RECEIVED
DEC 09 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Post-Conviction Relief Judge
Maite Murphy, Trial Judge

Appellate Case No. 2018-002210

MATTHEW C. DWYER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JANELL H. GREGORY
Assistant Attorney General
SC Bar No. 103176

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

STATEMENT OF ISSUE..1

STATEMENT OF THE CASE..2

STATEMENT OF FACTS 5

STANDARD OF REVIEW 9

ARGUMENT 11

I. The post-conviction relief court properly found Counsel was not constitutionally ineffective for failing to advise Petitioner to testify in support of his claim of self-defense since Counsel advised him of his right to testify, explained it was Petitioner's decision whether to testify or not, and properly advised Petitioner that, if he chose to testify, he would be subject to cross-examination regarding a coded letter he wrote a State's witness attempting to secure an alibi; further the trial court conducted an extensive colloquy with Petitioner regarding his Fifth Amendment right at the conclusion of which Petitioner knowingly and intelligently informed the court he did not wish to testify in his case. 11

CONCLUSION 19

PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and suddenly advised Petitioner not to testify since such advice was due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense, and where Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if he had testified and presented evidence that he was acting in self-defense during the altercation with the decedent?

RESPONDENT'S STATEMENT OF THE ISSUE

Did the post-conviction relief court properly find Counsel was not constitutionally ineffective for failing to advise Petitioner to testify in support of his claim of self-defense since Counsel advised him of his right to testify, explained it was Petitioner's decision whether to testify or not, and properly advised Petitioner that, if he chose to testify, he would be subject to cross-examination regarding a coded letter he wrote a State's witness attempting to secure an alibi; further, the trial court conducted an extensive colloquy with Petitioner regarding his Fifth Amendment right at the conclusion of which Petitioner knowingly and intelligently informed the court he did not wish to testify in his case?

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Sumter County Clerk of Court's order of commitment. Petitioner was indicted at the July 2015 term of the Sumter County Grand Jury for murder and possession of a weapon during the commission of a violent crime (2015-GS-43-0623). John S. Keffer, Esquire, (Counsel) represented Petitioner. Assistant Solicitor John P. Meadors (Meadors) of the Third Circuit Solicitor's Office prosecuted the case. On October 19, 2015, Petitioner appeared with Counsel before the Honorable Maite Murphy and proceeded to a jury trial. At the conclusion of the five-day trial, the jury found Petitioner guilty on both charges. Judge Murphy sentenced Petitioner to forty-five years' imprisonment for murder and a concurrent term of five years for the weapons charge. Thereafter, Petitioner filed a timely notice of appeal.

Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense perfected Petitioner's appeal. In his brief, Petitioner raised the following issue:

> Whether the trial court erred in refusing to charge self-defense when evidence showed that appellant and the decedent, who was ex-military and knew martial arts, got into a fight after a sexual advance in the decedent's moving car and that the appellant was scared?

The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Mathew C. Dwyer, Unpublished Opinion No. 2017-UP-449 (Ct. App. December 6, 2017). The Remittitur was issued on December 27, 2017, by the South Carolina Court of Appeals.

Petitioner then filed his application for post-conviction relief on May 21, 2018, alleging he was being held unlawfully for the following reasons:

a. Ineffective assistance of counsel;
    1. Failure to advise right to testify and closing argument;
    2. Failure to inform of plea offer;
    3. Failure to keep attorney/client privilege;
    4. Failure to prevent Applicant from addressing court;

5. Failure to call Sheriff as a witness;
6. Failure to request a mistrial;
7. Failure to present evidence in defense;
8. Failure to request continuance;
9. Failure to object to hearsay;

b. State misconduct and presentation of false evidence;
   1. Stephen Dwyer was threatened with prosecution if he did not testify;
   2. State failed to disclose exculpatory information;
   3. State used improper procedure to obtain DNA;
   4. State failed to inform jury victim was a sex offender;
   5. State tampered with evidence;
   6. State presented witness who was victim of prior assault;
   7. State treated the testimony of the witnesses as fact;

c. The trial court erred in refusing to charge self-defense;
   1. Evidence clearly showed that Applicant and decedent got into a fight;

d. Violation of my 14th amendment/due process;

e. Biased jury/ biased testimony; and

f. Hearsay.

