STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Rafael Escalante, ... 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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QUESTION PRESENTED

1. Whether trial counsel rendered ineffective assistance of counsel when he concede that Petitioner left the scene of the crime during opening argument and when such admission relieved the State of its burden of proof to find Petitioner guilty beyond a reasonable doubt?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the July 2005 term for reckless homicide (2005-GS-23-5306), leaving the scene of an accident resulting in death (2005-GS-23-5305), and escape (2005-GS-23-5307). (App.pp.229-39). Richard H. Warder, Esquire represented Petitioner.

The case was called to trial on October 9, 2006 and the escape charge was severed from the remaining charges. Petitioner then pled guilty to reckless homicide and the Honorable John C. Hayes deferred sentencing until the end of trial. (App.pp.14-18). Petitioner proceeded to trial on the charge of leaving the scene of an accident resulting in death and was found guilty. On October 10, 2006, Judge Hayes levied concurrent sentences of ten (10) years for reckless homicide and twenty-five (25) years for leaving the scene of an accident resulting in death. (App.p.161).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[1] brief. The Court of Appeals dismissed the appeal. State v. Escalante, Op. No. 2008-UP-714 (S.C. Ct. App. filed Dec. 18, 2008).

Petitioner filed an application for post-conviction relief (PCR) on March 20, 2009 (2009-CP-23-2315). (App.pp.162-88). A hearing was held at the Greenville County Courthouse on August 27, 2010. (App.pp.196-221). Petitioner was present and represented by Caroline M. Horlbeck, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison

[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Hill denied relief in an order filed October 5, 2010. (App.pp.222-28).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

At the start of trial – during opening arguments to the jury – trial counsel made the following statements:

> There's no question that initially my client when he got out of his car went and looked at the victim and took off and ran.
>
> The issue we are deciding is whether he left the scene. The scene would be something that we'll talk about after you have heard the testimony. My client never left the scene. He was apprehended at the scene. The crime would take the actual departure from that area.

(App.p.41) (emphasis added).

At the PCR hearing, Petitioner argued the underscored section of trial counsel's opening argument conceded his guilt. (App.pp.209-10). Trial counsel explained why he made this statement, saying, "[i]t was going to be a fact I considered that would be proven. And to simply deny it would take away from the credibility of the position that he hadn't left the scene, that he had been there before he left the scene." (App.p.216).

In denying Petitioner's application for post-conviction relief, the PCR judge noted that – in the statement immediately following the one at issue – trial counsel told the jury that Petitioner never left the scene. The PCR judge found trial counsel's decision to make the statement complained of by the Applicant was strategic in nature. (App.pp.226-27).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Petitioner failed to meet his burden of proving the first prong of Strickland – that trial counsel did not render reasonably effective assistance. When reviewing counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066. Thus, courts will apply a highly deferential standard of review. Id. at 689, 104 S. Ct. at 2065. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain

strategy. See Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Counsel's strategy is reviewed under "an objective standard of reasonableness." Id. Trial counsel testified at the PCR hearing that the statement in question was a part of his trial strategy and that his overall strategy was to argue Petitioner never left the scene. (App.p.216). In addition to developing this theory through cross-examination of the witnesses, trial counsel expressly stated during closing arguments that Petitioner never actually left the scene of the crime. (App.p.140). Trial counsel testified he felt it was in petitioner's favor to concede he fled the vehicle because to argue otherwise would undermine other elements of the argument. Trial counsel's articulation of the thought process behind his strategy is reasonable because witnesses did, in fact, testify that they saw Petitioner leave the scene of the accident. Linda Evett and Jonathan Adkins both testified they saw Petitioner flee from his vehicle and run up the street. (App.p.68; p.78). Officer Smith testified that when he arrived on the scene, he witnessed Petitioner running away and gave chase. (App.p.91). Officer Blair testified that when he arrived on the scene, he observed Officer Smith struggling with Petitioner more than "a football field" away from the accident. (App.pp.103-05). Based upon the witnesses' testimony, trial counsel was reasonable in assuming Petitioner's initial flight from his vehicle would be proven. Thus, trial counsel's decision to state Petitioner initially fled his vehicle was reasonably based on trial strategy.

Further, Petitioner also failed to meet his burden of proving the second prong of Strickland – that he was prejudiced by trial counsel's performance. Petitioner must prove that "but for counsel's errors, there is a reasonable probability that the outcome of the

trial would have been different." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). As discussed supra, trial counsel made the statement in question during his opening argument to the jury. (App.p.41). Opening arguments, however, are not considered evidence. See State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986). And the trial judge instructed the jury immediately before opening arguments that the attorneys "are not witnesses. So they are not giving you testimony. And they are not arguing to try to convince you of anything at this point." (App.p.39). Regardless, Petitioner cannot prove he was prejudiced by trial counsel's representation because the State presented overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, Petitioner failed to prove either error or prejudice under the Strickland test. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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July 27, 2011

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The Honorable D. Garrison Hill, Circuit Court Judge

Rafael Escalante, ... Petitioner,

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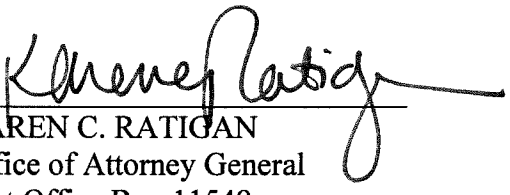
CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 27th day of July, 2011.



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