

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
CERTIORARI TO LAURENS COUNTY

Court of Common Pleas

Brian M. Gibbons, Post-Conviction Relief Judge

Donald B. Hocker, Trial Judge
—————

Appellate Case No. 2019-000948
—————

ROBERT HARBUCK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.
—————

RETURN TO PETITION FOR WRIT OF CERTIORARI
—————

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II. The post-conviction relief court did not err in finding a portion of Dr. Batalis’s testimony outside the scope of his expertise in the final order of dismissal as the objected to testimony was outside Dr. Batalis’s knowledge, skills, and experience; further, the post-conviction relief court overruling the State’s objection and allowing the testimony during the evidentiary hearing did not preclude the court from evaluating the objected to testimony and finding it was outside the scope of Dr. Batalis’s expertise in the final order of dismissal.11

III. The post-conviction relief court properly found Counsel was not ineffective for failing to conduct a reasonable investigation in Petitioner’s case.15

a) Counsel did investigate Petitioner’s case based on the facts provided to him by Petitioner, which were entirely fabricated based on Petitioner’s own testimony at the evidentiary hearing; further, Counsel presented mitigation to the trial court regarding Petitioner’s mental health, and the trial court expressly stated it considered Petitioner’s mental health issues in determining Petitioner’s sentence.16

b) Counsel was not ineffective for failing to obtain Lindler’s medical records or calling an expert to testify regarding his injuries because Lindler’s injuries were not material to Petitioner’s charges; further, Counsel objected and moved for a mistrial when the State elicited testimony regarding Lindler’s injuries, which ultimately led the trial court to instruct the jury to disregard the testimony of Lindler’s injuries.18

IV. The post-conviction relief court properly found Counsel was not ineffective for failing to have a valid trial strategy as Counsel's testimony shows he did have a valid trial strategy which he developed based on Petitioner's claim that Petitioner had only ingested a Red Bull and cigarettes on the date of the incident, however, that claim was entirely false as Petitioner admitted during the evidentiary hearing and to Dr. Maddox that he was on "a lot" of methamphetamine at the time of the incident; further, Petitioner benefited from Counsel's trial strategy as Petitioner was able to keep his voluntary intoxication from consideration by the jury and trial court.20

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PETITIONER'S ISSUES PRESENTED ON CERTORARI

- I. Did the PCR Court violate the separation of powers doctrine by adopting the State's proposed order of dismissal when this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law?
- II. Did the PCR Court err by finding in the order of dismissal that Dr. Nicholas Batalis's opinion on whether the collision could have cause great bodily injury is outside the scope of his expertise when the PCR Court properly overruled the State's objection and allowed this expert testimony at the PCR hearing?
- III. Did the PCR Court err in finding trial counsel provided effective assistance of counsel when trial counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not consulting expert witnesses to review Petitioner's mental health records and officer Linder's medical records based on the expert testimony presented at the PCR hearing?
- IV. Did the PCR Court err in finding trial counsel provided effective assistance of counsel when trial counsel had an objectively unreasonable trial strategy and failed to subject the prosecution's case to meaningful adversarial testing?"

RESPONDENT'S ISSUES PRESENTED ON CERTORARI

- I. Did the post-conviction relief court act within the scope of its authority in requesting the prevailing party to draft the proposed order of dismissal in Petitioner's case as this Court has recognized this is a common practice for the sake of efficiency in post-conviction relief cases; further did the post-conviction relief court properly request the proposed order be sent to him for his review prior to signing the order of dismissal?
- II. Did the post-conviction relief court did err in finding a portion of Dr. Batalis's testimony outside the scope of his expertise in the final order of dismissal as the objected to testimony was outside Dr. Batalis's knowledge, skills, and experience; further, did the post-conviction relief court overruling the State's objection and allowing the testimony during the evidentiary hearing did not preclude the court from evaluating the objected to testimony and finding it was outside the scope of Dr. Batalis's expertise in the final order of dismissal?
- III. Did the post-conviction relief court properly find Counsel was not ineffective for failing to conduct a reasonable investigation in Petitioner's case?
 - a. Did Counsel properly investigate Petitioner's case based on the facts provided to him by Petitioner, which were entirely fabricated based on Petitioner's own mental health expert's testimony at the evidentiary hearing; further, did Counsel present mitigation to the trial court regarding Petitioner's mental health, and did the trial court expressly

state it considered Petitioner's mental health issues in determining Petitioner's sentence?

b. Was Counsel ineffective for failing to obtain Lindler's medical records or calling an expert to testify regarding his injuries because Lindler's injuries were not material to Petitioner's charges; further, did Counsel object and move for a mistrial when the State elicited testimony regarding Lindler's injuries, which led to an in camera hearing, and ultimately led the trial court to instruct the jury to disregard the testimony of Lindler's injuries?