An evidentiary hearing into the matter was convened on November 16, 2018, at the Sumter County Courthouse before the Honorable George M. McFaddin. At the outset of the hearing, Petitioner withdrew his claims of prosecutorial misconduct and due process violations. Petitioner proceeded on the following allegations:

1) Ineffective Assistance of Counsel:

   a) Failing to explain the details of a plea offer;

   b) Advising Petitioner not to testify;

2) Trial court error[1]

   a) Failing to instruct the jury on self-defense.

---

[1] This allegation was dismissed with prejudice as post-conviction relief is not a substitute for direct appeal.

Petitioner was present at the hearing and represented by Timothy Griffith, Esquire. Assistant Attorney General Susannah R. Cole of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel and Meadors also testified. By order filed November 30, 2018, Judge McFaddin denied and dismissed Petitioner's application for post-conviction relief finding Petitioner failed to demonstrate how Counsel's performance was unreasonable under prevailing professional norms. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

On the morning of January 27, 2015, emergency medical personnel responded to the scene of a crashed vehicle located off S.C. Highway 521 in Sumter County. (App. 81, lines 7-20.) EMS workers found the vehicle in a ditch, with the rear of the car resting against an embankment. (App. 82, lines 1-3.) In the back seat of the vehicle, a dead man was in a seated position. (App. 82, lines 8-12.) The victim's legs were draped across the center console. (App. 83, lines 19-22.) The rear window was broken out, the front passenger window was down, and the driver's window was broken. (App. 84, lines 19-23.) The man had dried blood by his left ear, on his pants near his left ankle, on his pants near the right back pocket, and by the right front pants' pocket. Blood was also on the victim's jacket, passenger side front seat, passenger side front door frame, and on the rear seat. (App. 84, line 23 – p. 83, line 3.) EMS noted brain matter on the rear seat below the window on the right side of the car and a wound to the back of the man's head. (App. 85, lines 4-7.) The vehicle was in reverse gear. (App. 83, lines 3-11.)

Investigator Michael McCauley, a crime scene investigator with the Sumter County Sheriff's Department, responded to the scene that morning. (App. 92, line 13 – 94, line 17.) The investigating officers were suspicious of the victim's placement inside the car and the blood and bodily fluids surrounding the body. (App. 95, lines 1-11.) The victim's head was resting over the back seat, just before the rear window. (App. 97, lines 21-24.) Blood found on the victim's pants leg and on the passenger side headrest was more consistent with a transfer pattern than with high velocity spatter from an injury to the back of the head during a car crash. (App. 99, lines 7-23; 101, lines 18-24.) McCauley also found blood on the outside of the passenger door. (App. 102, lines 1-5.) On the rear floorboard behind the passenger's seat, McCauley found a live round of

.380 caliber ammunition. (App. 112, lines 6-21.) The victim's phone was found in the woods behind the ditch and embankment in which the car was located. (App. 120, line 18 – 121, line 7.)

The following day, McCauley attended the autopsy of the victim at the Newberry Pathology Center. (App. 115, lines 2-10.) McCauley examined the victim's clothing he was wearing the night he was killed, as well as the bullet recovered from the victim's skull. (App. 116, line 2 – 117, line 1.) McCauley identified the bullet as a .380 round of ammunition. App. 134, line 21 – 135, line 5.)

Dr. Janice Ross, the State's pathologist, performed the autopsy on the man identified as Johnny Singleton on January 28, 2015. (App. 182, line 13 – 183, line 16.) Ross found the victim had a gunshot wound to the back of the head and a bruise inside his upper lip but appeared to have no other external injuries. (App. 185, lines 2-8.) Dr. Ross believed the injury to the upper lip occurred near the time of death. (App. 185, line 22 - 186, line 2.) The gunshot wound to the back of the victim's head indicated the bullet traveled from the back, right side of the head through the brain and toward the front left of the head into the left sinus cavity. (App. 186, line 15 - 187, line 9.) Dr. Ross opined the gun was at least two feet away from the victim when it was fired. (App. 189, lines 18-24.) The victim's dentures were intact and in place at the time of his death, and his toxicology report was negative. (App. 188, lines 20-24; 191, line 2.)

