STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

———————

Certiorari to Edgefield County

Honorable William P. Keesley, Circuit Court Judge

———————

RECEIVED

Mar 05 2021

S.C. SUPREME COURT

BRYAN J. PHILLIPS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2020-000568

———————

RETURN TO PETITION FOR WRIT OF CERTIORARI

———————

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

QUESTION PRESENTED BY THE STATE OF SOUTH CAROLINA

1.

Did the PCR court err in finding trial counsel was constitutionally ineffective for not objecting to the trial court's qualification of the court interpreter under the interpreter qualification statute used in criminal cases when the interpreter was qualified to interpret under either qualification scheme and when Phillips did not prove there is a reasonable probability the outcome of trial would have been different had trial counsel raised that particular objection?

2.

Did the PCR court err in finding trial counsel was constitutionally ineffective for failing to hire a defense interpreter when trial counsel conducted a reasonable search for a court interpreter but was unsuccessful due to the scarcity of Chinese interpreters and when Phillips did not prove there is a reasonable probability the outcome of trial [could] have been different had trial counsel hired a defense interpreter?

3.

Did the PCR court err in finding trial counsel was constitutionally ineffective for calling Investigator Young as a witness when the witness's testimony confirmed the person who pointed out Phillips to law enforcement was motivated by a hope for personal gain and when Phillips did not prove there is a reasonable probability the outcome of trial would have been different had Young not testified?

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

State's Issues 1 and 2

Does any evidence support the PCR court's conclusion that trial counsel's admitted failure to make the proper objection under the statute governing interpreters in criminal cases would have resulted in either the lack of any qualified interpreter at the trial or reversal on appeal?

State's Issue 3

Does any evidence support the PCR court's conclusion that trial counsel's unreasonable strategy of eliciting incriminating hearsay providing a separate connection of the defendant to the crime from a police officer called as a defense witness prejudiced respondent?

STATEMENT OF THE FACTS

Respondent Bryan Phillips was indicted in Edgefield County for criminal conspiracy, armed robbery, first-degree burglary, and kidnapping. App. 1 – 15. On January 23, 2011, Phillips was tried before the Honorable William P. Keesley and a jury. App. 15. Phillips was tried along with his co-defendant, K.C. Langford. App. 15. Ervin J. Maye represented the State. App. 15. Randall D. Williams represented Phillips and Mark R. Calhoun represented Langford. App. 15. The jury convicted Phillips. App. 539, l. 19 – 541, l. 12. On November 12, 2012, the Supreme Court affirmed Phillips' convictions. App. 1307-09. Phillips' petition for a writ of certiorari to the United States Supreme Court was denied on October 7, 2013. App. 1376.

On December 19, 2013, Phillips filed a PCR application. App. 1377. After amendments, on December 13, 2017, a hearing was held before the Honorable J. Cordell Maddox, Jr. App. 1420. Arthur K. Aiken represented Phillips. App. 1420. Alphonso Simon, Jr., and Melody J. Brown represented the State. App. 1420. On May 31, 2018, Judge Maddox granted Phillips PCR. App. 1511. On November 25, 2019, Judge Maddox denied the State's motion to alter or amend and the State's petition to this Court followed. App. 1548.

STANDARD OF REVIEW

A PCR court's findings of fact are entitled to deference on appeal and will be upheld if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

State's Issues 1 and 2

Evidence supports the PCR court's conclusion that trial counsel's admitted failure to make the proper objection under the statute governing interpreters in criminal cases would have resulted in either the lack of any qualified interpreter at the trial or reversal on appeal.

In its opinion affirming respondent Bryan Phillips' ("Phillips") appeal, this Court pointed out the error by counsel that resulted in the PCR court's grant of relief. App. 1308. See State v. Phillips, Op. No. 2012-MO-049 (filed Nov. 21, 2012). Appellate counsel for Phillips raised the issue of whether the interpreter at Phillips' trial was improperly qualified by the trial judge. App. 1308. This Court affirmed with a parenthetical indicating that the standard of review controlled. App. 1308. But this Court dropped the following footnote: "We note this is the statute for interpreters in a civil case, not a criminal one. However, because it was the one applied by the circuit court and argued by the parties at trial and on appeal, we use it here." App. 1308, n.1.