IV. Did the post-conviction relief court properly find Counsel was not ineffective for failing to have a valid trial strategy as Counsel's testimony shows he did have a valid trial strategy which he developed based on Petitioner's claim that Petitioner had only ingested a Red Bull and cigarettes on the date of the incident, however, that claim was entirely false as Petitioner admitted during the evidentiary hearing and to Dr. Maddox that he was on "a lot" of methamphetamine at the time of the incident; further, did Petitioner benefit from Counsel's trial strategy as Petitioner was able to keep his voluntary intoxication from consideration by the jury and trial court?

STATEMENT OF THE CASE

Robert Harbuck (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Laurens County Clerk of Court. During the October 2015 term, the Laurens County Grand Jury indicted Petitioner for assault on an officer while resisting arrest (2015-GS-30-1622); four counts of attempted murder (2015-GS-30-1618, -1619, -1620, -1621); and failure to stop for a blue lights (2015-GS-30-1710). Thomas Quinn, Esquire, (Counsel) represented Petitioner. Assistant Solicitors Dale Scott and Jim Todd of the Eighth Circuit Solicitor's Office prosecuted the case. On August 24-26, 2016, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker, circuit court judge.

The jury convicted Petitioner of resisting arrest as a lesser-included offense of assault on an officer while resisting arrest (2015-GS-30-1622), three counts of third-degree assault and battery as a lesser-included offense of attempted murder (2015-GS-30-1618, -1619, -1620), assault and battery of a high and aggravated nature as a lesser-included offense of attempted murder (2015-GS-30-1621), and failure to stop for blue lights (2015-GS-30-1710). Petitioner was sentenced to one year imprisonment for resisting arrest, thirty days imprisonment for each third-degree battery conviction, nine years imprisonment for assault and battery of a high and aggravated nature, and three years imprisonment for failure to stop for blue lights. All sentences were to run concurrently. Petitioner did not file a notice of appeal.

Petitioner filed a timely application for post-conviction relief on August 7, 2017, and alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation for trial. See Wiggins v. Smith, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel also failed to have

Applicant evaluated for competency and criminal responsibility by the South Carolina Department of Mental Health or by an independent psychiatric/mental health expert. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records despite having a duty to determine whether Applicant was competent to stand trial or could raise the affirmative defense of insanity. See Reeves v. State, 415 S.C. 366. 782 S.E.2d 747 (Ct. App. 2015).

- b. Trial Counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial. See State v. Blair, 275 S.C. 529. 273 S.E.2d 536 (1981) S.C. Code §§ 44-23-410 and 430.
- c. Trial Counsel failed to provide notice of the affirmative defense of insanity to the Solicitor as required prior to trial and to properly raise the defense at trial. See Rule 5(f). SCRCrimP; see also S.C. Code §17-24-10.
- d. Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.
- e. Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. See United States v. Cronin, 466 U.S. 648 (1984).
- f. Trial Counsel failed to object to inadmissible evidence during Applicant's trial.
- g. Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.
- h. Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.
- i. Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State.
- j. Trial Counsel failed to request jury instructions on the affirmative defense of not guilty by reason of insanity and guilty but mentally ill.

- k. Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase.

On December 18, 2017, the State filed its return, requesting an evidentiary hearing. Thereafter, on June 14, 2018, Petitioner, through his counsel, Dayne C. Phillips, Esquire, filed an amend application for post-conviction relief. In this amended application, Petitioner set forth the following grounds for post-conviction relief:

- a. Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury" or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary in requesting a lesser-included offense.
- b. Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.
- c. Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.

On March 1, 2019, an evidentiary hearing into Petitioner's allegations was held at the Greenwood County Courthouse before the Honorable Brian M. Gibbons. Prior to the hearing, Petitioner expressly waived the allegation pertaining to the Blair hearing and Counsel's failure to request jury instructions on the affirmative defense of insanity or guilty but mentally ill.¹ During the hearing, Petitioner abandoned the allegation pertaining to Counsel's failure to object to inadmissible evidence during Petitioner's trial as Petitioner failed to provide any testimony

¹ Petitioner waived allegations "b" and "j" in his initial post-conviction relief application.

regarding this claim.² Petitioner went forward on his remaining allegations.