Janie Mae Shaw testified she played cards with the victim on a daily basis. (App. 152, lines 4-8.) On the night of January 26, 2015, Johnny Singleton ate some food and took a nap at Ms. Shaw's house before playing cards with four other people. (App. 152, line 19 – 153, line 8.) Singleton left between 9:30 and 10:00 pm that night. (App. 153, lines 9-16.) As was his custom, Singleton hid his cash of approximately $500 from the evening's card game inside his sock. (App. 153, line 17 – 154, lines 1-5.) Singleton was angry as he prepared to leave because

someone was calling him repeatedly. (App. 155, lines 20-23.) Ms. Shaw also recognized Petitioner as a visitor to her house, but not the night Singleton died. (App. 156, line 17 – 158, line 8.)

Phone logs from the victim's phone revealed multiple calls made to and received from the victim's phone by Petitioner. When investigators called Petitioner's phone and identified themselves, Petitioner claimed to be Novian Sinclair, a prior roommate of his. (App. 362, line 17 - 366, line 4.) Petitioner maintained he had no information about the death of Johnny Singleton, and he claimed he was not with the victim on the night of his death. Petitioner did not attempt to explain why his cell phone records showed calls from his phone to the victim's. (App. 340, lines 1-9.) The officers executed a search warrant for Petitioner's residence, obtained a DNA sample from Petitioner, and questioned him about the death of the victim. (App. 214, line 10 - 218, line 14.) Petitioner continued to deny having any knowledge or involvement in the victim's death. (App. 244, line 16 - 245, line 20.)

Phone records revealed Petitioner also called his brother, Stephen Dwyer (Stephen), multiple times on the night of the shooting. In his statement to law enforcement officers with the Sumter County Sheriff's Department, Stephen said Petitioner called him to come pick him up around 10:30 pm off on Hwy 521. (App. 287, lines 2-10.) Stephen asked Petitioner what happened, and Petitioner said, "I F'd up." (App. 287, lines 7-8.) Stephen, who needed to give a friend a ride to her place of work, agreed to pick Petitioner up along the way. (App. 287, lines 12-22.) Petitioner told Stephen he had been shot and asked him to hurry. (App. 288, lines 2-4.)

When Stephen found Petitioner, he was near a club off of Hwy. 521, walking toward Sumter. (App. 287, line 23 - 288, line 1.) Petitioner's hand was bleeding and was wrapped with something like a shirt. (App. 288, lines 5-6.) Petitioner told Stephen he did not want to go to the

hospital. (App. 288, lines 6-8.) After Stephen dropped his friend off at her workplace, he drove Petitioner to his house. Stephen asked Petitioner what happened to his hand, and Petitioner told him he cut it. (App. 288, lines 9-14.) Petitioner would not give Stephen any details about the victim that night. (App. 288, lines 14-21.)

The day after the shooting, Stephen, who had seen the news that morning, deduced Petitioner was involved in Singleton's death. (App. 289, lines 6-12.) Stephen stopped by Petitioner's house again on his way home from the gym. (App. 289, lines 6-8.) Petitioner told Stephen he and the victim were fighting in the car, and the man was ex-military and knew karate. Petitioner told Stephen he was scared and shot the victim in the head, but he did not mean to shoot him in the head. (App. 289, lines 12-17; State's Ex. 75.) Petitioner told Stephen "that the dude saw the gun. They were in the car when they were tussling. And after he shot him, the car was wrecked and hit a tree. (App. 289, lines 17-20.) Petitioner took the victim's wallet and money and threw the victim's phone into the woods. (App. 289, lines 21-22.) Petitioner also told Stephen he hid the gun in the back of a truck at the club off of Hwy. 521. (App. 291, lines 7-21.) The following day, when Stephen asked Petitioner again if he killed Johnny Singleton, Petitioner told Stephen he did not and claimed he was "just playing" and made up the story he told him earlier. (App. 290, lines 1-7.)[2]

