

STATE OF SOUTH CAROLINA
In The Supreme Court

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May 19 2020

S.C. SUPREME COURT

CERTIORARI TO HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Trial Judge
The Honorable Bentley Price, PCR Judge

Appellate Case No. 2019-001173

ABDUL FURQUAN. Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Argument on Certiorari

Did the PCR judge err in finding that trial counsel was not ineffective where counsel failed to elicit testimony that Petitioner's DNA was excluded from the gun, gloves, or bandanas that were allegedly used in the commission of the crime?

Respondent's Counterargument on Certiorari

Did the post-conviction relief court properly find Petitioner failed to establish constitutionally ineffective assistance of counsel by choosing not to elicit testimony concerning DNA evidence because Counsel's trial strategy was reasonable and Petitioner was not prejudiced by the alleged inaction?

STATEMENT OF THE CASE

Abdul Furquan (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its May 2012 term, the Horry County Grand Jury indicted Petitioner for First-Degree Burglary (2012-GS-26-02057) and Attempted Murder (2012-GS-26-02058). Petitioner was represented by Ryan Stampfile, Esquire (hereafter “Counsel”). Assistant Solicitor Joshua D. Holford Esquire, from the Fifteenth Circuit Solicitor’s Office, represented the State. On September 18-19, 2013, the case proceeded to trial before the Honorable Larry B. Hyman, Sr. and a jury. On September 19, 2013, the jury found Petitioner guilty of the crimes charged. Judge Hyman sentenced Petitioner to life imprisonment without possibility of parole.

Petitioner timely filed a Notice of appeal, which was perfected by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On appeal, Petitioner argued:

Did the trial court violate the Eighth Amendment’s bar against cruel and unusual punishments by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime?

On November 16, 2016, the South Carolina Court of Appeals affirmed Petitioner’s convictions. *State v. Furquan*, Op. No. 2016-UP-479 (Ct. App. 2016). Petitioner then sought certiorari to the South Carolina Supreme Court which was denied the petition. The Remittitur was issued on October 10, 2017.

Petitioner timely filed a post-conviction relief (hereafter “PCR”) application on November 27, 2017, alleging:

1. Ineffective assistance of counsel, in that:
 - a. “Counsel failed to adequately investigate the facts and circumstances

surrounding the DNA evidence. Counsel's failure to conduct such an investigation deprived the jury of critical exculpatory DNA evidence. This information is relevant to an accurate assessment of applicant's guilty or innocence."

- b. "Counsel failed to correct unsupported facts offered by the State in [their] closing argument. The State informed the jury 'Ladies and gentlemen, that is the gun that shot this victim in the head.' The record does not support this allegation nor does the SLED report. The jury may have had doubt if this 'fact' had been corrected."
- c. "Counsel failed to notify the Court that he in fact filed two separate motions to be relieved as counsel. The Applicant was not satisfied with counsel's representation and did not want to proceed to trial with him. The Applicant filed a complaint against counsel and requested he be relieved from representing the Applicant. In the best interest of the Applicant he should have been afforded a newly appointed counsel."
- d. "Counsel failed to investigate and present the facts and circumstances surrounding the possession of the weapon during the attempted murder. The fact that the co-defendant's admission to wearing the gloves with the skeletal designs and the firearms trace which revealed the co-defendant was the owner of the gun along with GSR findings on the gloves. Counsel's failure to present these facts on cross-examination deprived the jury critical information relevant to an accurate assessment of applicant's innocence to attempted murder."
- e. "Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case."
- f. "Counsel failed to seek an instruction on 'Hands of One – Hands of All' to explain that 'intent' was an essential element to prove applicant guilty to knowingly participating in this case. Applicant was prejudiced due to the fact he had no intention to do bodily harm to victim."
- g. "Counsel was ineffective for failing to file a notice of appeal when his client specifically requested him to do so. Another individual who had to take her time to go to the public defenders and did the appeal herself when trial counsel informed her 'I would not do it.'"

Respondent made its Return on March 1, 2018. The evidentiary hearing occurred on March 29, 2019, before the Honorable Bentley Price. James K. Falk, Esquire represented Petitioner. Assistant Attorney Generals Jacob Isenberg and Johnny E. James, Jr. of the South

Carolina Attorney General's Office represented Respondent. At the evidentiary hearing, Petitioner proceeded forward on ineffective assistance of counsel for failure to investigate potential alibi witnesses and failure to present a valid trial strategy.

At the PCR hearing, Petitioner stated that he did not see the DNA analysis until after the trial. (App. 393). Petitioner stated he asked Counsel why no DNA was presented – he said they would seek “hand of one, hand of all, one of the most serious violent charges giving a life sentence.” (App. 393). Petitioner testified that Fleming's DNA was on the guns, gloves, and bandana, but Petitioner's DNA was excluded. (App. 394-97). Petitioner testified that when he asked Counsel about the DNA evidence, Counsel never responded. (App. 397).

