

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

BRYAN HOLDER,

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 ISSUES PRESENTED

I. The record amply supports the PCR Judge's finding that Trial Counsel was not ineffective in relation to Petitioner's guilty plea to grand larceny in connection with the same gun used in the attempted murder.

II. The record amply supports the PCR Judge's finding that Trial Counsel was not ineffective in relation to the State handing the gun to Petitioner during his testimony, and asking how he shot it.

STATEMENT OF THE CASE

On May 3, 2013, the Spartanburg County Grand Jury indicted Petitioner Bryan Holder on three counts of attempted murder, and one count of possession of a weapon during a crime of violence, arising from a shooting on July 2, 2012. The case was called for a jury trial on May 6, 2013, before the Honorable J. Derham Cole, Circuit Court Judge. Christopher Thompson, Esquire (Trial Counsel) represented Petitioner, and Barry Barnette, Solicitor, and Prina C. Taylor, Assistant Solicitor represented the State.

The State presented evidence Petitioner stole rifles, shotguns and ammunition from a home in Spartanburg County on June 29, 2012. The guns included a Marlin 30-30 lever action rifle, and a Remington 30-06 bolt action rifle, both with mounted scopes. (Appendix, pp. 17-41).

That night, Petitioner and a co-defendant, Tyler Schomer ["Schomer"], took the 30-30 and 30-06 rifles out to a field to shoot at targets. The field was located across from a Raceway convenience store and an Ingles store. They shot the rifles toward the woods and in the opposition direction from the stores, and took the rifles to Schomer's house after they finished. (Appendix, pp. 48-51).

Schomer testified he and Petitioner went back to the field the next night. Petitioner used the 30-06 rifle to shoot at a road sign, and then aiming with the rifle's scope, fired shots toward the Raceway and Ingles stores. Petitioner told Schomer he thought he hit someone in a car at the Raceway, so they listened to a police scanner to see if a call went out about a shooting there. When they heard the call go out, they returned to Schomer's house and put the rifles on Schomer's front porch. After Petitioner's arrest, Schomer sold the 30-06 to a man in exchange for drugs. (Appendix, pp. 101-166).

Bonnie Raines was shot that night while sitting in the passenger seat of a car parked outside the Raceway store. The bullet entered through the car door, passed through Ms. Raines and went

into the car's center console, which kept it from striking the driver, Bobby Swigert. In addition, two bullets hit concrete outside the Ingles store, bounced up and struck the front windows of two stores next to Ingles. Forensic evidence established all the bullets were fired from the 30-06 rifle Petitioner stole two days before the shootings occurred. (Appendix, pp. 222-277).

Mark Swanger testified he was pressure washing the gas pumps in front of Ingles early on the morning of July 2, 2012, when he heard what sounded like a gunshot very close to him. A few seconds later he heard another shot go by him, and he hid until police arrived. He stated he heard a total of four to five shots, and saw a girl lying in the Raceway parking lot holding her side. (Appendix, pp. 284-24-290).

Petitioner testified he only went to shoot the rifles once, both he and Schomer shot the 30-06 rifle, they shot at the lid of a five gallon bucket, and he never shot toward the Raceway and Ingles stores. He stated he never said anything to Schomer about shooting anyone. (Appendix, pp. 344-385).

The State requested a jury charge on the "hand of one is the hand of all." Petitioner objected, arguing there was no evidence he and Schomer acted in concert in the attempted murders. Petitioner then requested a mere presence charge in the event the court gave a "hand of one is the hand of all" charge. After a recess, and without ruling on the accomplice liability charge issues, the circuit court indicated it would charge the lesser included offenses of assault and battery of a high and aggravated nature as to Ms. Raines, and assault and battery first degree as to Mr. Swigert and Mr. Swanger. (Appendix, pp. 407-411).

During closing argument, Petitioner asserted Schomer was the shooter. The State argued Petitioner and Schomer essentially pointed the finger at each other as the shooter, but even if the jury believed Schomer was the shooter, Petitioner testified they did everything together and

Petitioner supplied the stolen guns and ammunition, so at a minimum, Petitioner was guilty as an accomplice. (Appendix, pp. 412-436).

The circuit court charged the jury on “hand of one is the hand of all,” mere presence, and the lesser included offenses. (Appendix, pp. 436-467). The jury convicted Petitioner of assault and battery of a high and aggravated nature as to Ms. Raines, assault and battery first degree as to Mr. Swigert and Mr. Swanger, and possession of a weapon during a crime of violence. The circuit court sentenced him to an aggregate term of incarceration of forty-five years. (Appendix, pp. 472-486).

On appeal, Petitioner asserted circuit court error in charging the jury on accomplice liability. By unpublished opinion filed June 3, 2015, the South Carolina Court of Appeals affirmed Petitioner’s convictions. (Appendix, pp. 620-621). The South Carolina Supreme Court denied Petitioner’s Petition for Writ of Certiorari by Order dated May 5, 2016. (Appendix, p. 622).