The crime for which Phillips was charged was the robbery of the owners of a Chinese restaurant at their home. App. 170, l. 15 – 175, l. 15. The victims spoke Mandarin Chinese. App. 138, l. 11 - 14. They spoke little English. App. 144, l. 23 – 24. South Carolina had no interpreters certified through Court Administration as Chinese interpreters. App. 149, l. 9 – 11.

The State attempted to qualify Ming Louie ("Louie") as the interpreter for the victims. App. 132, l. 7 – 156, l. 9. Louie was born in Canton and Mandarin was not his native dialect, although he said he learned both Mandarin and the local dialect growing up. App. 139, l. 13 – 140, l. 2. Louie was not certified as an interpreter by any court and had never applied for certification. App. 135, l. 3 – 137, l. 5. He had never read the ethical rules for interpreters in South Carolina. App. 145, l. 19 – 21. He had served as an interpreter in court approximately

fifty times. App. 137, l. 14 – 16. He claimed he had no trouble communicating with the victims. App. 138, l. 17 – 19.

After *voir dire* of Louie, trial counsel objected to his qualification as an interpreter. App. 152, l. 14 – 16. Trial counsel said only, "For the record, I do object to his qualification." App. 152, l. 14 – 16. Judge Keesley qualified Louie as the interpreter over this objection. App. 154, l. 3 – 156, l. 9. The court cited S.C. Code Ann. § 15-27-155 prior to ruling on the objection. App. 148, l. 3 – 20.

Louie interpreted for three witnesses. App. 200, l. 11 – 236, l. 13. Ji Quing Chen testified that he operated the Hong Kong Restaurant. App. 200, l. 24 – 201, l. 3. Problems soon occurred with Louie's translation. App. 202, l. 10 – 23. The solicitor said, "It's kind of hard to do this through the interpreter." App. 202, l. 10 – 23. After the solicitor asked the simple question of "What did you do when you first go home at your residence," Louie said, "Excuse me, I have to understand what he's saying," and held a conversation with the witness. App. 202, l. 10 – 23. Judge Keesley admonished Louie, telling him, "Hold on a minute. You have to do this verbatim, you understand?" App. 202, l. 20 – 21.

Louie held another conversation with the next witness, Li Guan Xin and trial counsel objected. App. 223, l. 8 – 11. Judge Keesley again admonished Louie, telling him, "It's got to be verbatim, whatever he asks, you translate, whatever he says…". App. 223, l. 12 – 13. Langford's counsel objected at the beginning of the next witness that Louie was answering before the witness said anything. App. 228, l. 19 – 229, l. 11. The court again reiterated that Louie was only to give a verbatim translation. App. 229, l. 12 – 14.

Phillips' appellate counsel raised the objection to Louie's qualification as the second issue on appeal. App. 1177. The brief only cited to section 15-27-155, the same section briefly

referenced by the trial judge. App. 1185. The State's brief questioned whether the issue was preserved for appeal "in light of the very generic objection raised at trial." App. 1208. The State also only cited section 15-27-155. App. 1208-11

As this Court pointed out when it decided Phillips' direct appeal, section 15-27-155 was the wrong statute. App. 1308, n. 1. The correct statute was the interpreter statute that applied specifically to criminal cases. See S.C. Code Ann. § 17-1-50 (setting forth procedures for interpreters in criminal actions). Phillips' appellate counsel testified at the PCR hearing that she looked at section 17-1-50, but did not raise this statute in her brief because it was not preserved. App. 1434, l. 7 – 1435, l. 22. The law of issue preservation limited her to raising the qualification issue under the civil statute used by the parties at trial. App. 1434, l. 7 – 1435, l. 22. Had the issue been preserved under the criminal statute, she would have raised it as her first and best issue. App. 1435, l. 16 – 1436, l. 5.

At the PCR hearing, when asked about the judge's error in using the civil interpreter statute, trial counsel admitted he "did not object to it specifically." App. 1478, l. 11 – 1479, l. 12. When asked if his objection would preserve the issue for appellate review, trial counsel stated, "we would hope that we would do it perfectly and I indicate to you that I didn't do it perfectly." App. 1479, l. 18 – 21. PCR counsel asked, that without the victim's "testimony there's no evidence of even a crime, right?" App. 1481, l. 15 – 20. Trial counsel replied, "This is true." App. 1481, l. 19 – 21. Trial counsel also admitted that he could have secured funding to hire a defense interpreter, but failed to do so. App. 1486, l. 22 – 1489, l. 5. A defense interpreter could have told trial counsel what Louie said to the witnesses during their improper conversations for which Louie was admonished by the trial judge. App. 1486, l. 22 – 1489, l. 9.