At the conclusion of the post-conviction relief hearing, Judge Gibbons instructed both parties to provide briefs in support of their cases. Following briefing, Judge Gibbons instructed Respondent to draft a proposed order of dismissal and submit it to the post-conviction relief court. On May 17, 2019, both parties were informed by Judge Gibbons' law clerk that Judge Gibbons had signed and the proposed order of dismissal, however, the Laurens County Clerk's Office never received the signed order.³ Based on the email from the law clerk, Petitioner issued a Rule 59(e), SCRCR, Motion to Alter or Amend on May 17, 2019. On May 28, 2019, both parties received an e-mail from Judge Gibbons' law clerk explaining Judge Gibbons respectfully denied Petitioner's motion. Thereafter, Petitioner filed a notice of appeal and the South Carolina Supreme Court requested a copy of the original order of dismissal for the appellate record. At that time, it was discovered the Laurens County Clerk of Court had not received the original order of dismissal in Petitioner's case. As a result, on June 26, 2019, a signed copy of Petitioner's order of dismissal from his post-conviction relief hearing was filed with the Laurens County Clerk of Court.

STATEMENT OF FACTS

On September 6, 2015, Petitioner was driving down I-26 in his gold Chevrolet Silverado "like a NASCAR driver, cutting through traffic, using the emergency lane as a speed lane." (App. 35.) A group of co-workers (witnesses) who were traveling on I-26 the same morning, observed Petitioner's driving and made a frantic call to 911. (App. 35.) Trooper Lindler (Lindler) caught up to Petitioner and attempted to pull Petitioner over. (App. 50.) The witnesses

² Petitioner abandoned allegation "f" in his initial post-conviction relief application.

³ According to the public index, the final order of dismissal was filed with the Laurens County Clerk of Court on June 26, 2019.

got in front of Petitioner and exited the interstate. (App. 49.) At that point, Petitioner was behind them and began to follow them. (App. 50.) The witnesses noticed Petitioner and pulled over on the interstate ramp to let him pass as they believed he was fleeing from Lindler. (App. 50.) Instead of passing the witnesses, Petitioner pulled up behind them and rammed their vehicle. (App. 50.) Lindler pulled in behind Petitioner and, after Petitioner rammed the witnesses' car, put his truck in reverse and sped towards Lindler's police cruiser. (App. 50-51.) Petitioner then drove his truck and pulled it in front of the witnesses' vehicle. (App. 51.) Lindler then positioned his police cruiser between the witnesses' vehicle and Petitioner's vehicle. (App. 51.) Lindler ordered Petitioner out of the vehicle at gunpoint and Petitioner complied. (App. 87.) Petitioner complied with Lindler's commands until Petitioner was put in handcuffs and he began fighting. (App. 88.) Another Trooper showed up at that time, and shortly thereafter, officers from the Clinton Police Department arrived on the scene. (App. 88.) Petitioner remained combative and officers had to wait for a caged vehicle to transport Petitioner from the scene. (App. 88.) Once the caged vehicle arrived, multiple officers had to be used to put Petitioner in the vehicle as he continued to fight. (App. 90.) Officers "drive stunned" Petitioner two times during the arrest in order to get him to comply with their commands. (App. 140.) Petitioner would stop fighting temporarily, but would eventually become combative again. (App. 140-142.)

While being transported, Petitioner attempted to shimmy out of his handcuffs back of the caged unit and officers had to pull over and radio for assistance. (App. 36, 143.) Officers spoke to Petitioner, attempted to calm him down, and Petitioner appeared to be cooperative. (App. 144.) Once officers opened the car door, Petitioner became combative again. (App. 144.) Petitioner was eventually transported to the hospital for an exam. (App. 146-147.) Petitioner

would not consent to an exam and told the doctors, “You’re not touching me.” (App. 147.) Due to Petitioner’s non-compliance, no blood was drawn at the hospital. (App. 148.) Petitioner was then taken to jail without further incident. (App. 148)

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), SCRPC; Caprood, 338 S.C. at 109, 525 S.E.2d at 517; 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 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. at 670. 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

I. The post-conviction relief court acted within the scope of its authority in requesting the prevailing party to draft the proposed order of dismissal in Petitioner's case as this Court has recognized this is a common practice for the sake of efficiency in post-conviction relief cases; further, the post-conviction relief court properly requested the proposed order be sent to him for his review prior to signing the order of dismissal.

Petitioner alleges the post-conviction relief court erred in delegating the drafting of the order of dismissal in Petitioner's post-conviction relief matter to Respondent. However, the post-conviction relief court did not improperly delegate a judicial function to Respondent in Petitioner's matter. After both parties submitted post-hearing briefs in support of the arguments made at the evidentiary hearing, the post-conviction relief court requested Respondent draft a proposed order consistent with the Respondent's arguments and submit it to opposing counsel before submitting it to the presiding judge for review. This Court has recognized the efficiency of this practice in previous cases where the prevailing party drafts a proposed order for the lower court and submits the proposed order to the presiding judge for review. The presiding judge in Petitioner's case did not act outside of this normal practice and did not improperly delegate his judicial duties to Respondent. This Court should deny certiorari.