On cross-examination, Petitioner stated that there were no facts to prove that there was a common plan between he and Fleming, but that witnesses that testified at trial that Petitioner pointed a gun at the driver and told him to drive. (App. 411). He stated that he did not have specific intent at that time, so he is innocent of the crime. (App. 411). He did state he understands the “hand of one, hand of all” principle applies in this case and even if he did not shoot the victim he could still be convicted of attempted murder. (App. 411). Petitioner conceded that three witnesses saw him at the scene of the incident. (App. 412-13). Petitioner conceded that Counsel objected to the gun at trial. (App. 419).

Counsel also testified at the PCR hearing. When asked why he did not call SLED agents to testify, he stated he did not want them to have the last word in front of the jury. Counsel did send out subpoenas, but this changed when Petitioner decided not to testify. (App. 425-26). Counsel also testified that he anticipated the State calling witnesses that would testify that they did not see Petitioner fire a weapon or wear gloves. (App. 425-26). Counsel testified Tyler did not notice gloves on Applicant's hands, and Sam claimed they were on his co-defendant's hands.

(App. 425-26). Counsel testified SLED agents notified him they intended to state the items tested may have been cleaned. (App. 426-27). Counsel testified he did not cross-examine the police officer about DNA because it was not raised on direct-examination. (App. 427). Counsel testified there was not a smoking gun regarding the DNA evidence so he did not use it. (App. 426). Finally, Counsel testified he did not think a jury would consider DNA evidence as exoneration when every witness testified Applicant was present. (App. 425). Based on this, Counsel testified these concerns caused him to believe that eliciting further testimony regarding the lack of DNA evidence would have been a bad trial strategy.

After the evidentiary hearing, the court issued an Order of Dismissal denying Petitioner's PCR application. Petitioner appeals from the denial of relief based upon the allegation that counsel was ineffective for failing to elicit testimony at trial that Petitioner's DNA was excluded from the gun, gloves, and bandanas allegedly used in the commission of the crime.

STATEMENT OF FACTS

On October 16, 2011, David Moran was playing games on his computer in his apartment when he heard a knock at the door. (App. 69, 188-89). Thinking it was a friend he anticipated visiting that night, Moran opened the door and, instead, he encountered two men wearing bandanas over their faces. (App. 188-89, 195). Moran immediately tried to shut the door, but the men forced their way into the apartment. (App. 189-91). One of the men suddenly pulled out a silver revolver and shot Moran in the head. (App. 190).

Upon hearing the gunshot, Moran's roommate, Eric Collins, immediately grabbed his rifle, ran out of his bedroom, and went to investigate the loud popping noise he heard come from the living room area. (App. 68-69, 74-75). When he entered the living room, he saw the men with bandanas over their faces inside of the apartment, and one of the men was holding a silver revolver while standing over Moran, who was sprawled out on the floor. (App. 69-70, 72). At that point, the armed man looked at him and exclaimed, "Oh, shit." (App. 69). The intruders fled from the apartment. (App. 69).

Law enforcement officers responded to the scene and Moran was quickly transported to the hospital with a fractured skull. (App. 118-19, 191-92). Detective Allen Large of the Horry County Police Department then began an investigation into the incident, but he was initially unable to develop any leads concerning the perpetrators' identities. (App. 118-21). A few days later, Samantha and Taylor, went to the authorities and provided information implicating Petitioner and his accomplice, Jeremy. (App. 95, 98, 113, 116-17, 121).

In response, Detective Large obtained arrest warrants for Petitioner and Jeremy, along with a search warrant for the trailer they shared. (App. 101, 110-11, 121-23, 144, 150). The Horry County Police Department's Special Response Team then executed the warrants at the

trailer and arrested Petitioner and Jeremy inside. (App. 133). Thereafter, in the ensuing search on the premises, officers located and secured two bandanas, two sets of gloves (later tested positive for gunshot residue), and a silver .38-caliber revolver that was thrown from the trailer during the execution of the warrants. (App. 129-30, 132, 139, 168-69).

At trial, Counsel cross-examined three witnesses regarding the possession of the guns, bandana, and gloves. Counsel questioned Tyler Topolski, Samantha Topolski, and Lindsay Smith about the gun, who all stated that they did not know who fired the weapon when it was fired. (App. 84, 98, 115). Samantha testified to telling the police that Petitioner's co-defendant, Jeremy Fleming, later told her that he "shot the dude in the head." (App. 98). Lindsay testified that she heard someone was shot, but did not remember telling the police that Jeremy shot someone. (App. 113-14). Lindsay testified that Jeremy said he wanted to go back and finish the job. (App. 117). On direct examination, Mary Linder testified on direct that no one claimed the weapon and it was never identified to her. (App. 143). Troy Large testified that he never discovered who owned the gun. (App. 143).

