

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Horry County
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Larry B. Hyman, Trial Judge
The Honorable George McFaddin, Jr., PCR Judge

Appellate Case No. 2020-001180

EBON ROBERTS.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issue on Certiorari

Whether trial counsel provided ineffective assistance of counsel in failing to call two witnesses to testify at Petitioner's trial to impeach the testimony of the alleged victims, where the alleged victims were the state's key witnesses in this case.

Respondent's Counterstatement of Issue on Certiorari

Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for allegedly failing to call character witnesses to the stand when he was not informed these witnesses existed, the testimony proffered was not credible, and the alleged deficiency did not prejudice Petitioner at trial?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During the May 2015 term, the Horry County Grand Jury indicted Petitioner for armed robbery (2015-GS-26-01888), two counts of kidnapping (2015-GS-26-01889 and -01890), and unlawful possession of a pistol (2015-GS-26-01891). J.M. "Buddy" Long, Esquire represented Petitioner. Assistant Solicitor James Austin Thomas, Esquire prosecuted the case. On September 15-16, 2015, Petitioner proceeded to trial before the Honorable Larry B. Hyman, circuit court judge, and a jury. Petitioner was found guilty as indicted on September 16, 2015. Judge Hyman sentenced Petitioner to imprisonment for concurrent terms of life without parole for the armed robbery and kidnappings, and one consecutive term of five years' imprisonment for unlawful possession of the pistol.

Petitioner filed a timely notice of appeal that was perfected by Susan B. Hackett, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. *State v. Roberts*, Op. No. 2017-UP-085 (S.C. Ct. App. filed Feb. 15, 2017). The remittitur was issued on March 3, 2017.

In his initial PCR application, filed November 9, 2017, Petitioner alleges he is being held in custody unlawfully on the following grounds:

1. "Denial of effective assistance of counsel."
 - a. "Counsel failed to investigate the facts of the case."
 - b. "Counsel advised to waive preliminary hearing."
 - c. "Counsel was laboring under conflicting interest."

Through Counsel, Petitioner, in his first amended application dated November 7, 2019, alleged:

1. "Trial Counsel was ineffective for failing to call witnesses favorable to Applicant that would have substantiated his testimony at trial that Applicant knew Shaun Cain and

Rebecca Kennedy prior to the incident involving the alleged robbery and kidnapping despite Cain and Kennedy's claim of not knowing Applicant, specifically Monique Alston and Latasha Atkins could attest to the aforementioned."

2. "Trial Counsel was ineffective for failing to cross-examine a lay witness, Rebecca Kennedy (a.k.a. Rebecca Harrington) concerning a prior criminal conviction which was admissible under the rules of evidence. (Shoplifting, Myrtle Beach Municipal Court Case No.: 34168AO)."
3. "Trial Counsel was ineffective for failing to cross-examine all law enforcement officers as to whether they undertook any investigation into Applicant's side of the sequence of events that led to his being charged with the crimes for which he was convicted."
4. "Trial counsel was ineffective for failing to advise Applicant that he had absolute right to proceed pro se if he did not wish to have trial counsel represent him at trial or advise the trial judge of Applicant's request."
5. "Trial counsel was ineffective for failing to communicate to the Court that Applicant wished to proceed pro se if he had to choose between representing himself pro se and having trial counsel represent him."
6. "Trial counsel was ineffective in failing to cross-examine witnesses Cain and Kennedy about their prior drug use and abuse."

In his second amendment to the PCR application, dated November 12, 2019, Petitioner, through PCR Counsel, added another allegation: "[t]rial counsel was ineffective for failing to interview and call as a witness Officer Michael Cavallini with the City of Conway Police Department."

At the PCR hearing, Petitioner proceeded forward on the following allegations:

1. Failure to call Officer Cavallini as a witness at trial.
2. Failure to call character witnesses Monique Alston and Latasha Atkins to testify at trial.
3. Failure to cross-examine Kennedy regarding a twenty year old misdemeanor shoplifting conviction and alleged drug use.
4. Failure to cross-examine Cain regarding a pending criminal conviction in Florida and alleged drug abuse.
5. Failure to cross-examine law enforcement officers regarding Petitioner's version of the story.
6. Failure to investigate the evidence and discovery.
7. Failure to investigate, prepare and properly assert Petitioner's defense that Cain and Kennedy bought drugs from Petitioner and were his co-conspirators in his plan to rob Wendy's.
8. Failure to request a preliminary hearing when Petitioner stated he wanted one.
9. Failure to adequately advise Petitioner and communicate to the court that Petitioner wanted to proceed *pro se*.
10. Failure to communicate with Petitioner concerning updates on the case and new information.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections, filed on August 20, 2020. In the order, Judge McFaddin Jr. found:

1. Counsel was not ineffective for failure to call Officer Cavallini as a witness at trial when Counsel strategically decided to not call Cavallini because he was a witness favorable to the state and, if his testimony would have had any impact at trial, it would have had a negative impact on Petitioner.
2. Counsel was not ineffective for failure to call character witnesses Monique Alston and Latasha Atkins to testify at trial because Counsel credibly testified he was not informed of any potential witnesses who could testify to the relationship between the victims and Petitioner and also found that the character witnesses' testimonies were not credible and that no alleged deficiency of Counsel would have impacted Petitioner at trial.
3. Counsel was not ineffective for failure to cross-examine Kennedy regarding a twenty-year-old misdemeanor shoplifting conviction and alleged drug use because nothing in the discovery indicated drug abuse and, thus, cross-examination would be a baseless fishing expedition that Counsel acted strategically in deciding not to undergo. The criminal charge was deemed inadmissible and irrelevant. Additionally, because Petitioner failed to demonstrate what evidence would have been presented beyond his personal speculation, prejudice was not demonstrated.
4. Counsel was not ineffective for failure to cross-examine Cain regarding a pending criminal conviction in Florida and alleged drug abuse because the request for admissibility of the charge was denied by the Judge, the drug abuse was not in the discovery and, thus, cross-examination would be a baseless fishing expedition that Counsel acted strategically in deciding not to undergo. Additionally, because Petitioner failed to demonstrate what evidence would have been presented beyond his personal speculation, prejudice was not demonstrated.
5. Counsel was not ineffective for failure to cross-examine law enforcement officers regarding Petitioner's version of the story because the defense that he and the victim were co-conspirators was not in the discovery and Counsel reasonably concluded that cross-examining the officers about the defense would be baseless and draw greater attention to the fact that Petitioner's theory of the case was unsubstantiated, thereby hurting Petitioner at trial; not helping.
6. The judge found Counsel properly investigated and reviewed the discovery provided and Petitioner's claim to the contrary was without merit.
7. Counsel was not ineffective for failure to investigate, prepare and properly assert Petitioner's defense that Cain and Kennedy bought drugs from Petitioner and were his co-conspirators in his plan to rob Wendy's because the claims were unfounded and names of potential witnesses were never given to Petitioner. Additionally, Petitioner's defense that he and the victims were co-defendants inherently would require Petitioner to concede he was guilty of all crimes beyond the kidnapping charges, which would have had a negative impact on Petitioner at trial. Additionally, Petitioner presented no evidence, beyond his own speculation, that demonstrated what further investigation would have uncovered.

8. Counsel was not ineffective for failure to request a preliminary hearing when Petitioner stated he wanted one because he was not constitutionally entitled to one and this was waived when Petitioner proceeded to trial without requesting a preliminary hearing from the trial judge.
9. Counsel was not ineffective for failure to adequately advise Petitioner and communicate to the court that Petitioner wanted to proceed *pro se* because Petitioner clearly knew this right existed when he requested to proceed *pro se* on record and, when Petitioner requested to proceed *pro se* the judge denied the motion, leaving the matter outside of Counsel's hands altogether.
10. Counsel was not ineffective for failure to communicate with Petitioner concerning updates on the case and new information because Petitioner failed to show anything Counsel failed to communicate to him that would have rendered Counsel deficient and no showing of how that alleged failure to communicate impacted the outcome of the proceedings.

Petitioner appeals from the denial of relief based upon the allegation that Counsel was ineffective for failure to call two witnesses to testify at Petitioner's trial to impeach the testimony of the alleged victims, where the alleged victims were the state's key witnesses in this case.

STATEMENT OF FACTS

Around three in the morning on December 8, 2014, Rebecca Kennedy, a Wendy's employee in Conway, South Carolina, was sitting in her car outside the restaurant waiting on her co-worker and boyfriend Shaun Cain to finish closing the store. (App. 60-61, 86). Petitioner approached Kennedy's vehicle, pointed a gun at him, forced himself into the back of the car, and duct-taped Kennedy. (App. 60-61). When Cain approached the vehicle, Petitioner jumped out, captured him, and forced Cain to grant entry into the restaurant's office, who deliberately entered an access code incorrectly to trigger a security alarm. (App. 61, 86-88, 99-100). Petitioner forced Cain to crawl to the office, while Kennedy was made to follow by walking with her head down. (App. 61, 91). Petitioner duct-taped the two together and demanded money, but was frustrated by a largely inaccessible time-locked safe. (App. 61-62, 91-92, 98). When security called the restaurant about the late entry, Petitioner gave the phone to Cain, who deliberately gave an insufficient answer in order to raise an alarm. (App. 62-63, 92). Petitioner attempted to exit the Wendy's using Cain's uniform after realizing law enforcement was on scene, but the ruse was not successful, and Petitioner was immediately taken into custody by Conway police. (App. 63-65, 92-93, 97, 139-44, 156-58, 163-67). The weapon and duct tape were both recovered. (App. 186-89).

STANDARD OF REVIEW

The standard of review for PCR 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 PCR 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 petitioner shouldering the burden of proof. Rule 71.1(e), SCRCP; *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 determined that Petitioner failed to establish counsel was ineffective for allegedly failing to call character witnesses to the stand when he was not informed these witnesses existed, the testimony proffered was not credible, and the alleged deficiency did not prejudice Petitioner at trial.

