

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Edgefield County

Mar 12 2021

The Honorable William P. Keesley, Trial Judge
The Honorable J. Cordell Maddox, Jr., PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2020-000568

BRYAN J. PHILLIPS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I. Phillips has failed to provide any evidence that Ming Louie did not meet the criteria for qualification under the civil statute and that there is a reasonable probability the outcome of trial or appeal would have been different had trial counsel raised that specific objection

The PCR court found trial counsel's performance was deficient because trial counsel did not preserve for appellate review an objection to the trial court's use of the civil statute in qualifying the interpreter. App. 1515. Without providing any analysis, the PCR court found there is a reasonable probability the outcome of the proceedings would have been different had trial counsel raised the specific objection. App. 1517. Phillips did not prove that there would have been any difference in the outcome of trial or appeal if trial counsel had objected to the trial court's use of the civil statute because the interpreter, Ming Louie, met the criteria for qualification under both statutes, because Phillips offered no evidence that Louie's interpretation fell short of the criminal statute's requirements, and because Phillips offered no evidence that Louie's interpretation was erroneous in any way.

First, in his return to the petition for a writ of certiorari, Phillips has still failed to explain how Louie did not satisfy the criteria for qualification under the statute for criminal cases. The State's petition goes to great length to show that it would have been proper for the trial court to have found that Louie was qualified even if the court had cited the criminal statute instead of the civil one. Phillips correctly points out that Louie had never read the ethical rules for court interpreters in South Carolina, but that was a problem easily dealt with when the trial court supplied Louie with a copy of the rules, the trial court took a break in the proceedings so that Louie could read the rules, and the trial court and trial counsel questioned Louie about the rules. App. 145-54.

Second, Phillips has still failed to prove that there is a reasonable likelihood that the

outcome of trial or appeal would have been any different had trial counsel objected when the trial court found Louie qualified while citing the civil statute. Phillips cites the assistant solicitor's comment during trial that it was difficult to question a witness through the interpreter, but questioning witnesses using an interpreter can be challenging in any situation, particularly when such is not a commonly required of most trial attorneys in South Carolina. App. 202. The only evidence that Phillips was able to muster in his return in support of the PCR court's finding of prejudice was the testimony from the attorney who represented Phillips on direct appeal. Indeed, that bit of testimony was the only justification the PCR court gave for its finding of prejudice. App. 1517.

When Phillips asked appellate counsel if the issue interpreter qualification issue would be the first raised in her brief, she answered, "Yes, I think so." App. 1435. Phillips asked if it would have been absolutely [her] best argument," and appellate counsel answered, "Yes. Any time you have the wrong statute, I think that would certainly be significant." App. 1436. Contrary to Phillips' assertion, appellate counsel's testimony is evidence only that appellate counsel probably would have raised the issue on appeal had it been preserved and that she would have felt that the argument would likely have been Phillips' strongest on appeal. Appellate counsel's affirmations are not evidence that there is a reasonable likelihood that the outcome of appeal would have been different had she raised the issues. In conducting its prejudice analysis, the PCR court was required to ask "if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Strickland v. Washington, 466 U.S. 668, 695-96 (1984). Instead of doing that, the PCR court outsourced its obligation by basing its finding entirely upon what Phillips' appellate attorney would have argued instead of considering how our appellate

courts would have responded to the issue.

Phillips misstates the standard of review by asking this Court to give much deference to the PCR court's finding of prejudice based upon appellate counsel's testimony. When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (citations omitted). However, pure questions of law will be reviewed de novo without deference to the lower court. Id. “[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.” Vanover v. State, Op. No. 5799 (S.C. Ct. App. filed Feb. 3, 2021) (Shearouse Adv. Sh. No. 4 at 34) (quoting Strickland, at 698). The PCR court should not have substituted Phillips' attorney's estimation of the strength of Phillips' case for its own, and this Court should not compound the error by deferring to the PCR court on this point.