While Jill was testifying, Counsel made a Rule 403, SCRE, objection to the gun's admission into evidence. (App. 159-60). This was overruled by the court, because witness descriptions matched the weapon recovered and the probative value was not substantially outweighed by unfair prejudice. (App. 161).

Eric Collins identified a silver revolver in the apartment. (App. 70). Tyler identified a silver and black revolver in the vehicle. (App. 79). Troy identified a gun with a silver and black handle was discovered upon execution of the search warrant. (App. 132). Mary identified Applicant and Jeremy as the individuals living at the residence where Troy executed the search warrant. (App. 144-46). Jill established a chain of custody for the weapon. (App. 167-68). Tyler

testified that Applicant had a silver and black revolver after running from the apartment complex. (App. 79). Troy recovered a silver and black revolver while executing a search warrant. (App. 132). Jill established a chain of custody for the silver and black revolver recovered. (App. 167-69). Jeremy denied having a gun, but said Petitioner was equipped with a revolver. (App. 172-73).

Also on direct examination, Tyler stated that Jeremy was wearing gloves with skulls on them, but did not see if Petitioner was wearing gloves. (App. 78). Additionally, Samantha testified to seeing Jeremy with skeletal gloves on. (App. 98). Jill Domongauer, Crime Scene Investigator, testified that the skeletal gloves recovered had gunshot residue on them. (App. 170). Also on cross-examination, Jeremy testified that he wore the skeleton gloves. (App. 177).

The victim, David Moran, testified that when Petitioner and Jeremy broke into his house, they were both wearing bandanas over their faces and all he could see were their eyes. (App. 189). Tyler testified that neither Jeremy nor Petitioner had their faces covered when they got out of the car and approached the apartment. (App. 78). Samantha said they were both wearing hoodies and gloves and Lindsey stated they both had bandanas covering their faces (App. 89, 108-09). Jeremy testified he never wore a mask that day. (App. 173, 177).

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). Overall, reviewing courts “give[] great deference to the post-conviction relief court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRPC; *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). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish constitutionally ineffective assistance of counsel by choosing not to elicit testimony concerning DNA evidence because Counsel’s trial strategy was reasonable and and Petitioner was not prejudiced by the alleged inaction.

On appeal, Petitioner argues the PCR court erred in denying him relief because counsel was ineffective for failing to elicit testimony that Petitioner’s DNA was excluded from the gun, gloves, or bandanas that were allegedly used in the commission of the crime. However, the PCR court properly rejected this argument, finding that Counsel was not deficient in eliciting this testimony because he cross-examined multiple witnesses regarding this issue and no evidence of the alleged deficiency prejudicing Petitioner was shown. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing

professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCPP (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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 696. 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; if it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

“Where trial counsel articulates a valid reason for employing a certain trial strategy, counsel will not be deemed ineffective.” *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citing *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). Counsel can be deficient when examining witnesses if they fail to elicit testimony key to a petitioner’s defense. *Miller v. State*, 379 S.C. 108, 116, 665 S.E.2d 596, 600 (2008), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding counsel was deficient in failing to elicit testimony about similarities between armed robberies from a witness who could corroborate where the applicant’s key defense was third party guilt).

To prove prejudice, a petitioner must first provide evidence of what a more extensive cross-examination would have revealed without speculating. *Miller*, 325 S.C. at 217, 481 S.E.2d at 133 (finding no prejudice where petitioner did not present any evidence at the PCR hearing to exhibit additional information a trial witness should have been examined on).

Here, Petitioner alleges Counsel was ineffective for failing to elicit testimony about evidence connecting Petitioner to the gun, gloves, and bandana. However, Counsel was not deficient in failing to elicit testimony because any failure to elicit testimony regarding the items was a part of a valid and reasonable trial strategy and, even if this Court found Counsel was deficient, Petitioner was not prejudiced as a result.

Deficiency

Counsel’s trial activities were a part of a larger and reasonable trial strategy and, thus, no deficiency can be found. Counsel testified at the PCR hearing that, even though he originally subpoenaed SLED agents to testify, he decided not to call them because he did not want to allow

them to have the last argument in front of the jury. (App. 425). Additionally, Counsel stated that no one alleged that Petitioner's DNA evidence was on the items at trial, but conceded he could have asked if DNA evidence placing him at the scene existed, but did not. (App. 428).

