STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

G. Thomas Cooper, Jr., Trial Judge
J. Derham Cole, PCR Judge

RECEIVED
May 18 2020
S.C. SUPREME COURT

JEFF CHESTNUT

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2019-000347

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General

1000 Assembly Street
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED FOR CERTIORARI

I. Whether the PCR court erred in denying relief, where trial counsel was ineffective in failing to object to the admission of Petitioner's statement to law enforcement, where counsel argued pre-trial that the statement was involuntarily made based on promises made by the officer, where counsel failed to renew and preserve the objection during trial?

II. Whether the PCR court erred in denying relief, where trial counsel failed to obtain an eyewitness identification expert, where Petitioner was indigent and could not afford an expert, where the eyewitness who identified Petitioner saw only the eyes of the alleged robber and made the identification two weeks after the robbery, and where trial counsel failed to discuss with Petitioner the possibility of hiring an expert?

III. Whether the PCR court erred in denying Petitioner's request for funding for an eyewitness identification expert following both a written and oral motion, where the eyewitness's identification was unreliable, and where Petitioner requested funding to retain an expert witness in order to prove he was prejudiced by trial counsel's errors?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES PRESENTED ON CERTIORARI

I. Did the PCR court correctly find Petitioner failed to show prejudice from Counsel's alleged failure to object to Sergeant Isenhoward's testimony regarding Petitioner's statement to law enforcement where the trial court ruled pre-trial the statement was voluntarily made and Petitioner admitted during pretrial he voluntarily gave the statement?

II. Did the PCR court correctly find Counsel reasonably decided an eye-witness identification expert was unnecessary because the identification was weak and instead chose a valid trial strategy of attacking the eye-witness' credibility through cross examination?

III. Did The PCR Court act within its discretion by denying Petitioner's funding request for an eyewitness identification expert after hearing both parties' arguments?

STATEMENT OF THE CASE

Jeff Chestnut (Petitioner) was indicted for three counts of armed robbery and three counts of kidnapping in July 2012. (App. 826-37). Petitioner was previously indicted in December 2010 for armed robbery (2010-GS-40-2641). Mathias Chaplin (Counsel) represented Petitioner. Assistant Solicitors Joanna McDuffie, John Steadman, and Nicole Simpson prosecuted the case. (App. 1). Petitioner proceeded to a jury trial on September 17–20, 2012, before Judge G. Thomas Cooper, Jr. (App. 1-673). The jury convicted Petitioner as indicted. (App. 650-51). Judge Cooper sentenced Petitioner to serve concurrent terms of thirty years' imprisonment on all charges. (App. 673). Applicant appealed.

Appellate Defender David Alexander perfected Petitioner's appeal on August 20, 2013, by filing an *Anders*[1] brief in the Court of Appeals raising the following issue: "Whether the trial court erred in admitting [Petitioner's] written statement when the evidence showed it was not knowingly and voluntarily made?" On November 1, 2013, Petitioner filed a *pro se* response to the *Anders* brief. The Court of Appeals dismissed the appeal on June 25, 2014. The case was remitted back to the circuit court on July 18, 2014.

Petitioner commenced the underlying PCR action on August 22, 2014. (App. 675-89). The State submitted its return on March 11, 2015. (App. 690-94). Thereafter, Petitioner amended his allegations, through PCR counsel, on January 26, 2016. (App. 695-96). Petitioner simultaneously moved for discovery and funding to obtain an eyewitness identification expert. (App. 697-98; Supp. App. 1-4). On February 3, 2016, an evidentiary hearing convened before Judge J. Derham Cole. (App 699-797). Petitioner was present and represented by Jonathan D. Waller. Assistant Attorney General J. Clayton Mitchell, III, represented the State. (App. 699).

[1] *Anders v. California*, 386 U.S. 738 (1967).

At the outset of the PCR hearing, Petitioner moved for discovery and funding for an eyewitness identification expert. (App. 702-07). Petitioner argued he needed funding to obtain an eyewitness identification expert because the eyewitness testified at trial that she recognized Petitioner from his eyes. The State argued that while identification was an issue at trial, Petitioner was implicated in being involved in the robbery though his statement to law enforcement and other witnesses' and his co-defendant's statements to law enforcement. The PCR court denied Petitioner's motion for discovery and funding. (App. 707). The hearing then proceeded as an evidentiary hearing. Petitioner and Counsel testified at the hearing.