---

[2] The case later took an interesting twist. One day during March of 2015, a security guard at Sumter Mall was approached by a woman he did not know and asked if he was a real cop. (App. 144, lines 1-221.) The woman wanted to remain anonymous, but told the guard she had information that might help a case. (App.144, line 24 – 145, line 2.) The woman handed him a letter and asked him to give it to the police. (App. 141, line 12 – 142, line 3; p. 145, lines 2-4.) The letter said "Mathew Dwyer" on the top of the envelope (App. 147, lines 17-19), and it was addressed to Demetrius Cooper. The guard handed the letter over to Detective Mathew Yates with the Sumter Police Department. (App. 142, lines 3-20.)

The Sumter Police Department, determined the subject of the letter was unrelated to a city case, but discovered the county had a pending case to which the letter was relevant. (App. 174, line 17 – 176, line 21.) Demetrius Cooper, who was Matthew Dwyer's friend, testified for

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 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 810 S.E.2d at 839 (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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 179, 810 S.E.2d at 840. 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).

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; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); 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 "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (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

---

the State. (App. 196, lines 7-16.) Cooper said he received an encoded letter from Dwyer. However, the letter also contained a key code so that Cooper could decipher its contents. (App. 198, lines 1-17.) In the letter, Dwyer thanked Cooper for "everything you are doing for me." (App. 201, lines 12-18.) Dwyer also told Cooper he needed an alibi for January 26th. (App. 202, line 15 - 203, line 5.) Dwyer told Cooper the story he wanted Cooper to fabricate about his activities that night if anyone asked him. (App. 202, line 1 - 209, line 14.) Cooper forgot about the letter, but he was later surprised that the letter fell into the hands of law enforcement. (App. 210, lines 10-21.)

cases. "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, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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). Second, counsel's deficient performance must have prejudiced the applicant 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. 668, 670 (1984). 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

The post-conviction relief court properly found Counsel was not constitutionally ineffective for failing to advise Petitioner to testify in support of his claim of self-defense since Counsel advised him of his right to testify, explained it was Petitioner's decision whether to testify or not, and properly advised Petitioner that, if he chose to testify, he would be subject to cross-examination regarding a coded letter he wrote a State's witness attempting to secure an alibi; further the trial court conducted an extensive colloquy with Petitioner regarding his Fifth Amendment right at the conclusion of which Petitioner knowingly and intelligently informed the court he did not wish to testify in his case.

Petitioner alleges the post-conviction relief court erred in refusing to find Counsel constitutionally ineffective for advising Petitioner not to testify in support of his self-defense claim at trial. However, the post-conviction relief court properly found Counsel was not ineffective because Counsel's original trial strategy was to call Petitioner as a witness, however, at the start of the trial, the State provided Counsel with a coded letter Petitioner wrote to a State's witness, Demetrious Cooper (Cooper), attempting to secure an alibi. Petitioner admitted to writing this letter, which, in Counsel's evaluation, compromised their entire defense. Counsel then advised Petitioner taking the stand at trial would be very risky, Petitioner agreed, and decided not to testify. The trial court also engaged in a thorough colloquy with Petitioner regarding his right to testify, after which Petitioner maintained his decision not to testify. As the testimony from the evidentiary hearing establishes, Petitioner was aware of his right to testify, aware the decision was his to make, and aware of the risks associated with testifying at the time he elected not to testify in support of his self-defense claim. Further, Counsel articulate a valid reason why his trial strategy changed at the beginning of trial as the new evidence changed his original evaluation of Petitioner's case. As such, the post-conviction relief court properly denied Petitioner relief and this Court should deny certiorari.

"Under Strickland, in order to provide ineffective assistance of counsel based on his claim that his attorney prevented him from exercising his right to testify at the pre-trial hearing,

Rashaad must show both that his attorney violated his right to testify and that this testimony had a 'reasonable probability' of changing the outcome." United States v. Rashaad, 249 F. App'x 972, 973 (4th Cir. 2007) (citing Strickland, 466 U.S. at 694.) Here, Petitioner cannot establish Counsel violated his right to testify or that his testimony would have a reasonable probability of changing the outcome of his trial.