Petitioner's claim that the post-conviction relief court improperly delegated its duties to Respondent is meritless. In Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019), this Court acknowledge the "collaborative effort" involved in drafting the post-conviction relief orders. In its opinion, this Court stated, "We recognize the prevailing party often prepares a proposed order for the PCR court." In Hall v. Catoe, 360 S.C. 353, 364-365, 601 S.E.2d 335, 341 (2004), this Court held,

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for

judges to ask a party to draft a proposed order for the sake of efficiency.

This Court further highlighted the commentary to South Carolina Appellate Court Rule 501, Canon 3 B(7)(e), which states “a judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.” Id. at 365, 601 S.E.2d at 341.

Here, the procedure followed by the post-conviction relief court is appropriately in line with the procedures recognized by this Court. The post-conviction relief court requested Respondent draft a proposed order of dismissal after presiding over the evidentiary hearing and reviewing post-hearing briefs from each party. The post-conviction relief court directed Respondent to draft a proposed order of dismissal consistent with Respondent’s arguments and provide a copy to opposing counsel. After complying with the post-conviction relief court’s request, the proposed order of dismissal was reviewed, approved and signed by the presiding post-conviction relief judge. Thereafter, Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, which was subsequently denied by the post-conviction relief court. Petitioner has failed to show this Court how Petitioner was denied fundamental fairness based on the post-conviction relief court’s request for Respondent to draft and submit a proposed order of dismissal in Petitioner’s case. As such, this Court should deny certiorari.

II. The post-conviction relief court did not err in finding a portion of Dr. Batalis’s testimony outside the scope of his expertise in the final order of dismissal as the objected to testimony was outside Dr. Batalis’s knowledge, skills, and experience; further, the post-conviction relief court overruling the State’s objection and allowing the testimony during the evidentiary hearing did not preclude the court from evaluating the objected to testimony and finding it was outside the scope of Dr. Batalis’s expertise in the final order of dismissal.

Petitioner’s claim that the post-conviction relief court erred in finding Dr. Nicholas Batalis’s (Batalis) testimony was outside the scope of his expertise in the final order of dismissal

based on the post-conviction relief court overruling the State's objection to his testimony during the evidentiary hearing and allowing him to testify is meritless. Petitioner highlights sections of Batalis's testimony on direct-examination in support of his allegation; however, Petitioner failed to highlight the shortcomings of Batalis's expert opinion that were elicited during cross-examination. During cross-examination, testimony was elicited that showed he was not qualified to provide an expert opinion on whether the impact between Petitioner and Lindler's vehicles could have resulted in great bodily injury. It is within the post-conviction relief court's purview to evaluate the entirety of Batalis's testimony from the evidentiary hearing along with the argument provided by Petitioner and the State in the post-hearing briefs when the matter is taken under advisement, as it was in this case. In assessing the totality of the evidence, testimony, and argument provided to him, the post-conviction relief court properly found Batalis's expert testimony was outside of his expertise and afforded it the weight he believed it deserved in its ruling on Petitioner's post-conviction relief application. The post-conviction relief court is not bound to find an expert witness's testimony credible simply because the court allowed arguably objectionable testimony during the evidentiary hearing. The post-conviction relief court properly evaluated the entirety of Batalis's testimony, made the determination that his testimony was outside the scope of his expertise, and made findings consistent with that determination in the final order of dismissal. Therefore, this Court should deny certiorari.

Petitioner called Batalis as an expert witness to provide an expert opinion as to whether the injuries suffered by Lindler after Petitioner rammed his car into Lindler's patrol vehicle rose to the level of great bodily injury as defined by South Carolina statute. Over the State's objection, Petitioner also elicited testimony from Batalis that Petitioner's ramming of Lindler's patrol vehicle could not have led to great bodily injury, which the State believed was outside

Batalis's expertise.⁴ It is important to note that at trial neither side presented any evidence regarding the speed of Petitioner's vehicle at the time of the collision, however, the jury did see a video of the in-dash camera coming off the mount due to the impact of Petitioner's vehicle upon Lindler's patrol car. (App. 315.) Testimony was also provided that the impact caused Petitioner's vehicle to become attached to the push bumper on Lindler's patrol car. (App. 85.) There was also testimony that Petitioner's vehicle tires were spinning and smoke was coming from them prior to Petitioner colliding with Lindler's patrol car. (App. 109.)

During Batalis's testimony the State objected numerous times due to the testimony being offered was outside his expertise. The following exchange occurred during Batalis's direct-examination testimony:

Petitioner: And so as an expert in forensic pathology is it your opinion that those actions would likely not produce death?

State: Objection, Your Honor. This is beyond his expertise.

