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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

November 18, 2020

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

RE: Ranata Jones v. State of South Carolina
Appellate Case No. 2020-000343
Lower Court Case No. 2018-CP-42-02769

Dear Mr. Shearouse:

Enclosed for filing is the **Reply to the Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
S.C. Bar No. 104191

CFM/ec
Enclosures

cc: Susan B. Hackett, Esquire

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Trial Judge
The Honorable G. Thomas Cooper, Jr., PCR Judge

Appellate Case No. 2020-000343

RANATA JONES.....Respondent.

v.

STATE OF SOUTH CAROLINA.....Petitioner.

**REPLY TO THE RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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ARGUMENT

In its reply to the return to petition for writ of certiorari, the State argues the PCR court erred in granting Jones relief based upon failure to procure and utilize the 911 call and failure to call Kimberly Hughes as a witness at trial. Specifically, the State argues that Counsel was ineffective because he issued a discovery requested that should have been sufficient to produce the 911 audio and he adequately investigated the potential trial witness and the exclusion of the witness was a valid trial strategy. Further, even if the 911 call was procured and utilized and Hughes was called as a witness at trial, neither action would have changed the results of the proceedings. Thus, the PCR court's findings are controlled by an error of law and are not supported by probative evidence in the record. Consequently, this Court should grant certiorari.

In PCR actions, applicants bear the burden of proving allegations in their applications. *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), SCRPC ("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.

I. **The State contends all issues were raised in the original petition for writ of certiorari because the Court only made conclusions of law entitling Jones to relief on two issues.**

The State contends that all appealable issues were raised on appeal because the PCR court made conclusions of law and, thus, granted relief on two grounds; failure to procure and utilize the 911 call and failure to call Hughes as a witness. In ruling on a PCR application, the PCR court must “make specific findings of fact, and state expressly conclusions of law, relating to each issue presented.” S.C. Code Ann. § 17-27-80 (2014). *See* 71.1(a), SCRPC (stating that the South Carolina Rules of Civil Procedure apply to PCR cases “to the extent that they are not inconsistent with the Act.”). Further, “[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon.” Rule 52(a), SCRPC. “The PCR court’s general denial of all claims not specifically addressed in the PCR court’s order ‘does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.’” *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (quoting *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007)).

Here, the PCR Court articulated:

I find the first prong of the Strickland test is met. A reasonable investigation would have led to the 911 tape recording which supported Applicant’s theory of the case. A reasonable investigation would have led to the 911 tape recording which supported Applicant’s theory of the case. A reasonable investigation would also require interviewing potential witnesses. Ms. Hughes testified that she was never interviewed by Mr. Schultz. Mr. Schultz testified that he did not have the 911 recording and thought Ms. Hughes’ testimony would be unconvincing because he understood she was asleep at the time of the accident. I find that the failure to procure the 911 recording and interview witness Kimberly Lyles Hughes was deficient. *See Edwards v. State*, 392 S.C. 449, 456 710 S.E.2d 60, 64 (2011). As counsel did not possess the evidence, it is unreasonable that there could be a valid strategic reason for his failure to present it at trial. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). I find that the Applicant has further met the second prong of the Strickland test. But for counsel’s failure to present favorable evidence along with his failure to make effective evidentiary

arguments regarding Scott's subsequent call to Trooper Elder, the jury likely would have acquitted Ms. Jones.

(App. 236).

Thus, there were two primary issues that the Court specifically granted relief upon: failure to procure and utilize the 911 tape in developing a defense, as it relates to building up Scott's credibility in his confessions concerning driving the night of the incident, and failure to call Kimberly Hughes as a witness. As shown above, the Court found Counsel was deficient for two things: failure to investigate, procure, and ultimately utilize the 911 tape and failure to interview and call Hughes to testify. Concerning prejudice, the court found that the failure to present "favorable evidence" and "make effective evidentiary arguments regarding Scott's subsequent call to Trooper Elder." Because both deficiency and prejudice must be established on any particular ground for Counsel to be found ineffective and the Court is required to make conclusions of law regarding each and every ground the Court finds entitles an application to relief, Respondent interprets this finding of prejudice as a failure to present evidence consisting of the 911 call and calling Hughes as a witness and a failure to then utilize the 911 tape to make a more effective argument concerning Scott's conflicting testimony by building up his statements indicating he, not Jones, was the offender, and, thus, further undermining Scott's statement to the Trooper identifying Jones as the driver. Thus, because the PCR Court only specifically identified two issues of law as the basis for relief based upon both deficiency and prejudice, all issues were appealed by the State and Jones should not be entitled to relief by default.

II. The post-conviction relief court erred in granting relief, where Counsel was not ineffective for failure to obtain 911 calls because he made a standard discovery request at the start of the case, did not know a 911 call existed, and, thus, expecting further discovery requests regarding the 911 call would be unreasonable.

Here, the State contends that Counsel was not ineffective for not gaining actual possession of 911 calls. *Strickland* makes clear that counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim’s validity is evaluated for “reasonableness [under] all the circumstances” with “a heavy measure of deference to counsel’s judgments” applied. *Id.* However, counsel is required to, at minimum, “interview potential witnesses and make an independent investigation of the facts and circumstances of the case”, *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff’d*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government’s forensic evidence and conducting analyses of all other available forensic evidence.” *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel acted reasonably given the circumstances and, thus, was not deficient. Counsel submitted a standard discovery request, which produced other related evidence, including videos and reports. (App. 215). Though an affidavit was signed by Counsel’s legal assistant, acknowledging receipt of the 911 call and reflecting that the 911 call was clearly provided to Counsel, the record reflects Counsel had no memory of a 911 tape attached to the file leading up to trial. (App. 215). Although Jones’ Counsel points out Counsel was notified the 911 call existed multiple times at trial, if the allegation is that Counsel failed to review and utilize the 911

call at trial, notification during the trial is too late. Further, concerning Jones' Counsel's statement that it was unreasonable for Counsel not to submit a supplemental discovery request, requiring defense attorneys to submit supplemental discovery requests concerning certain items, regardless of whether or not they personally know such items exist, lest they be deemed deficient, is an unreasonable demand. Counsel's testimony that he did not remember a 911 call attached to the case was consistent at the PCR hearing and, thus, Counsel was not deficient for failing to procure, listen, and admit the call into evidence. (App. 214, 218-22).