Petitioner filed an application for post-conviction relief on October 3, 2016, raising the following allegations:

1. Ineffective assistance of counsel in failing to advise him his guilty plea to the grand larceny of the gun used in the attempted murder shooting would be used against him at the attempted murder trial; and
2. Denial of due process from plea and trial counsel’s failure to properly investigate and call expert witnesses.

(Appendix, pp. 489-500). Respondent submitted its Return on June 14, 2017, after Petitioner was appointed counsel to represent him in the post-conviction relief proceeding, and indicated the State would oppose any amendments to the Petition that were not filed well in advance of the evidentiary hearing. (Appendix, pp. 503-510).

The matter was called for an evidentiary hearing on February 2, 2018, before the Honorable Grace Gilchrist Knie, Circuit Court Judge (PCR Judge). On the date of the hearing,

Petitioner filed a Supplement Application asserting eleven grounds for relief, nine of which were in addition to the issues raised in the original Application. (Appendix, pp. 501-502). Petitioner was present at the hearing and represented by Susannah Ross, Esquire. Assistant Attorney Giovanoli of the South Carolina Attorney General's Office represented the State. As indicated in its Return, the State objected to the newly asserted grounds, noting that the hearing was notice five weeks prior to the hearing date, but the PCR Judge allowed Petitioner to proceed on all grounds. (Appendix, pp. 516-522).

Petitioner testified on his own behalf, and presented testimony from Trial Counsel. (Appendix, pp. 523-570). Following the hearing, the PCR Judge issued an Order of Dismissal with Prejudice, signed and filed June 5, 2018, denying Petitioner's application for post-conviction relief. (Appendix, pp. 574-589).

Petitioner moved to alter or amend the Order of Dismissal, alleging the PCR Judge failed to rule on various issues raised in the Application and Supplemental Application. (Appendix, pp. 591-592). The State filed a Return on August 7, 2018, asking the PCR Judge to amend the Order of Dismissal to address each specific issue. (Appendix, pp. 593-598). The PCR Judge filed an Amended Order of Dismissal with Prejudice on August 21, 2018, addressing each specific issue Petitioner raised, and again finding Petitioner failed to establish any grounds for post-conviction relief. (Appendix, pp. 599-619).

Petitioner timely filed a notice of appeal, and filed a Petition for Writ of Certiorari and Appendix on March 1, 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 PCR Judge's finding that Trial Counsel was not ineffective in relation to Petitioner's guilty plea to grand larceny in connection with the same gun used in the attempted murder.

Petitioner argues the Post-Conviction Relief Judge erred in finding Trial Counsel was not ineffective in advising him to plead guilty to grand larceny of the guns used in the shooting, and in failing to advise him the guilty plea would be used against him in the trial on the remaining charges. 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 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.

Trial Counsel testified he advised Petitioner to plead guilty to the grand larceny charge because he knew the State had substantial evidence tying Petitioner to the stolen guns. As a matter of strategy, Trial Counsel wanted to show the jury Petitioner admitted when he did something wrong, but he would not plead guilty to something he did not do, which Trial Counsel believed would help Petitioner’s credibility with the jury. (Appendix, pp. 552-553).

More significant to the post-conviction relief issue, during Petitioner's guilty plea hearing on the grand larceny charge, the State indicated on the record it intended to bring the grand larceny evidence in at trial on the remaining charges. Prior to accepting Petitioner's plea, the trial judge specifically advised Petitioner the information regarding the grand larceny "may come up during the course of the trial," and Petitioner stated he understood and indicated he wanted to proceed with the guilty plea. (Appendix, pp. 13-23). In light of the discussion during the guilty plea hearing, Trial Counsel did not object when the State brought up Petitioner's guilty plea to grand larceny charge during trial. (Appendix, pp. 553-554). Having pled guilty with full knowledge that the State would bring it up during trial, Petitioner cannot now claim Trial Counsel was ineffective by failing to advise him of that fact.

The PCR Judge found Trial Counsel was credible and articulated a reasonable strategy regarding his advice that Petitioner plead guilty to the grand larceny charge. Other than conclusory assertions that the guilty plea "made it more difficult to blame the co-defendant for the shootings," and "there was a strong likelihood that the outcome of the trial would have been different" without the guilty plea, Petitioner cites no evidence supporting his ineffective assistance of counsel allegation. As the PCR Judge noted, post-conviction relief "is not a venue for questioning each and every decision of trial counsel," and Petitioner failed to "demonstrate by a preponderance of evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of the trial." (Appendix, p. 608).

There is ample evidence in the record supporting the PCR Judge's findings and conclusion that Trial Counsel was not ineffective in advising Petitioner to plead guilty to the grand larceny charge. Accordingly, the Petition for Writ of Certiorari should be denied on this issue.