Advised of Right to Testify

As an initial matter, it is evident from the record and Petitioner's testimony that Petitioner was aware of his right to testify at his trial, and aware that the decision as to whether to testify or not was up to him. Petitioner testified he and Counsel agreed he would testify at trial initially. (App. 565.) Petitioner testified he changed his mind based on Counsel's advice and it was his decision not to testify. (App. 565.) Further, the trial court conducted a thorough colloquy with Petitioner where the trial court reiterated Petitioner's right to testify, the decision to testify was his to make, and only Petitioner could waive his right to testify. (App. 408-410.) Petitioner was afforded an opportunity to speak with Counsel prior to making his decision, after which, Petitioner told Judge Murphy he understood his right and would not be testifying. (App. 410.)

"A defendant's knowing and voluntary wavier of a statutory or constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). Here, not only is the record complete with a thorough colloquy between Petitioner and the trial judge, but Petitioner and Counsel both testified at the evidentiary hearing that Petitioner was aware of his right to testify, and knew it was Petitioner's decision as to whether or not to testify. Ultimately, Petitioner informed Counsel and the trial court that he made the decision not to testify, despite knowing he had the right to do so.

Counsel's Reevaluation of Petitioner's Case

Nevertheless, Petitioner claims he did not testify based on the erroneous advice of Counsel. Counsel testified he was prepared to present Petitioner's self-defense claim at trial and filed notice of that defense with the court. (App. 575.) However, Counsel testified his evaluation of Petitioner's case changed upon receiving a letter from the State that was written in code by Petitioner, which, in Counsel's assessment, "completely changed the case." (App. 578.) Counsel testified the letter sent to Cooper was written in a code and, once decoded, it revealed Petitioner was asking Cooper to be an alibi witness for him. (App. 577.) Petitioner also asked Cooper to say that Petitioner got in a fight so he could explain the injury he sustained to his hand. (App. 577.) Petitioner admitted to writing the letter during the evidentiary hearing, however, he never told Counsel about the letter prior to trial. (App. 568-569, 577, 578.) After receiving the letter, Counsel met with Cooper and he confirmed he received the letter from Petitioner, and had no intention of providing Petitioner with an alibi. (App. 578.) As a result of the letter, Counsel testified, "[Petitioner] and I had several conversations about him testifying, and I told him that he would be subject to cross-examination based on that letter, if he wanted to testify that was up to him." (App. 578.) Counsel testified his assessment of Petitioner's case went from "self-defense to now he's searching for an alibi." (App. 578.) Counsel testified the plan for Petitioner to testify took a turn after he received that letter. (App. 579.)

Petitioner uses Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), to support his position that Counsel was deficient. Petitioner argues Counsel was deficient because "he abandoned his trial strategy midtrial and failed to utilize his discretion when he advised Petitioner not to testify." (PWC. 13.) However, in Foye, counsel's initial trial strategy was for Foye not to testify and, after Foye's co-defendant provided damaging testimony, counsel

admitted he did not reevaluate his position on whether Foye should testify. Id. at 592, 518 S.E.2d at 269. This Court found Foye's counsel deficient for failing to use "his discretion in employing an appropriate trial strategy in light of the unexpected testimony." Foye, 335 S.C. at 592, 518 S.E.2d at 268.

Here, unlike Foye, Counsel testified his assessment of Petitioner taking the stand changed once he received the letter Petitioner wrote "searching for an alibi." (App. 578.) As Counsel credibly testified, he was "shocked" when he received the letter and reevaluated Petitioner's decision to testify at trial after receiving the letter that "completely changed the case." (App. 578, 584.) It is evident from Counsel's credible testimony at the evidentiary hearing that his assessment and advice to Petitioner changed once he received the letter that contradicted Petitioner's self-defense claim. Counsel testified, ". . . our whole case was built on what [Petitioner] had told me and it turned out what he had told me wasn't necessarily the truth[.]" (App. 584.) Counsel further testified, ". . . the letter fundamentally changed everything. [Y]ou can't go forward with a self-defense when at the same time you're asking for an alibi that no one knows about." (App. 583.) Counsel also testified he and Petitioner had "several conversations about [Petitioner] testifying, and I told him that he would be subject to cross-examination based on that letter, if he wanted to testify that was up to him." (App. 578.)