The PCR court correctly held that trial counsel performed deficiently by not objecting to the interpreter's qualification under the wrong statute and not obtaining a defense interpreter. App. 1515-19. Failure to preserve an issue for appellate review is deficient performance. Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (holding trial counsel deficient for failing to make a proper objection on the record and failing to preserve issue for appeal). Allowing Louie to have off-the-record, unknowable (because of the lack of a defense interpreter) conversations with the witnesses during the trial was also deficient performance.

The PCR court's finding of prejudice is also supported by the evidence at the hearing. The PCR court credited the testimony of appellate counsel that had the issue been preserved, it would have been raised as her first and best issue. This finding is entitled to deference on appeal under the strict standard of review. "An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). "Under the proper standard of review, the appellate court's "view" must be limited to whether there is probative evidence to support the PCR court's factual findings." Id. Further, the court held that the crucial difference between the two statutes—that in a criminal case the interpreter must be able to readily interpret simultaneously and consecutively—likely would have led to reversal because of Louie's failures during the trial. The PCR court correctly granted relief on this issue and certiorari should be denied.

State's Issue 3

Evidence supports the PCR court's conclusion that trial counsel's unreasonable strategy of eliciting incriminating hearsay providing a separate connection of the defendant to the crime from a police officer called as a defense witness prejudiced respondent.

The State's key witness at trial was Phillips' third co-defendant, Alvin Phillips ("Alvin"). With a crucial mistake, trial counsel undid the successful discrediting of Alvin as a liar and gifted the State with evidence from a "good citizen" linking Phillips and Langford to the robbery. The PCR court correctly granted relief on this issue.

None of the victims could identify the men who robbed them, therefore the State's case rested on Alvin's testimony. App. 181, l. 16 – 24. Alvin and Phillips are first cousins. App. 238, l. 25 – 239, l. 2. Langford had a child with Alvin's sister. App. 239, l. 15 – 24. Alvin had been to the victims' restaurant and knew their house was within "easy walking distance" from where Philips lived. App. 240, l. 18 – 241, l. 9.

On direct, Alvin testified that he and Phillips had seen the victims coming and going between their house and their restaurant. App. 242, l. 10 – 16. They believed they were transporting their money from the restaurant on these trips and had noticed they did not go to the bank after work. App. 242, l. 17 – 243, l. 7. Alvin and Phillips began discussing a robbery about a month before the crime took place. App. 243, l. 8 – 244, l. 6.

On the night of the robbery, Phillips called Alvin and Alvin got his gun and ski mask. App. 244, l. 11 – 245, l. 16. They met on the front porch and Langford said we would come, too. App. 245, l. 24 – 246, l. 14. The three men went to the victims' house between 10:00 and 10:30 PM. App. 246, l. 20 – 247, l. 5. They hid in the bushes and waited for the victims. App. 248, l. 8 – 23.

When a man arrived, Alvin jumped out of the bushes with his gun and made him get on the ground. App. 249, l. 2 – 10. They demanded money, but could not understand the man. App. 249, l. 11 – 22. Phillips hit a man in the back of the head. App. 250, l. 2 – 10. Langford went behind the house and when he returned, he had the victims' black money bag. App. 250, l. 14 – 251, l. 9. The men ran back to Phillips' house and split up the money in the bag. App. 251, l. 10 – 253, l. 12. Phillips pled guilty to this armed robbery, but claimed he was not promised anything for his testimony. App. 258, l. 19 – 259, l. 19.

Alvin was discredited on cross-examination. Langford's attorney cross-examined Alvin first. App. 267, l. 21 – 25. He pointed out that while Alvin had pled guilty to armed robbery, he still had five other serious charges, including kidnapping and first-degree burglary, outstanding. App. 267, l. 21 – 268, l. 19. Alvin admitted he was hoping that after the trial, these other charges would be dismissed. App. 268, l. 20 – 269, l. 5. Alvin had not yet been sentenced on the armed robbery conviction. App. 270, l. 8 – 14. Alvin had prior convictions for shoplifting and larceny. App. 269, l. 17 – 22.