Court: Sustained. Let me rephrase. Doctor, what is your opinion on whether or not this was a great bodily injury?

Batalis: I don't believe the injuries suffered were great bodily injury. I believe also asking about the - - if the collision would likely to cause great bodily injury - -

State: That's the objection Your Honor.

Court: All right. Hang on a second. Is that based upon a reasonable degree of medical certainty?

Batalis: Yes.

Court: All right. Thank you. Objection noted and overruled.

(App. 398-399.) During that exchange, Batalis did not offer an opinion regarding whether the

⁴ During voir dire of Batalis, he testified he did not have any experience or training in accident reconstruction or estimating the speed of vehicles. (App. 385.)

collision would likely cause great bodily injury. The only opinion he offered to a degree of medical certainty was that Lindler did not suffer great bodily injury, which was within the scope of his expertise. As Batalis's direct-examination continued, Petitioner attempted to elicit testimony from Batalis regarding the findings in his report, and the State promptly objected as that portion of the report provided an opinion that was outside of Batalis's expertise. (App. 399.) The post-conviction relief court heard argument from both sides and following the argument the court stated, "All right. I agree with you, Mr. Phillips. I'm going to overrule the State's objection. You know, the beauty of the nonjury proceeding is that, you know, I'm standing both as fact-finder and as the judge of the law. So I can - - you know, I'm going to let it in. And of course I'll give it the credibility I believe it deserves. Okay." (App. 400-401.)

On cross-examination, the State was able to elicit testimony that Batalis did not know the rate of speed Petitioner's vehicle was traveling at the time he rammed Lindler's vehicle, nor did he review any crime scene photos of the vehicle damage or skid marks created by Petitioner's vehicle prior to impact. (App. 402.) Batalis also testified on cross-examination that he was not familiar with the mounts for in-dash video cameras inside police vehicles, nor the amount of force it would take to dislodge such mounts. (App. 402.) The State provided argument in its post-hearing brief that based on Batalis's lack of training and experience in accident reconstruction the testimony offered by Batalis stating the impact of the collision could not have caused great bodily injury was outside of his expertise as his knowledge, training, and experience does not afford him the capability of making that determination based on the information he was provided.

Based on the comment the post-conviction relief court made when overruling the State's objection, shows the intent of the court to give Batalis's testimony the "credibility it deserves,"

and was reserving judgment on the weight that the post-conviction relief court would afford Batalis's opinion. Ultimately, the post-conviction relief court found Batalis's testimony that the collision could not have caused great bodily injury was outside the scope of his expertise. The post-conviction relief court was well within its authority to make such a finding in its final order of dismissal despite overruling the State's object during the evidentiary hearing. This Court should deny certiorari.

III. The post-conviction relief court properly found Counsel was not ineffective for failing to conduct a reasonable investigation in Petitioner's case.

Petitioner alleges the post-conviction relief court erred in finding Counsel was not ineffective for failing to obtain Petitioner's mental health records and Lindler's medical records in his investigation, and presenting that information at trial or in mitigation on Petitioner's behalf. However, as the post-conviction relief court properly found, Counsel did obtain and present mitigation consistent with the story Petitioner provided to Counsel. Further, Petitioner could not have utilized his own mental health expert, Dr. Maddox (Maddox), that he presented at the evidentiary hearing because Petitioner told Maddox a completely different story than what he told Counsel and the jury at trial. The post-conviction relief court properly found Counsel was not ineffective as to this allegation as Counsel presented the relevant mitigation to the trial court regarding Petitioner's mental health prior to sentencing. Further, prior to pronouncing the sentence, the trial court expressed it had taken Petitioner's PTSD into account in determining the appropriate sentence in Petitioner's case. Petitioner failed to meet his burden set forth in Strickland and the post-conviction relief court properly found Counsel was not ineffective as to this allegation. Therefore, this Court should deny certiorari.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation

of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel, especially when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)); see also Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence in order to prove counsel was ineffective for failing to call a witness.).

a. Counsel did investigate Petitioner’s case based on the facts provided to him by Petitioner, which were entirely fabricated based on Petitioner’s own testimony at the evidentiary hearing; further, Counsel presented mitigation to the trial court regarding Petitioner’s mental health, and the trial court expressly stated it considered Petitioner’s mental health issues in determining Petitioner’s sentence.