On appeal, Petitioner argues the PCR court erred in denying him relief for failing to call two witnesses to testify at Petitioner's trial to impeach the testimony of the alleged victims, where the alleged victims were the State's key witnesses in this case. However, the PCR court properly rejected this argument, finding that Counsel credibly testified that he was not informed of the witnesses prior to trial, would have called them if he was informed of their existence, and the testimony proffered by the witnesses was not credible. 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.

Relevant Facts:

At the PCR hearing, both Monique Alston, Petitioner's nephew, and Latasha Aklin, Petitioner's ex-girlfriend, testified. Alston stated he thought Petitioner knew the victims for about a month before he was arrested and that Alston personally knew them since the October prior to the incident. (App. 401-02). Alston stated that Petitioner sold drugs to the victims three times: first, at a Smith-Jones Recreation Center; second, at the Wendy's; and, third, at an apartment complex. (PCR Tr. 403).

After Petitioner was arrested, Alston stated he received a call from him from inside the jailhouse. (App. 405). Petitioner did not tell Alston who the victims were and did not ask Alston to testify. (App. 405-06). Alston testified this call was the only conversation Alston had with Petitioner prior to trial. (App. 406).

Alston stated he was present throughout the entirety of Petitioner's trial, including during

the victims' testimonies. (App. 399-400). Though he stated he did not remember exactly what they testified to, he remembered them stating that they did not know Petitioner prior to the incident. (App. 400). Alston stated he reached out to Counsel prior to trial regarding the previous relationship between the parties once he realized they were the alleged victims. (App. 405). Alston stated that no one reached out to him for an interview or to testify and he was never on a witness list. (App. 399-400). Alston stated he did not approach Petitioner or Counsel at trial and volunteer to testify because he did not know he could volunteer to testify. (App. 406-07). Alston stated he could have contradicted their testimonies if he was asked to testify and his testimony would have corroborated Petitioner's theory of the case; specifically, that the victims and Petitioner were all co-defendants. (App. 400-01).

Aklin stated she saw Kennedy and Cain one time in the fall of 2014 when they met her and Petitioner at the recreation center so Petitioner could sell drugs to them. (App. 409, 411, 413). Aklin testified Petitioner was arrested in December 2014. (App. 414-15). Aklin did not talk to Petitioner while he was in prison awaiting trial beyond writing letters. (App. 415). Aklin testified that he never asked her to testify or wrote to her concerning the victims. (App. 415).

Aklin stated the next time she saw the victims was at trial. (App. 414). Aklin stated she observed the trial voluntarily and was not subpoenaed to appear. (App. 412). She stated she recognized both victims and could have testified that they were the same people at the center, but stated she was not asked to testify and did not know volunteering to testify was an option. (App. 410-12). She testified to recalling Cain and Kennedy saying they did not know Petitioner and that she could have contradicted that statement. (App. 411).

Discussion:

In a PCR action, the petitioner bears the burden of proving allegations contained in the

application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner 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 petitioner 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 petitioner 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), SCRCP (“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 petitioner 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. Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

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.

At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show ineffectiveness for failure to call a witness, the witness(es) must be produced at the PCR hearing or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

“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). Thus, 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*, 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).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the petitioner 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).

The PCR court is entitled to extraordinary deference in determining the credibility of the witnesses before it. *Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994)); *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (citing *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010)).

Here, Counsel was not deficient for failing to call character witnesses Alston and Aklin to testify because Counsel credibly testified that he was not informed of these witnesses leading up

to trial, nor was he informed of any witnesses that could testify to the alleged pre-existing relationship between Petitioner and the victims. (App. 360-61, 393). Counsel stated that if this information was provided, someone from the office would have investigated the potential witness, but could not recall if this information was provided. (App. 361). Counsel stated that no character witnesses approached him at trial to testify, but he would have called them as witnesses if he knew they existed and could corroborate Petitioner's story. (App. 462). Counsel is not expected to know of or call witnesses who can corroborate Petitioner's theory without being informed that such witnesses exist. Thus, Counsel cannot be found deficient for failing to call witnesses who he did not know existed prior to trial.

The PCR Court, who is entitled to great deference in determining the credibility of witnesses, found these witnesses incredible. Specifically, the PCR Court found it highly unlikely that if a relationship did exist between the parties, that Petitioner would not have mentioned it to Counsel or the judge at trial. Further, if both character witnesses did, in fact, attend the trial like they testified to at the PCR hearing, it is implausible that neither character witness nor Petitioner felt behooved to set the record straight when they heard the two State witnesses lying on the stand. Thus, the theory presented was presumably not made known to the character witnesses until after trial proceedings, rendering their testimonies incredible. Further, because Aklin's and Alston's testimonies presumably did not exist before the conclusion of trial and are otherwise incredible, Petitioner was not prejudiced by any alleged failure on Counsel's part. Accordingly, because deficiency nor prejudice can be found, Counsel was not ineffective on this ground.

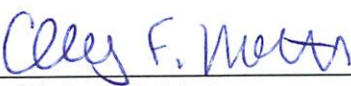
CONCLUSION

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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