Langford's lawyer pointed out the contradiction between Alvin claiming he held the gun, but that someone else hit a victim with the pistol. App. 272, l. 12 – 273, l. 8. Alvin admitted that when the case was first called for trial, Alvin refused to testify. App. 275, l. 17 – 276, l. 10. Alvin signed a statement in March 2009 saying that Langford and Phillips were not guilty. App. 276, l. 11 – 15. He admitted saying that his statement to police implicating Langford and Phillips was false. App. 276, l. 16 – 19.

Phillips' attorney further cross-examined Alvin on his statement exonerating Phillips and Langford. App. 280, l. 7 – 282, l. 8. He also showed Alvin a statement he made exonerating Langford and Phillips in January 2009, which Alvin admitted signing. App. 280, l. 7 – 282, l. 8.

Alvin said in his March 2009 statement that he "was not in my right state of mind" when he implicated Phillips and Langford. App. 280, l. 7 – 282, l. 8. Alvin said his prior statement was "false." App. 280, l. 7 – 282, l. 8. Alvin admitted hoping for only a "small amount of time" and that he had rehearsed his testimony with the solicitor. App. 290, l. 1 – 18. On redirect, Alvin said Langford brought him the statements to sign and claimed they were false. App. 294, l. 10 – 296, l. 1. Alvin denied being pressured to sign them. App. 296, l. 2 – 4.

After the State rested, Phillips' trial counsel told the court that he intended to call a witness, Joseph Patrick Stevens, but had been informed that Stevens was in California. App. 374, l. 3 – 19. Trial counsel believed Stevens was still in South Carolina. App. 374, l. 7 – 19. Stevens was under subpoena. App. 375, l. 2 – 5. Judge Keesley asked the sheriff to help locate Stevens. App. 375, l. 7 – 11. Trial counsel also stated that he had "an alternative remedy" of calling police officer Roosevelt Young. App. 374, l. 20 – 375, l. 1. When the court returned from a recess, the judge said that Young was on his way, but that the police were still tracking down Stevens. App. 375, l. 19 – 25. The judge excused the jury for lunch. App. 376, l. 7 – 25.

After the lunch recess, Phillips' trial counsel undid all of the good work discrediting the Alvin by calling Officer Young as the first witness in his defense case. App. 383, l. 18 – 20. Philips asked Young if he knew Stevens and knew about the current case and Young agreed he did. App. 386, l. 1 – 5. Trial counsel then asked if Stevens was working as an informant for Young or had ever worked as an informant for Young, but Young denied this. App. 388, l. 6 – 18. Young denied that Stevens worked as an informant for another officer. App. 389, l. 21 – 23.

Young described Stevens as "an acquaintance." App. 388, l. 19 – 20. Trial counsel inexplicably asked whether Young considered Stevens a "good citizen" and Young replied,

"Yes, sir." App. 389, l. 12 – 14. Young admitted that Stevens had been in the courthouse, but denied ever arresting him. App. 389, l. 15 – 18.

According to Young, Stevens had a family court bench warrant and called Young "and started giving me information about" the robbery. App. 389, l. 19 – 23. Young admitted Stevens sought him ought for help with his legal problem, but said he could give him no help. App. 389, l. 24 – 390, l. 8. Trial counsel asked whether Stevens gave Young the names of "three individuals" and then had Young confirm that those three were Phillips, Langford, and Alvin. App. 390, l. 9 – 20. He confirmed with Young that Stevens had an association with these men and Young said they were somehow related. App. 391, l. 24 – 392, l. 3. When trial counsel asked whether Stevens called "out of the goodness of" his heart, Young replied, "Yes, sir." App. 393, l. 7 – 16.

On cross, the solicitor tied Stevens to the defendants through Veronica Phillips, a name mentioned by trial counsel. App. 392, l. 4 – 8. App. 396, l. 16 – 19. The solicitor confirmed that Young had no power or influence over Stevens' legal troubles. App. 395, l. 3 – 396, l. 2. He asked Young, "And Joseph Patrick Stevens gives you the information that solves this case; isn't that correct?" App. 399, l. 23 – 25. Officer Young replied, "Yes, sir." App. 400, l. 1.

In trial counsel's closing, he told the jury that Officer Young was "a very good witness" and that he could not "really shake him" on his assertion that Stevens was being "a good samaritan," but invited the jury to use their common sense and ask if that was what really happened. App. 470, l. 18 – 471, l. 9. Solicitor Maye made full use of the testimony about Stevens. Tr. 492, l. 16 – 493, l. 15. He said it made no difference what Stevens' motivation was when he called Young and gave him "accurate information." App. 492, l. 16 – 24.