Petitioner alleges Counsel was ineffective in his investigation of Petitioner’s mental health. However, Maddox’s report and testimony shows Petitioner’s story to Counsel and the jury was entirely untruthful. Counsel even testified Maddox’s report would not have been helpful to Petitioner at trial. (App. 433.) “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” Strickland, 466 U.S. at 691(emphasis added). Here, Petitioner maintained to Counsel and the jury that he had only ingested a Red Bull and

cigarettes prior to the incident. (App. 205, 207.) Petitioner denied the incident was drug induced and testified he had not used illegal drugs on the day of the incident, or the night before the incident. (App. 201.) However, Petitioner testified during the evidentiary hearing that he was on “a lot” of methamphetamine and had been up for three days prior to the incident. (App. 414, 425.) According to Maddox’s report, Petitioner was using three grams of methamphetamine per day and was intoxicated at the time of the incident. (App. 409.)

Further, Petitioner cannot show any resulting prejudice from any alleged deficiency as Counsel investigated the case and developed his trial strategy based on the story Petitioner told him, which was a lie. Had Counsel sought the assistance of Maddox prior to trial, it is unclear what version of the story Petitioner would have provided to her since he was insistent at trial that he was not intoxicated and not under the influence of illegal drugs. As Maddox testified, the majority of her report was based on the narrative Petitioner gave her, and she had no way of substantiating his claims through military records. (App. 416-417.) Based on Petitioner’s propensity to be untruthful, even under oath, Petitioner cannot show this Court the information he would have provided Maddox in preparation for his trial would have been consistent with the story he provided her in preparation for his post-conviction relief hearing.

Notwithstanding Petitioner’s untruthfulness, Counsel did obtain information on Petitioner’s PTSD diagnosis and treatment and presented it to the trial court. Counsel testified the judge was aware of Petitioner’s PTSD and Counsel testified he also provided information from the Department of Veteran Affairs and letter from a U.S. Army Major Schofield on Petitioner’s behalf. During sentencing, the trial judge stated, “I am taking into account to some extent the fact that you are currently being treated for PTSD.” (App. 331.) Later, the trial judge stated,

You know, if you had been in and out of the criminal justice system and then convicted of this particular offense, I don't think there's any question I'd give you the max, which is 20 years. I'm not going to do that, because I have given some benefit, some weight to the mitigation that's been presented in this case.

(App. 332.)

Despite Petitioner's mental health issues, the trial judge was clearly disturbed by Petitioner's actions towards Lindler, and, had mitigation been provided consistent with Maddox's report showing Petitioner was voluntarily intoxicated during the incident, the trial court likely would have increased Petitioner's sentence. Since Petitioner was able to maintain during the trial that he was not intoxicated, he was able to receive the benefit of Counsel's mitigation for his PTSD while denying his voluntary intoxication. As Counsel testified, "I don't believe . . . most judges would think being on a methamphetamine binge would be helpful for sentencing." (App. 459.)

Petitioner has failed to show this Court how Counsel was ineffective as the mitigation provided to the trial court was the most favorable mitigation Petitioner could receive while maintaining his claim that he was not intoxicated at the time of the incident. Petitioner has failed to show how the results of his trial would have been different had Counsel presented Maddox at trial. As Counsel testified, Petitioner would have been more likely to have been convicted of attempted murder if he utilized Maddox's report as it would have taken the intent issue away and he believes intent is what caused the jury to reduce the charges against Petitioner. (App. 457.) Therefore, the post-conviction relief court properly found Counsel was not ineffective as to this allegation. This Court should deny certiorari.

b. Counsel was not ineffective for failing to obtain Lindler's medical records or calling an expert to testify regarding his injuries because Lindler's injuries were not material to Petitioner's charges; further, Counsel objected and moved for a mistrial when the State elicited testimony regarding

Lindler's injuries, which ultimately led the trial court to instruct the jury to disregard the testimony of Lindler's injuries.

Petitioner alleges the post-conviction relief court erred in finding Counsel was not ineffective for failing to obtain Lindler's medical records and calling an expert to testify regarding Lindler's injuries, and in support of this allegation, Petitioner presented testimony from Batalis at the evidentiary hearing. However, after hearing Batalis's testimony, Counsel testified he would not have used an expert like Batalis at trial because Batalis was not prepared to discuss moderate bodily injury and his testimony would have left Petitioner in a position to still be found guilty. (App. 456.) Further, Counsel testified Batalis's report would not have been admitted at trial because it was speculative and would have infringed on the jury's province. (App. 455.) Moreover, Counsel objected to Lindler's testimony regarding his injuries, and the trial court provided a curative instruction to the jury that Lindler's injuries were not to be considered. (App. 98.) Based on the foregoing, post-conviction relief court properly found Counsel was not ineffective as to this allegation. This Court should deny certiorari.