The issues presented to the PCR court were the following allegations of ineffective assistance of counsel:

1. Failure to retain the services or investigate the potential effectiveness of an eyewitness identification expert;
2. Failure to procure telephone records of Petitioner as a potential defense;
3. Failure to object to the lack of notice of the State's expert witness, and for failure to object to the expert witness's written report being entered into evidence because the report was not provided in discovery;
4. Failure to properly argue factors regarding the reliability of a witness's identification during the suppression hearing;
5. Failing to object to the trial court's preliminary remarks to the jury as the remarks improperly shifted the burden to Petitioner;
6. Failure to object to several instances of impermissible hearsay during Drenita Ore's testimony;
7. Failure to object to impermissible hearsay during Timothy Bell's testimony;
8. Failure to contemporaneously object to the photo lineup being entered into evidence;
9. Failure to contemporaneously object to Angela Diaz-Garcia's in-court identification of Petitioner;
10. Failure to object to several leading questions during Investigator Kevin Eisenhoward's testimony;
11. Failure to object to the advisement of rights form being entered into evidence;
12. Failure to allow Petitioner to view surveillance video before trial;

13. Failure to renew the directed verdict motion at the close of Defendant's case and the close of all evidence;
14. Failure to request a jury charge on "withdrawal";
15. Failure to request a jury charge on "mere presence" after the State's closing argument; and
16. Failure to object to the trial court's jury charge.

(App. 695-96; 708-10; 790-91). The PCR court took the matter under advisement at the conclusion of the PCR hearing. (App. 786). On February 19, 2019, the PCR court issued an order denying relief on all grounds. (App. 789-825). Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner was charged in connection to a robbery of the Carolina Gold bingo parlor (Carolina Gold), which was robbed on May 23, 2010. (App. 270-78). Petitioner's girlfriend, Teidra Dennis, worked at Carolina Gold. (App. 45; 370).

Two men robbed Carolina Gold. (App. 276-79). A Carolina Gold employee identified Tyward Jordan, one of Petitioner's co-defendants, as one of the robbers even though both men covered their faces with bandannas. (App. 182-83; 276-82). Drenita Ore, an employee, remembered seeing Jordan at Carolina Gold two days prior to the robbery. (App. 182-83). Ore also recalled Dennis making suspicious phone calls from other employees' cellphones before the robbery occurred. (App. 171). After the robbery, Dennis immediately left Carolina Gold and did not speak to law enforcement. (App. 176). Later, when questioned by law enforcement, Dennis implicated Petitioner in the robbery. (App. 47).

Based off of Dennis's implication, law enforcement arrested Petitioner and questioned him. (App. 47; 380-81). Petitioner waived his right to counsel and gave a statement to Investigator Kevin Isenhoward. (App. 381). After a *Jackson v. Denno*, 378 U.S. 368 (1964) hearing, the statement was introduced through Isenhoward at trial. (App. 47-75; 388-403). The trial court ruled the statement was admissible. (App. 100-02). In his statement Petitioner told Isenhoward he

served as a lookout during the robbery. (App. 394-95). This portion of the statement was challenged at the *Denno* hearing and trial. (App. 84; 482). Counsel contemporaneously objected to the statement at trial. (App. 387-89).

Angela Diaz-Garcia (Garcia) was the manager of Carolina Gold Bingo. (App. 269-70). Garcia and her daughter, Kayla Sharpe, were both working at the bingo parlor the night of the incident. (App. 270). Garcia and Sharpe both testified at trial. (App. 215; 269).

Sharpe testified she worked at Carolina Bingo as a banker, meaning that when she was working, she was responsible for handling the money of the bingo. (App. 216). The night of the robbery, Sharpe lent Dennis her cell-phone. (App. 217). Sharpe testified there was normally a security guard at the bingo, but by the time of the robbery, the security guard had already left. (App. 222). Sharpe recalled going to the back room of the bingo parlor to help a customer with an issue. When she exited the back room, Sharpe was unaware of what was happening when the bingo caller stated "[Sharpe], Stop. We're being robbed . . . ." (App. 218). Sharpe looked for Garcia, her mother, and saw her mother in the "cage" being held at gunpoint by a man. (App. 219). Sharpe stated Garcia was in the "cage" where all the money was kept, and she and Garcia had just recently moved the money from the counter-top into a drawer that was under the counter in the cage. (App. 220). Sharpe recalled the man inside the cage took the money from the drawer, and another man in the bingo's main area took the money in her possession. (App. 221). After the man in the main area took the money from her, both robbers fled out the side door. (App. 221). Sharpe recalled the man in the cage wore black pants and covered his face with a black bandanna, and he was shorter and "chunkier" than the man in the main area. (App. 219; 221).