Even if this Court finds that Counsel was deficient, Jones was not prejudiced by this deficiency. Although Scott stated in the 911 call that Jones was asleep in the front seat, he also initially states in the 911 call that he was riding in the car, instead of stating that he was driving the car. 911 Tape. Additionally, though Scott states Jones was asleep in the front seat during the accident and while he was calling 911, there is a considerable amount of yelling in the background of the call. 911 Tape. The yelling individuals are not identified; however, because it remains unrefuted that only Scott, Jones, and Hughes were in the car, that they were stranded, alone, on the side of the highway, and, that no other car stopped when they crashed, the only people around to yell were Hughes and Jones, contradicting Scott's statement that they were asleep at the time. 911 Tape. Thus, because the 911 call does not clearly indicate Scott was driving like Jones' Counsel suggests and the tape contains contradictory statements there within and evidence that contradicting Scott's testimony at trial, Scott still would have been impeached, his testimony deemed unreliable by the jury, and Jones still found guilty as a result.

Additionally, concerning Jones' Counsel's argument that if the 911 call was admitted into evidence, though Counsel stated he wished he had played the tape, he did not indicate he thought it would have made a difference. In fact, Counsel found the tape was ambiguous concerning who

was driving the car. Further, even if the tape was played, because of the apparent contradictions in the tape and the concurrent contradictions in Scott’s testimony itself, there is no indication that the State’s argument imploring the jury to focus on what Scott initially stated to police officers would have changed; let alone that the change would have been so significant that it would have changed the results of the proceeding. Additionally, because after hearing the tape Counsel stated he did not think Scott clearly stated he was driving on the 911 tape, Counsel probably would not have argued that Scott’s first instinct was to “confess his crime” like Jones’ Counsel suggests. (App. 218-19). Thus, because the 911 tape likely would not have changed either sides’ argument, it remains highly unlikely that the 911 tape would have changed the results of the proceedings. Consequently, even if Counsel was deficient for failing to procure and play the 911 tape, Jones was not prejudiced by this deficiency.

III. The post-conviction relief court erred in granting relief, where Counsel reasonable investigated the passenger as a potential witness when Counsel interviewed the witness, put her on the witness list, and ultimately excluded her testimony because of irrelevance.

Here, the State contends that Counsel was not ineffective for failing to call an irrelevant witness to the stand. “In most PCR cases in which the applicant seeks relief for trial counsel’s failure to call witnesses, the PCR court’s analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Counsel’s performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-

58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Prejudice will generally be found if the testimony was significant and favorable enough to the applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Here, Counsel was not deficient because his decision not call Hughes to testify was a strategic move. Contrary to Jones' Counsel's assertion the PCR courts finding, both Counsel and Hughes stated that they talked about the case prior to trial. (App. 208, 216). Additionally, even if Counsel failed to interview Hughes, Counsel was seemingly aware of what Hughes' testimony would substantively consist of and the weaknesses stemming from her as a witness. Counsel likely would not have subpoenaed Hughes unless he thought her testimony would help Jones' case, which would require her testimony reflect Scott, not Jones, was driving. Moreover, Counsel stated he remembered speaking with Hughes about the case and that she told him she was in the backseat and asleep during the incident. (App. 216). Hughes stated she talked to Counsel in his

office about the case, that she was asked to testify at trial, but was never called. (App. 207-08). Thus, because Counsel spoke with Hughes, had an idea of what her testimony would reflect, subpoenaed her, and decided not to call her because she was easily impeachable, Counsel was not deficient for failing to call her as a witness.

Still, even if Counsel was deficient, Jones was not prejudiced by this deficiency. Even if Hughes' testimony was presented at trial and this testimony was substantially similar to Scott's testimony, there is no indication that this confirmation of Scott's testimony would have been believed by the jury or otherwise changed the trial proceedings' results. In fact, because Hughes was an easily impeachable witness who, during the incident, was in and out of consciousness, by her own admission was not observing anyone else in the vehicle or observing who was driving the vehicle, and had a difficult time recalling the specifics of that night, this testimony likely would have been rejected by the jury. (App. 210). Thus, the jury likely would have found Hughes' testimony as incredible and contradictory when, by taking the stand, she would have both stated that she was not observing who was driving at the time of the accident but, despite this, "knew" Scott, not Jones, was driving. (App. 208, 210). The substantive nature of Hughes' testimony was rejected by the jury when articulated in Scott's testimony and presumably would be rejected again if Hughes testified, given her weak recall of the incident. Thus, even if the repetition of the same substantive testimony was not cumulative, this does not render a witness the jury rejected as incredible believable; especially when the corroborating voice was, through a lack of awareness during the incident, likely would have been deemed less credible than the already rejected witness. Thus, the State holds that even if Counsel was deficient, Jones was not prejudiced by the deficiency. Consequently, relief should be denied on this ground.

CONCLUSION

For the reasons stated above and in the original petition for writ of certiorari, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issues presented.

Respectfully submitted,

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