Petitioner alleges, Counsel's performance was so deficient it prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). However, as discussed in the previous section, some of Batalis's testimony was outside the scope of his expertise and, as Counsel testified, he would not have used Batalis's report at trial. (App. 456.) Counsel testified he does not believe Batalis's report would have been admissible, nor impacted the outcome of Petitioner's trial. (App. 443.) Counsel testified he believes most reasonable jurors could reasonably find great bodily injury would have occurred from Petitioner ramming his vehicle into Lindler's vehicle. (App. 456.) Further, Counsel testified he objected to Lindler's testimony about his injuries, which led to an in

camera review of Lindler's testimony regarding his injuries by the trial court. At the conclusion of that hearing, the trial court provided a curative instruction to the jury that they should not consider Lindler's injuries. (App. 98, 436.)

Based on Counsel's assessment of Batalis's testimony at the post-conviction relief hearing, and the information provided to the jury at trial, Counsel acted reasonably in preparing for Petitioner's trial. As Counsel testified, an expert was unnecessary in this capacity because the judge instructed the jury on all of the lesser included offenses and the definitions for moderate bodily injury and great bodily injury. (App. 435.) Further, the jury was instructed not to consider Lindler's injuries in deliberation, so an expert opinion on the matter would have highlighted the injuries and, as Counsel testified, a reasonable juror could believe the collision caused by Petitioner could have resulted in serious bodily injury. As such, Petitioner has failed to meet his burden to show any deficiency on behalf of Counsel or any resulting prejudice as required under Strickland. Therefore, this Court should deny certiorari.

IV. The post-conviction relief court properly found Counsel was not ineffective for failing to have a valid trial strategy as Counsel's testimony shows he did have a valid trial strategy which he developed based on Petitioner's claim that Petitioner had only ingested a Red Bull and cigarettes on the date of the incident, however, that claim was entirely false as Petitioner admitted during the evidentiary hearing and to Dr. Maddox that he was on "a lot" of methamphetamine at the time of the incident; further, Petitioner benefited from Counsel's trial strategy as Petitioner was able to keep his voluntary intoxication from consideration by the jury and trial court.

Petitioner's claim that the post-conviction relief court erred in finding Counsel was not ineffective for having an unreasonable trial strategy is meritless. During the post-conviction relief hearing, Counsel testified that his trial strategy was based on the story Petitioner provided him which ultimately was not true. Counsel testified the experts presented by Petitioner at the evidentiary hearing would not have been helpful to Petitioner's case and he would not have been able to use them at trial. Petitioner's claim that the outcome of his trial would have been different

had Counsel used experts is speculative and not supported by the credible testimony of Counsel at the evidentiary hearing. The post-conviction relief court properly found Counsel was not ineffective in developing a trial strategy in Petitioner's case and properly denied and dismissed this allegation. This Court should deny certiorari.

“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 (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); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Further, decisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998). Examples of such decisions include “which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.” Abney, 408 S.C. at 48, 757 S.E.2d at 547 (Ct. App. 2014) (Pieper, J., concurring).

What motions to file and “whether to put on evidence so as to preserve the final word in closing argument” are also strategic and tactical decisions to be made by trial counsel. Id.

Here, Counsel’s entire strategy was based on a lie perpetuated by Petitioner. Petitioner told Counsel he was not intoxicated at the time of the incident and maintained that claim under oath at trial. However, as Petitioner admitted during the evidentiary hearing, his testimony at trial was not true because at the time of the incident he was on “a lot” of methamphetamine. (App. 423.) As discussed in a previous section, it is Petitioner’s responsibility to provide truthful information to his attorney, so the attorney can make appropriate decisions in his case. See Thomas v. Gilmore, 144 F.3d 513, 515 (7th Cir. 1998) (“It is reasonable for a lawyer to place a certain reliance on his client.”) (citing Strickland, 466 U.S. at 691, 699.) As Counsel credibly testified, he developed a valid trial strategy based on the information Petitioner provided him, which was to convince the jury that Petitioner was “unable to formulate the intent necessary to commit the offenses.” (App. 431.) In executing that strategy, Counsel elicited testimony from Petitioner regarding his military experience, mental health counseling, and presented witnesses showing this incident was outside of Petitioner’s normal behavior. In Counsel’s closing argument he insisted Petitioner was not on drugs and explained the State had no proof Petitioner was on drugs at the time of this offense. (App. 254-256.) Counsel further stated:

That criminal intent is an essential element of each of these offenses, save one. And that if you find that [Petitioner] was not able to form the intention to commit these crimes because he was under a delusion that made him believe some other scenario was ongoing, and that he was thinking he was in an exercise, or whatever was in his sad little head, that he is not guilty of these crimes. We don’t lock people up for having mental difficulties. He has a medical discharge from the military. He’s undergoing therapy and counseling, according to his testimony.