Garcia testified similar to Sharpe. (App. 269-79). Garcia testified the man who entered the cage was wearing a baseball cap, covered his face with a black bandanna, black pants and

black shirt. Garcia also testified she could see the man's eyes. (App. 278). Garcia testified the man entered the cage and did not go straight for the money on the counter, rather, he went directly for the drawer were most of the money was kept. After getting the money from the drawer, he took the money from the counter. (App. 277-78). Garcia stated she picked Petitioner out of a photo line-up because she remembered his eyes. (App. 279-81). Garcia identified Petitioner as the robber in court. (App. 281).

Petitioner testified that on the day of the robbery, he went to the Comedy House Jordan, which was next door to Carolina Gold. (App. 464). Petitioner recalled Jordan was on the phone on the way to the Comedy House. Petitioner stated Jordan was planning a robbery on the phone. (App. 464-65). Petitioner stated Jordan's partner in the robbery was Quantis Sims. (App. 465). Petitioner asked if he could participate in the robbery but later changed his mind. (App. 466-67). Petitioner loaned his hat and clothes to Sims but did not enter Carolina Gold during the robbery. (App. 467). Petitioner stated that by loaning his clothes to Sims, he did not have to further participate in the robbery. (App. 467-68). Petitioner waited behind the Comedy House when he saw Jordan and Simms exit Carolina Gold and flee in their car. Jordan and Sims left Petitioner behind. (App. 469-70). Petitioner then hid under the steps of the Comedy House. (App. 470-71).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

"On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard." *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017).

ARGUMENT

I. The PCR court correctly found Petitioner failed to show prejudice from Counsel's alleged failure to object to Sergeant Isenhoward's testimony regarding Petitioner's statement to law enforcement where the trial court ruled pretrial the statement was admissible, Petitioner admitted to voluntarily giving the statement, Counsel did not think the trial court would change its decision, and the statement's admissibility was supported by the evidence

Petitioner argues Counsel was ineffective for not contemporaneously objecting to his statement's introduction at trial. (Pet. 6). Counsel did not object to the statement's introduction; therefore, this issue was not preserved. However, Petitioner's own pretrial testimony was that he knew his *Miranda* rights and he freely and voluntarily spoke to Isenhoward. Counsel testified he probably did not object to the statement's introduction because he felt the trial court would not change its pretrial ruling. Further, even if Counsel had objected, it is unlikely the trial court would have changed its pretrial ruling, and that statement's admissibility was supported by the evidence at trial.

Here, after the *Denno* hearing, the trial court ruled Petitioner was advised of his *Miranda* rights, and knowingly and voluntarily waived his rights. (App. 101). Counsel was not deficient for failing to contemporaneously object because Petitioner's own pretrial testimony was he knew his *Miranda* rights and he spoke freely and voluntarily to Isenhoward. (App. 85). Petitioner's opposition to the statement was not that he gave it unknowingly and involuntarily, his challenge to the statement was the written statement was not an accurate reflection of what he told Isenhoward. This argument goes to the weight of the evidence, not its admissibility. Further, Counsel testified at the PCR hearing that he probably did not contemporaneously object because the trial court was unlikely to change its ruling. Because Petitioner's own pretrial testimony reflected he gave his statement freely and voluntarily, Counsel was not deficient for failing to contemporaneously object to the statement's admissibility.

"In assessing prejudice under *Strickland*, the question ***is not*** whether a court can be certain counsel's performance had no effect on the outcome . . . ." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

Had Counsel objected to the statement at trial, it is unlikely the trial court would have changed its pretrial ruling. Counsel admitted he did not object to the advisement of rights form coming into evidence. However, Counsel stated he might have felt he "plowed that ground in pretrial . . ." and "[he] ha[d] no reason to think an appellate court would have ruled otherwise." (App. 724). Counsel's testimony shows he did not feel the trial court would change its pretrial ruling. Indeed, the trial court's pretrial ruling was supported by the record as even Petitioner admitted pretrial he freely gave his statement. Additionally, Isenhoward testified similarly at trial as he did pretrial. Had Counsel objected, it is unlikely the trial court would have changed its ruling as to the statement's admissibility. *See Harrington*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

Further, if Counsel had objected to preserve the issue for appeal, the trial court's decision was clearly supported by the record and would have been affirmed. As such, Petitioner was not prejudiced by Counsel's failure to object to the statement's admissibility because it is unlikely the trial court would have changed its pretrial ruling, and the ruling would have been upheld on appeal because the trial court's decision was supported by the evidence. Therefore, certiorari should be denied as to this issue.