II. The record amply supports the PCR Judge's finding that Trial Counsel was not ineffective in failing to object to the State handing the gun used in the shooting to Petitioner during his testimony, and asking him to show the jury how he shot it.

In his Supplemental Application, filed and served just prior to the evidentiary hearing, Petitioner asserted Trial Counsel was ineffective "for failing to object for the Solicitor appealing to emotions of the jury when handing the defendant the gun yelling how did you shoot it." (Appendix, p. 502). On appeal, he asserts "[t]his was highly prejudicial to [Petitioner] because it gave the jury a realistic picture of [Petitioner] shooting the weapon," and "placed this image in the minds of the jurors." (Petition, p. 10). Petitioner's allegations are meritless.

At trial, Petitioner testified he went with his co-defendant to a field to target shoot, and he shot the 30-06 gun used in the shooting at that time, but he shot it into the woods, not toward the Ingles store. (Appendix, pp. 344-357). On cross-examination, the Solicitor handed Petitioner a gun and had Petitioner identify it as the one he shot in the field. (Appendix, p. 357). The Solicitor then questioned Petitioner at some length about his plan and efforts to sell the stolen guns, another incident in which Petitioner fired a 20 gauge shotgun inside a house, and Petitioner's attempt to get a witness to change her story. (Appendix, pp. 357-365).

After that testimony, the Solicitor asked Petitioner to demonstrate for the jury how he shot the gun previously identified as the one he admitting shooting in the field. Trial Counsel objected on the ground the demonstration was irrelevant because Petitioner had already testified he shot the gun, which the trial judge overruled. The Solicitor then asked Petitioner about: 1) his testimony on direct examination that he shot the gun twelve or thirteen times; 2) whether the gun was a bolt action gun that could only shoot one bullet at a time; and how the gun had to be loaded. (Appendix, pp. 365-366).

The Solicitor then came back to the gun handed to Petitioner earlier, and since Petitioner admitted shooting the gun, the Solicitor asked him to show the jury how he shot it. (Appendix, pp. 65-66). Since Petitioner had admitted innocently shooting the gun for target practice, having him demonstrate how the gun could be shot was reasonable.

Trial Counsel testified the Solicitor's conduct was an unreasonable appeal to the emotion of the jury. He stated every lawyer uses strategies and tactics to be theatrical, and it was common for solicitors to use theatrics during trial, but he did not think the Solicitor's conduct warranted a objection. He did object to the demonstration as irrelevant in light of Petitioner's admission he had shot the gun for target practice, which the trial court overruled, but saw . (Appendix, pp. 563-564).

The only evidence Petitioner presented on this issue was his own self-serving statement he did not know he did not have to hold the gun when asked to do so be the Solicitor. The PCR Judge found Trial Counsel did not object to the demonstration because there was nothing objectionable about it, and Petitioner failed to present any evidence Trial Counsel was ineffective for failing to object when there was no basis for an objection, and there was no evidence of prejudice. (Appendix, pp. 614-15).

As with Issue I, Petitioner merely makes conclusory statements of ineffective assistance and prejudice regarding this issue. There is ample evidence supporting the PCR Judge's finding and conclusions regarding this issue. Accordingly, the Petition for Writ of Certiorari should be denied on this issue.

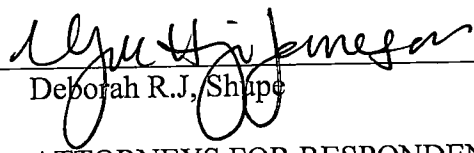
CONCLUSION

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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By: 
for Deborah R.J. Shupe

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June 17, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO AIKEN COUNTY

Appeal from Aiken County

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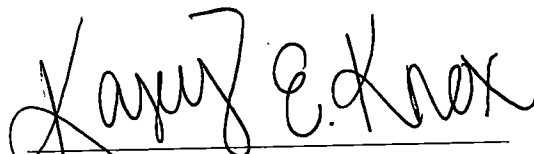
Respondent.

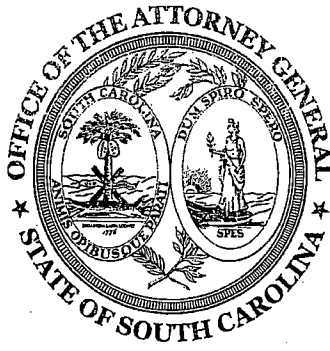
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by placing two (2) copies for hand delivery:

**Lara Mary Caudy, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
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This 17th day of June, 2019


KASEY KNOX
Legal Assistant



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 17 2019
S.C. SUPREME COURT

June 17, 2019

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

Re: Bryan Holder v. State of South Carolina
Appellate Case No. 2018-001091
Lower Court Case No. 2016-CP-42-3627

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,

for

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

DRS/kk
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)