Counsel stated that he chose not to pursue this line of questioning because SLED agents stated in prior conversations with him that no "smoking bullet" existed within the scope of DNA evidence indicating that Petitioner was exculpable. (App. 426). They also told Counsel that the evidence suggests either that Petitioner did not wear the items or that they were cleaned, thereby not exonerating Petitioner of anything. (App. 426-27). He further testified that the home search occurred days after the incident in question and, thus, the lack of DNA evidence was not surprising to anyone. (App. 427). This evidence did not exculpate Petitioner, but pursuing a line of questioning regarding this evidence might draw the jury's attention to the issue, with them ultimately concluding DNA evidence is unneeded for someone to be found guilty of a crime. At the PCR hearing, Counsel indicated he thought this extra attention would hurt their case. (App. 426-27). Thus, Counsel's decision not to draw the jury's attention to that fact was a reasonable trial strategy and, thus, Counsel was not deficient for executing it.

Prejudice

Even if Counsel was deficient, prejudice cannot be found. Counsel credibly recalled using cross-examination across multiple witnesses to highlight the likelihood Jeremy fired the weapon. (App. 431). Specifically, on cross-examination, Tyler, Samantha, and Lindsey testified they did not know who fired the weapon. (App. 84, 96, 115). Samantha testified to telling police during the interview that Jeremy "shot the dude in the head." (App. 98). Lindsay testified to not remembering she told police Jeremy shot a guy and Jeremy said he wanted to go back and finish the job. (App. 113-117). Thereafter, Troy testified nobody claimed ownership of the gun when it

was recovered. (Tr. 129). Counsel clearly did raise this issue regarding possession of the gun multiple times during the trial and the State's witnesses also corroborated the Counsel's point that Petitioner did not possess the weapon. Any additional testimony would be duplicative and, consequently, not key to the defense.

Additionally, Petitioner did not present any evidence or testimony at the PCR hearing showing that the evidence would have revealed but for Counsel's alleged deficiency. Additionally, though Petitioner testified that Counsel should have cross-examined Troy to show Jeremy had possessed the gun, Troy did not testify at the PCR hearing and, consequently, any allegation Petitioner made regarding what Troy would have said is speculative. Further, at trial, Troy's testimony reflected that he did not know who owned the gun. Additionally, he argued that Counsel should have called the SLED agents because of the lack of DNA evidence on the gun. However, several witnesses testified that they did not see Petitioner with a gun and, thus, any testimony from SLED agents would have been duplicative. Additionally, Petitioner did not call SLED agents to testify at the PCR hearing and, thus, Petitioner's argument did not rise above the level of mere speculation. Thus, Petitioner's argument that he was prejudiced by failure to elicit testimony regarding the lack of DNA evidence on the gun fails.

At the PCR hearing, when asked to point out where anyone testifying alleged he wore the gloves, Petitioner stated he could not. (App. 417). At trial, Tyler testified to seeing Jeremy with skeletal gloves on that night. (App. 78). Samantha testified to seeing Jeremy with skeletal gloves on. (App. 98). The Crime Scene Investigator, Jill, testified the skeletal gloves recovered had gunshot residue on them. (App. 170). Jeremy testified he wore the skeletal gloves. (App. 163). Thus, further evidence of Petitioner not wearing gloves that night would have been cumulative and not key to the defense. Therefore, probative evidence does exist, showing Petitioner was not

prejudiced by Counsel's action or inaction even if this Court found that Counsel was deficient.

When asked who testified to him wearing gloves, Petitioner conceded that no one could remember him wearing gloves and that there was no evidence of him wearing gloves presented at trial. (App. 419). Further, beyond the allegation that Counsel was ineffective for failing to elicit testimony that specifically showed he was not wearing gloves, Petitioner presented no evidence or testimony at trial showing what evidence could have been revealed if this testimony was elicited at trial. Most notably, Petitioner's arguments hinge on Counsel's alleged failure to question SLED agents about the lack of DNA evidence on the items, including the gloves, but Petitioner failed to call the SLED agents to testify about evidence he claims would have changed the outcome of the trial. Thus, his allegations do not rise above the level of mere speculation and, as such, must be rejected.

Regarding the bandana, though multiple witnesses stated that Petitioner was wearing a bandana and Counsel failed to object or otherwise elicit contradictory testimony indicating Petitioner's DNA was not found on the bandanas, Petitioner failed to call the SLED agents at the PCR hearing and did not otherwise present evidence indicating the missing testimony would have made a difference at trial. Thus, Petitioner failed to show he was prejudiced by Counsel's alleged ineffectiveness in eliciting testimony regarding the missing DNA evidence on the bandana and, thus, this allegation should be rejected and relief denied.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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