II. <u>The PCR court correctly found Counsel reasonably felt an eyewitness identification expert was unnecessary because the identification was weak, and, instead, chose a valid trial strategy of attacking the eyewitness' credibility through cross-examination</u>

Petitioner argues Counsel was ineffective for failing to hire an eyewitness identification expert. The PCR court correctly found Counsel employed a reasonable trial strategy of attacking the eyewitness' testimony because Counsel felt the eyewitness' identification was very week and thought he could adequately attack her credibility through cross-examination because the only thing she identified Petition from was his eyes. Further, there was other evidence introduced at trial, including Petitioner's own testimony, that he never entered the bingo hall but stayed outside the whole time.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Counsel felt the eyewitness' identification was weak and did not see the need to request funds for an eye-witness identification expert and instead chose to attack the eyewitness's identification through cross-examination. (App. 725). Counsel emphasized how unreliable the eyewitness's identification was, stating, "I thought the cross-examination that I gave of Ms. Garcia . . . was pretty compelling. I really believed . . . the jury should have looked at her with a bit of suspect with regards to how reliable [her identification] was." (App. 725). Importantly, Counsel testified, "One of the concerns I had [was] what if [an expert] came back and wrote a report and said it [was] [Petitioner]." (App. 726).

Counsel chose to attack Garcia's identification through cross-examination because he felt her identification was weak. Further, Counsel stated he was concerned an eyewitness identification expert could harm Petitioner's defense theory by identifying him as the robber. Therefore, Counsel made a reasonable decision to attack Garcia's identification through cross-examination because hiring an eye-witness expert could have been harmful to Petitioner's case. As such, Counsel was not deficient for making a reasonable decision not to pursue an eyewitness expert. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). Because Counsel articulated a reasonable trial strategy for attacking the identification instead of hiring an eyewitness expert, certiorari should be denied as to this issue.

III. The PCR Court acted within its discretion by denying Petitioner's funding request for an eyewitness identification expert after hearing both parties' arguments

Petitioner argues the PCR court abused its discretion in denying Petitioner's motion for funding to obtain an eyewitness identification expert. The PCR court heard argument from both parties' on this issue and denied Petitioner's request. The PCR court did not abuse its discretion.

Section 17-27-150(A) of the South Carolina Code (2014) provides:

> A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

Here, Petitioner moved for funding to obtain an eyewitness identification expert prior to the PCR hearing. (Supp. App. 2-4). Petitioner asserted he needed funding to obtain an expert because the only eyewitness identified him by his eyes because the rest of the robbers face was

covered. (App. 702-05). The State argued there was other evidence presented at trial linking Petitioner to the robbery. First, Petition gave a statement to law enforcement that he planned on participating in the robbery, drove his codefendants to the robbery, gave his clothes to a codefendant to use in the robbery, and stayed outside during the robbery to serve as a lookout. Additionally, Sharpe's phone records showed that Dennis called Petitioner multiple times before the robbery occurred, and Dennis implicated Petitioner was involved in the robbery. (App. 705-06). After hearing both sides' arguments, the PCR court ruled, "Motion for producing discovery denied." (App. 707).

Discovery is not a matter of right in a non-capital PCR case. Section 17-27-150(A) gives the PCR court the discretion to grant or deny discovery. However, discovery shall only be granted in the PCR court's discretion if good cause is shown. S.C. Code Ann. § 17-27-150(A). Here, the PCR court exercised its discretion and denied the funding request after hearing both parties' arguments. The PCR court weighed Petitioner's argument, the need for funding because Petitioner was identified only by his eyes from one eyewitness; against the State's argument, Petitioner was tied to the crime by his own admissions and other evidence showing that Petitioner intended to participate, gave up his clothes to aid a co-defendant, and served as a lookout. The PCR court implicitly ruled good cause was not shown because identification was not the main issue at trial because Petitioner admitted some involvement in his testimony and statement. Therefore, the PCR court properly exercised its discretion to deny discovery. As such, certiorari should be denied as to this issue.

CONCLUSION

Based on the foregoing, Counsel was not constitutionally ineffective. Petitioner failed to show he was prejudiced by Counsel's failure to object to the admission of Petitioner's statement

after the trial court ruled the statement was admissible pretrial, Counsel felt the trial court would not change its ruling during trial, and the trial court's decision would have been supported by the evidence at trial. Counsel was not ineffective for failing to hire an eyewitness identification expert because Counsel was unsure if the expert's opinion would help Petitioner, so Counsel decided to attack the eyewitness' testimony through cross-examination. Finally, the PCR court appropriately exercised its discretion in denying Petitioner's motion for funding after hearing argument from both parties. As such, certiorari should be denied, and the PCR court's order of dismissal should be affirmed.

Respectfully submitted,

s/ Samuel L. Key

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

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ATTORNEYS FOR RESPONDENT