(App. 257.) With the exception of the failure to stop for blue lights charge, the jury returned a verdict that convicted Petitioner on all lesser-included offenses, which Counsel credibly testified he believed his argument on intent is what caused the jury to reduce Petitioner's charges. (App. 457.) Counsel cannot be found to be deficient for an "unreasonable trial strategy" when Petitioner created the basis for such strategy by lying to Counsel, the trial court, and the jury.

Petitioner has also failed to show this Court any resulting prejudice from Counsel's alleged deficiency. Petitioner asserts Counsel's "unreasonable trial strategy would have been different had he consulted with expert witnesses in preparation for trial." (PWC. 24.) Petitioner's assertion that he would have received a more favorable outcome at his trial had Counsel sought the assistance of Maddox prior to trial is speculative. To arrive at that conclusion, this Court would have to assume: 1) Petitioner would have told Maddox the same story in preparation for trial that he did in preparation for his evidentiary hearing, which seems highly unlikely since Petitioner was adamant – even to the point of perjury – that he was not intoxicated at the time of the incident; and 2) the jury, being aware of his voluntary intoxication, would have returned a more favorable verdict than what he received, which also seems unlikely based on Counsel's testimony that Maddox's report would have "taken away from the issue of intent." (App. 457.) Counsel testified his argument regarding Petitioner's inability to formulate intent is what he believed led to Petitioner's convictions on lesser-included offenses. Petitioner offered no evidence at the evidentiary hearing that would support those assumptions and the resulting speculation that the outcome of his trial would have been different had Counsel sought the assistance of Maddox in preparation for trial.

Further, Petitioner has offered no evidence the trial court would have imposed a more favorable sentence had Petitioner been truthful about voluntary intoxication at the time of the

incident. Counsel credibly testified, “I don’t believe . . . most judges would think being on a methamphetamine binge would be helpful for sentencing.” (App. 459.) Counsel further testified he believed it was possible Petitioner would have been convicted of attempted murder had the jury known about Petitioner’s voluntary intoxication, because he did not know what the defense would have been under those circumstances. (App. 457.) Counsel even credibly testified that, had he known Petitioner was voluntarily intoxicated, he would have “had to change trial strategy or try to reopen plea negotiations.” (App. 457.)

Petitioner’s assertion that Counsel’s trial strategy was unreasonable in light of the testimony provided by Batalis at the evidentiary hearing is also meritless. As discussed in a previous section, Batalis’s testimony was outside the scope of his expertise as it related to determining whether the collision between Petitioner and Lindler’s vehicles could have led to great bodily injury. Counsel credibly testified he would not have used Batalis at trial and believed he did not provide any information that would have assisted Petitioner in his case as the jury was properly instructed on moderate bodily injury and great bodily injury. (App. 456.) Further, Counsel credibly testified, “most reasonable jurors would have found that a person backing their car into a trooper’s car [c]ould reasonably have found great bodily injury would occur.” (App. 456.)

Ultimately, the post-conviction relief court properly found Counsel developed a reasonable trial strategy based on the information Petitioner provided to him as he prepared for trial. Petitioner’s assertion that he was prejudiced by Counsel’s trial strategy is speculative and neither expert presented by Petitioner at the evidentiary hearing provided information that Counsel found would have assisted him in Petitioner’s trial, especially considering Petitioner’s claim that he was not intoxicated at the time of the incident. Petitioner has failed to meet his

burden to show Counsel was deficient in developing the trial strategy or that he was prejudiced by any alleged deficiency. The post-conviction relief court properly denied and dismissed this allegation. 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,

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By: 
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Feb 26, 2020

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas
Brian M. Gibbons, Post-Conviction Relief Judge
Donald B. Hocker, Trail Judge

Appellate Case No. 2019-000948

Robert Harbuck,

Petitioner,

v.

State of South Carolina,


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 placing one copy in the United States Mail, addressed to:

Dayne C. Phillips, Esquire
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201

This 26th day of February, 2020.



Jennifer Jennison
Administrative Coordinator for Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 26 2020
S.C. SUPREME COUR

February 26, 2020

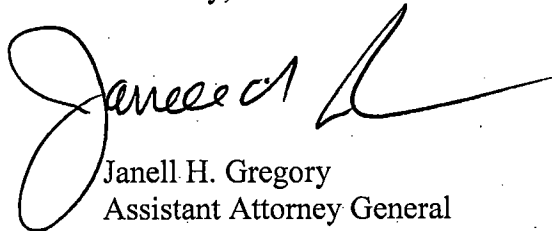
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Robert Harbuck v. State of South Carolina
Appellate Case No.: 2019-000948

Dear Mr. Shearouse:

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

Sincerely,



Janell H. Gregory
Assistant Attorney General
S.C. Bar # 103176

JHG/jj
Enclosures

cc: Dayne C. Phillips, Esquire
Victim Advocacy Division