on February 16, 2016. (Appendix, pp. 460-463, 472)

Petitioner filed an application for post-conviction relief on November 11, 2016, raising the following allegations:

1. Denial of Due Process
2. Ineffective assistance of counsel
3. Rule 5 & Brady Violations

(Appendix, pp. 464-470). Respondent submitted its return and moved for a more definite statement of Petitioner's allegations on December 28, 2017. (Appendix, pp. 471-478). Petitioner filed an Amendment to PCR Application on April 30, 2018, asserting the following:

1. Counsel filed to properly raise whether jail phone calls should have been suppressed,
2. Counsel failed to object to Solicitor's closing argument as violating the "Golden Rule."
3. Newly discovered evidence exists in the form of testimony from Applicant's former co-defendant and trial witness, Joshua Rosier
4. Applicant believes he observed witness coaching and claims improper actions on the part of the Solicitor

(Appendix, pp. 480-482).

The matter was called for an evidentiary hearing on May 7, 2018, at the Aiken County Courthouse before the Honorable R. Scott Sprouse, Post-Conviction Relief Judge. Petitioner was present at the hearing and represented by Lance Boozer, Esquire. Assistant Attorney General Julie

Coleman of the South Carolina Attorney General's Office represented Respondent. Petitioner testified on his own behalf, and presented testimony from Trial Counsel. (Appendix, pp. 483-532). Following the hearing, the Post-Conviction Relief Judge issued an Order of Dismissal signed on June 1, 2018, and filed June 11, 2018, denying Petitioner's application for post-conviction relief. (Appendix, pp. 545-558).

Petitioner filed a notice of appeal on June 12, 2018, and filed a Petition for Writ of Certiorari and Appendix on January 28, 2019. Respondent now submits this Return to the Petition for Writ of Certiorari.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

I. The record amply supports the Post-Conviction Relief Judge's finding that Trial Counsel was not ineffective for failing to file a motion to suppress the jail phone recordings in the appellate court because Petitioner failed to show any prejudice arising from the failure to file the motion.[1]

Petitioner argues the Post-Conviction Relief Judge erred in finding Trial Counsel was not ineffective for failing to file a motion in the appellate court seeking suppression of the jail phone call recordings. Probative evidence in the record amply supports the Post-Conviction Relief Judge's findings that Petitioner failed to meet his burden to prove 1) Trial Counsel was ineffective, and 2) he was prejudiced by the purported ineffectiveness.

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 appellate court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove Trial Counsel's performance was deficient. *Id.*; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 625 (1989). Under

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[1]As set forth above, Petitioner raised allegations of new evidence and prosecutorial misconduct in his amended Post-Conviction Relief application, but his Petition for Writ of Certiorari only includes alleged ineffective assistance of counsel in failing to file a motion in the appellate court regarding the jail phone call recordings, and in failing to appropriately object to the solicitor's closing argument. Therefore, the remaining issues are abandoned and not before this Court for review.

this prong, the court measures an attorney's performance by its "'reasonableness under prevailing professional norms.'" Cherry, 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, 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, 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, 386 S.E.2d at 625. The court need not first determine counsel's performance was deficient under the first prong of the analysis before examining the prejudice prong if it is easier to dispose of an ineffective assistance claim on the ground the applicant failed to show sufficient prejudice from the alleged deficiency. Strickland, 466 at 697. The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.*

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the applicant to prove trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* 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.

Petitioner contends Trial Counsel's failure to file the motion to suppress the jail phone recordings in the Court of Appeals was ineffective because the recordings violated the Homeland Security Act ("the Act'"). *See* S.C. Code Ann. §17-30-10 through §17-30-145 (2014). Trial Counsel testified she made a mistake in filing the suppression motion in the trial court rather than the appellate court. She admitted, however, that the argument she presented to the trial court was the same argument she would have made in the appellate court. The trial court found the Act did not apply to the jail phone recordings, (Appendix, pp. 60, 512-518).

The Act governs the interception of wire, electronic, or oral communications. S.C. Code Ann. §17-30-10. The Act defines "electronic, mechanical, or other device" as "any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than:

> (a) any telephone or telegraph instrument, equipment, or facility, or any component thereof:
>
> (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or
>
> (ii) being used by a provider of wire or electronic communications service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties.