Notably, although Petitioner admitted to writing the letter, Counsel testified, "[Petitioner] didn't tell me about the letter when he wrote it; and despite the fact that I met with him, as he said, five, six, seven, eight times, not one time did he discuss that letter with me." (App. 585.) Here, unlike Foye, Petitioner created the situation he now complains of as he put Counsel in a position to be surprised by his letter, which led to Counsel having to reevaluate the trial strategy at the outset of the trial. Counsel would not have been in the position to reevaluate the original

strategy had Petitioner informed Counsel about the letter he authored and sent to Cooper in an attempt to secure an alibi. Further, Petitioner improperly claims Counsel "abandoned his trial strategy midtrial." (PWC. 13.) Counsel testified he received the letter, which led to his reevaluation, "on the eve of trial or shortly after a jury was impaneled," which is well before "midtrial." (App. 577.) Although Counsel testified, "I didn't know if he was going to testify or not when we received that letter[,]" Petitioner was aware the trial strategy had changed when Counsel received the letter, which was earlier than "midtrial." (App. 589.)

Petitioner has failed to show this Court how Counsel was deficient as Counsel reassessed his trial strategy upon receipt of the coded letter Petitioner sent to Cooper. This Court found the counsel in Foye to be deficient for failing to reassess Foye's need to testify based on changes in his case, here, that is precisely what Counsel did. Counsel properly reassessed Petitioner's case based on the letter and advised Petitioner based on his reevaluation and the risk Petitioner would be taking subjecting himself to cross-examination. Counsel testified his trial strategy changed as a result of Petitioner's letter. "When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. 466 U.S 668 (1984.). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). 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, 417 S.E.2d 529 (1992). As

such, Petitioner has failed to establish Counsel was deficient as to this allegation and the post-conviction relief court properly denied Petitioner relief as to this claim.

Petitioner Failed to Show Prejudice

Petitioner has also failed to show this Court any resulting prejudice from Counsel's alleged deficiency. Petitioner claims "there is a reasonable probability the outcome of his trial would have been different if Petitioner would have testified he was acting in self-defense during the altercation with [the victim.]" (PWC. 13.) However, Counsel properly informed Petitioner that if he took the stand he was subject to cross-examination regarding the letter. (App. 578.) Counsel testified,

> I said, you're gonna have to explain this letter, you're gonna [have to] explain why you wrote this letter . . . he had no answer for that." (App. 579.) Counsel testified, . . . if what you're getting at is that somehow [Petitioner] was justified [in] writing that letter with a code and asking for an alibi, I'm not sure I'm gonna go to that extent because . . . I've never seen that in 18 years.

(App. 584.)

According to Counsel, the "shocking" letter that "changed everything" would have been severely damaging to Petitioner's credibility. Cooper testified at trial about the decoded letter, which stated in part:

> I need an alibi for January 26th. My 'story' is that from 6:00 p.m. until about 8:15 p.m., I was with you. We were drinking and chilling in Populars Square. All you know is when you pulled up, I was already there.

(App. 202-204.) Cooper went on to explain the contents of the letter indicated Cooper should say that he saw Petitioner get into a fight and Cooper broke it up and that is how Petitioner's thumb was injured. (App. 204-206.) Petitioner ended his letter with:

> So just in case anybody contacts you, and you will know what to say and our stories will match. Let me know if that is all right with you. It's a shame I can't depend on my own brother [Stephen] to

> get the job done. Also see if you can get in contact with Devon Kerley on facebook, and tell him to write me ASAP. I appreciate everything bro.[3]

(App. 208.) Cooper went on to testify that he took Petitioner's letter to mean Petitioner wanted Cooper to give him an alibi. (App. 209.) Cooper testified he thought about helping Petitioner, but ultimately decided not to provide him with an alibi. (App. 209-210.)