The solicitor used Stevens' hearsay statements to Young to bolster Alvin's credibility. App. 493, l. 6 – 15. He described bringing in Alvin to the police station for a statement and then said, "And [lo] and behold who does he say are the three people that are involved? Exactly the same thing that Stevens says, K.C. Langford, Bryan Jordan Phillips and Alvin Phillips." App. 493, l. 6 – 15.

At the PCR hearing, trial counsel explained his strategy for calling Officer Young. App. 1471, l.16 -1474, l. 6. App. 1490, l. 15 – 1497, l. 2. He said "we wanted to be able to show that Stevens was basically making assertions to law enforcement that were motivated by self-help or motivated by self-interest, and that was the real reason why, you know, that was pursued." App. 1471, l.16 -1474, l. 6. He wanted to "show that the person who made [Alvin] a suspect had problems of self-interest, if we could show that, then perhaps [Alvin] would be less credible in that regard as well." App. 1471, l.16 -1474, l. 6.

On cross, trial counsel first said he hoped he had done a good job of discrediting Alvin during his testimony. App. 1490, l. 15 – 1497, l. 2. He then admitted that Young's testimony about Stevens "established another connection between Bryan Phillips and the alleged crime." App. 1490, l. 15 – 1497, l. 2. Trial counsel then said Phillips "really believed that we needed to call Joseph Stevens." App. 1490, l. 15 – 1497, l. 2. He admitted that Stevens' statements to Young were hearsay. App. 1490, l. 15 – 1497, l. 2. He admitted that if the State tried to get Young's statements in, he could have kept them out by objecting on hearsay grounds. App. 1490, l. 15 – 1497, l. 2. He admitted being surprised that Officer Young denied that Stevens was an informant. App. 1490, l. 15 – 1497, l. 2.

The PCR court properly granted relief because of trial counsel's mistakes in calling Young to testify. App. 1516-18. Stevens' statements were hearsay and Young's recitation of

Stevens' statements was double hearsay and inadmissible if elicited by the State. See Rule 801(c), SCRE. The State would have had no way to get Stevens' fingering of Phillips and Langford into evidence until trial counsel gave the solicitor a gift by calling Young. Alvin had been discredited when he left the stand, but trial counsel inexplicably rehabilitated the State's case by establishing an independent connection to the crime that also bolstered Alvin's credibility. The PCR court's finding of prejudice on this point has ample support in the record and is entitled to great deference on appeal. Buckson at 320, 815 S.E.2d at 440.

The State claims that trial counsel did not perform deficiently because his trial strategy should not be second-guessed in PCR. While counsel's strategy is entitled to deference, the strategy must first be reasonable. "Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (emphasis in original). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." Id.

In Ingle, trial counsel's articulated strategy of asking a damaging question of a witness he had not interviewed because he relied on his client was held unreasonable. Id. Here, trial counsel asked questions about Stevens at his client's urging and was mistaken about what Officer Young would say about Stevens' status as an informant. The failure to ascertain what Young would say about Stevens was itself deficient, but the far larger unreasonable strategy was allowing any mention of Stevens in the trial at all. Also, in Ingle, trial counsel elicited damaging, inadmissible hearsay from a doctor about a victim's statements regarding a sexual assault. Id. at 472-75, 560 S.E.2d at 404-05. The Ingle Court reversed the denial of PCR. Id.

In Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001), trial counsel failed to object to inadmissible hearsay statements that bolstered the victim's credibility in a criminal sexual conduct

case. Id. at 155-57, 551 S.E.2d at 262-63. Trial counsel claimed he made a strategic decision not to object. Id. The Court rejected trial counsel's claimed strategy. Id. The Court held that the failure to object and exclude inadmissible hearsay prejudiced the applicant and remanded for a new trial. Id.

The PCR court correctly granted relief on this issue. The solicitor's closing argument shows how Stevens' testimony was used to great effect to provide another link to the crime and to rehabilitate the once-discredited Alvin. Had trial counsel not called Young, the result of the trial would have been different. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). No reason exists to grant certiorari and the grant of PCR should be left undisturbed.

CONCLUSION

For the foregoing reasons, the State's petition for certiorari should be denied.

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of March, 2021.