S.C. Code Ann. § 17-30-15(4)(a) (emphasis added). The Act further expressly provides:

> (B) It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

S.C. Code Ann. § 17-30-30(B) (emphasis added). Pre-trial motions to suppress intercepted transmissions on the ground the interception was illegal under the Act must be filed with the

"reviewing authority," defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. §17-3-15(9); S.C. Code Ann. § 17-30-110(A); *see also* State v. Whitner, 399 S.C. 547, 732 S.E.2d 861, 863 (2012) (the Act requires a motion to suppress be made before a panel of judges of the court of appeals).

While Trial Counsel conceded she mistakenly filed the motion to suppress the jail phone recordings in the trial court rather than the Court of Appeals, the Post-Conviction Relief Judge found Petitioner showed no prejudice resulting from Trial Counsel's performance because she made the same argument before the trial court she would have made to the Court of Appeals, and even if filed in the appropriate jurisdiction, the motion would not have been successful. The Post-Conviction Relief Judge found the Petitioner received a recorded message at the beginning of each call informing him the call would be recorded, and Petitioner consented to the jail phone recordings by proceeding with the phone calls after receiving the message. (Appendix, pp. 551-555).

There is ample probative evidence in the record supporting the Post-Conviction Relief Judge's finding Petitioner was not prejudiced by Trial Counsel's failure to file the pre-trial motion in the appropriate court. Trial Counsel made the same arguments before the trial court that she would have made in the Court of Appeals, which were meritless in light of the express provisions of the Act removing the recordings from its application. The recordings were made on telephones maintained in the ordinary course of the jail's business, and Petitioner consented to the calls being recorded. Accordingly, this Court should deny the Petition for a Writ of Certiorari on this issue.

II. The record amply supports the Post-Conviction Relief Judge's finding that Trial Counsel was not ineffective in relation to the "Golden Rule" objection during the solicitor's closing argument; and Petitioner's contention the proper objection was "an impermissible conscious of the community argument" is not preserved for appellate review.

In his amended post-conviction relief application, Petitioner asserted Trial Counsel was ineffective because she failed to make a specific "Golden Rule" objection to the solicitor's statement in closing argument regarding the importance of the verdict to the community. (Appendix, p. 480). During the Post-Conviction Relief Hearing, Petitioner only raised the "Golden Rule" ground as ineffective assistance of counsel. (Appendix, pp. 518-522). In fact, when Trial Counsel testified she objected because the solicitor's statement was a "Golden Rule" violation, Petitioner responded "(e)xactly." (Appendix, p. 519). The Post-Conviction Relief Judge found the solicitor's statement did not violate the "Golden Rule" because it did not suggest any specific verdict, or ask the jurors to put themselves in the victim's shoes, but merely reminded the jurors their service as jurors was important to the community. (Appendix, pp. 555-556).

In his Petition for Writ of Certiorari, however, Petitioner asserts Trial Counsel was actually ineffective for making a "Golden Rule" objection, because the proper objection was a "conscious of the community" objection, citing State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999). This assertion was clearly not raised to, or ruled on by, the Post-Conviction Relief Judge. Therefore, it is not preserved for appellate review. Plyler v. State, 309 S.C. 408, 424 S.E.2d 477, 478 (1992) (an issue neither raised at the post-conviction relief hearing, nor ruled on by the post-conviction relief court, is procedurally barred) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 [1983]). Accordingly, the Petition for Writ of Certiorari should be denied on this issue.

CONCLUSION

Based on the foregoing, the State submits this Court should deny the Petition for Writ of Certiorari in its entirety.

Respectfully submitted,

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April 15, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Aiken County
The Honorable R. Scott Sprouse, Post-Conviction Relief Court Judge
Appellate Case No. 2018-001091

DAVID E. ROSIER, JR.,

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STATE OF SOUTH CAROLINA,

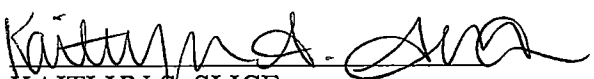
Respondent.

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:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 15th day of April, 2019.



KAITLYN S. SLICE
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RECEIVED
APR 15 2019
S.C. SUPREME COURT

April 15, 2019

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

Re: **David E. Rosier, Jr. v. State of South Carolina**
Appellate Case No. 2018-001091
Lower Court Case No. 2016-CP-02-2273

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,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General
SC Bar No. 5098

DRJS/ks
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)