In Foye, this Court found Foye was not prejudiced by his counsel's deficiency because, "Petitioner's prior convictions probably could have been admissible to impeach his testimony and cast severe doubt on his credibility." Foye, 335 S.C. at 592, 518 S.E.2d at 268. Here, had Petitioner chosen to testify regarding his self-defense claim, his credibility would have been severely questioned as the letter and Cooper's testimony show he was attempting to manufacture an alibi. Although Petitioner claims he could have "easily explained to the jury why he wrote the letter," Counsel testified Petitioner had no answer for why he wrote the letter during their conversations. (PWC. 13; App. 579.)

Further damaging to Petitioner's credibly was the testimony of Stephen. Stephen's testimony was in stark contrast to Cooper's testimony. Stephen testified Petitioner told him,

> . . . [Petitioner] and that dude were tussling in the car, and that the dude knew Karate, and had been military. And he got scared and said that he shot him in the head. [Petitioner] told me the dude saw the gun. They were in the car when they were tussling. And after he shot him, the car was wrecked and hit a tree. Petitioner took the victim's wallet and money and threw the victim's phone into the woods.

(App. 289.) Petitioner also told Stephen he hid the gun in the back of a truck at the club off of Hwy. 521. (App. 291.) Unfortunately for Petitioner, the physical evidence presented in his case

[3] There was a "p.s." to Petitioner's letter requesting Cooper contact yet another individual so Cooper could call him three-way with Petitioner. Petitioner requested Cooper let the individual "know what is going on with me." (App. 208-209.) This testimony made it clear Cooper was not the only person Petitioner was reaching out to for an alibi.

supported Stephen's version of events rather than Petitioner's self-defense theory. Meadors testified,

> There was [Petitioner's] blood. . . on the socks of the victim, and the testimony of the victim had come from a poker game and he always put his money in his socks and so we believe that [Petitioner] hurt his hand and was bleeding from the gun and that's where the blood came from his hand to the sock of the victim.

(App. 597.)

Petitioner's credibility is also challenged because Petitioner initially told Counsel there were two other witnesses in the vehicle with him and the victim. (App. 590.) Counsel testified he attempted to locate these two people through his investigation, but he was unable to locate them. (App. 590.) Petitioner claimed the unknown subjects were with him when he cut his hand at a store. (App. 590.) Counsel testified Petitioner told him he was scared of these unknown subjects and believed they would pull a gun on him. (App. 591.) Counsel testified he believes the unknown subjects do not exist as the State was also unable to produce any witnesses that were in the vehicle. (App. 590.) Counsel's advice to Petitioner regarding the risk he was taking if he chose to testify was very reasonable considering Petitioner's testimony regarding his claim of self-defense would have provide yet another version of his "story" to the jurors. Petitioner's attempt to manufacture an alibi and the fact that he provided inconsistent versions of his story to numerous people, it is unreasonable to believe Petitioner's testimony would have been considered credible by the jury and would have changed the outcome of his trial.

Petitioner has failed to establish any resulting prejudice from Counsel's alleged deficiency. As this Court found in Foye, Petitioner here cannot establish he would have been credible to the jury had he chosen to testify at trial regarding his self-defense claim. As Counsel discovered during his representation, Petitioner was untruthful and, based on the evidence presented against him at trial, it would be readily apparent to a reasonable jury that Petitioner

was not credible. As such, Petitioner has failed to meet his burden as set forth in Strickland to show any deficiency on behalf of Counsel or any resulting prejudice. As such, the post-conviction relief court properly denied Petitioner relief as to this claim and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

JANELL H. GREGORY
Assistant Attorney General
SC Bar No. 103176

By:
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 9th, 2019

RECEIVED
DEC 09 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMER COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Post-Conviction Relief Judge
Maite Murphy, Trial Judge

Appellate Case No. 2018-002210

MATTHEW C. DWYER,

Petitioner,

v.

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:

Lara M. Caudy, 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 9th day of December, 2019.

KAITLYN S. SLICE
LEGAL ASSISTANT