Finally, Phillips has provided no evidence that Louie's interpretation was erroneous in any way. The trial court admonished Louie three times during trial to interpret the witnesses' testimonies verbatim. App. 202, 223, 228-29. Phillips' return reinforces the conclusion that Phillips has no evidence of the inaccuracy of Louie's interpretation; he has speculation only, which cannot be the basis for a finding of prejudice. An applicant for post-conviction relief who provides only speculation as to what may have happened if his defense attorney had done something differently has failed to meet his burden. Briggs v. State, 421 S.C. 316, 333, 806 S.E.2d 713, 722 (2017) (instructing that an applicant for post-conviction relief “must demonstrate a ‘reasonable probability’ the result of the trial would have been different if [trial counsel] had not committed

the errors A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.”); see Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (A defense attorney’s “[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). The PCR court’s finding prejudice based upon that same speculation is an error that needs to be corrected.

II. Phillips’ argument does not take into account that trial counsel conducted a reasonable search for a court interpreter, offers only speculation as to how the lack of a defense interpreter affected the outcome of trial, and does not take into account the import of Alvin Phillips’ testimony about Phillips’ participation in the robbery.

The PCR court found that trial counsel was constitutionally ineffective for not hiring an interpreter for the defense at trial. Phillips’ argument on deficiency is that trial counsel could have gotten funding for a defense interpreter and that a defense interpreter could have told trial counsel what Louie and the witnesses discussed in Chinese. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (S.C. Ct. App. 2014) (citing Strickland, at 690). Phillips ignores the fact that trial counsel did attempt to find a court interpreter certified to interpret Chinese, but was unsuccessful. App. 1464. That trial counsel would have found locating such an interpreter difficult should have been no surprise because the clerk of court staff could not find one either. App. 154-55. In light of the circumstances, trial counsel’s efforts were reasonable. Moreover, Phillips’ presentation of a webpage listing one or more people who could function as Chinese-English interpreter does not satisfy Phillips’ burden of proving trial counsel’s not having a defense interpreter at trial deviated

from the reasonable, “prevailing professional norms” of criminal defense attorneys and the range of competence required of them. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Furthermore, Phillips’ assertion that trial counsel allowed Louie to have off-the-record conversations with the witnesses does not take into account that each of the three brief conversations at trial was met with some objection or correction: the trial court issued a corrective to the first conversation sua sponte, trial counsel objected to the second conversation, and Langford’s counsel objected to the third conversation. App. 202, 223, 228-29. The conversations hardly passed without notice or reprimand.

The PCR court incorrectly found prejudice from the lack of a defense interpreter because Phillips introduced no evidence that the lack of defense interpreter affected the outcome of trial. The PCR court found prejudice based in part upon the fact that the defense had no independent ability to understand what Louie said to the victims. App. 1517-18. The only thing that Phillips did at the PCR hearing and has done in his return is wonder aloud whether the Chinese witnesses or Louie said something to one another that they should not have done. The oath that Louie took before he began interpreting at trial was a reasonable safeguard in place to ensure a fair and accurate interpretation between the English-speaking questioners and the Chinese-speaking victims. If Phillips and the PCR court are right that prejudice must be presumed whenever a defense attorney does not have a private interpreter to verify in real time the accuracy of a court-qualified interpreter’s interpretation, then every trial needing an interpreter must now use two interpreters in order to pass constitutional muster. That would be an absurd result.

Ultimately, the victims were unable to identify Phillips as one of the robbers. App. 1468.

Codefendant Alvin Phillips provided evidence of Phillips' guilt as to each element of the charged offenses. That evidence was not affected by the lack of a defense interpreter because Alvin testified fluently in English. The PCR court should have considered "the specific impact counsel's error had on the outcome of the trial" and considered "the strength of the State's case in light of all the evidence presented to the jury." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citations omitted). Phillips' return gave little consideration to this argument.

This Court should grant this petition for a writ of certiorari to review the PCR court's finding that trial counsel was constitutionally ineffective for not hiring an interpreter for the defense.

CONCLUSION

For all of the foregoing reasons, this Court should grant a writ of certiorari and reverse the PCR court's erroneous findings.

Respectfully submitted,

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