

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

2010-CP-38-1601
Appellate Case No. 2012-212308

RECEIVED

APR 18 2013

S.C. Supreme Court

GEORGE MOSES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Is there evidence of probative value to support the post-conviction relief court's finding that Counsel was not ineffective for failing to obtain the victim's medical reports and have those reports reviewed by an expert witness, where Counsel reviewed the victim's autopsy report with an expert witness prior to trial, Counsel's trial strategy was to prove self-defense, and Petitioner failed to present the victim's medical records or testimony regarding such records to the post-conviction relief court?

STATEMENT OF THE CASE

Petitioner was indicted at the December 2006 term of the Orangeburg County Grand Jury Armed Robbery (2006-GS-38-2067) and Murder (2006-GS-38-2069). He was represented by Doug Mellard and Margaret Hinds, Esquires. Petitioner proceeded to a jury trial before the Honorable James C. Williams, Jr. On February 12, 2009, Petitioner was convicted of Armed Robbery and the lesser included offense of Voluntary Manslaughter. Judge Williams sentenced Petitioner to life imprisonment without the possibility of parole pursuant to S.C. Code Ann § 17-25-45.

A notice of appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Moses, Op. No. 2010-UP-394 (S.C. Ct. App. Filed August 30, 2010). The Remittitur was sent on September 15, 2010.

Thereafter, Petitioner filed a timely application for post-conviction relief on October 29, 2010, alleging being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of Counsel:
 - a. "...failed to provide expert witness to testify against State's theory of facts in defendant case, as to victims cause of death and aledegd (sic) intent by the defendant."
 - b. "...failed to obtain victims medical records, which have shown preexisting heart condition and jury abuse as possible causes of death to victim."
 - c. "...failed to object to jury charge of voluntary manslaughter, thereby shifting the burden of proof of intent to the defendant."
 - d. "...failed to request additional jury instructions that the State must disprove self defense by a reasonable doubt."
 - e. "...failed to request additional instructions to the on the use of the deadly and retreat in self defense."
 - f. "...failed to call wittness (sic) with testimony helpful to defendants defense of self defense. Officer Todd Williams of the Orangeburg Sheriff's Office gave a statement as to the injur[ies] and condition of defendant which would have aided the jury in determining defendant plan of self defense."

- g. "...advising defendant to waive his Fifth Amendment right not to testify at trial."
 - h. "...failing to request a jury instruction to the lesser included offenses of Armed Robbery."
 - i. "...failing to motion the court for a dismissal of the defective indictment before trial."
 - j. "...failing to investigate DNA evidence which was recovered from crime scene, which showed multiple person(s) at scene of the crime."
 - k. "...failing to file for interlocutory appeal after Denno hearing."
 - l. "...failing to introduce the autopsy report into evidence."
 - m. "...failing to object to the introduction of statements and testimony pursuant to 19-1-90 and 19-1-80 and 8-15-50 of South Carolina Code of Laws 19776."
2. Ineffective Assistance of Appellate Counsel.
- a. Failed to include all property preserved issues for Appellate review by the S.C. court of Appeals.
 - i. Failed to include issue of defective indictment that was amended by trial judge.
 - ii. Failed to include the issue of trial judges denial of defendant motion for a direct verdict as to the offenses of Murder and Armed Robbery.
 - iii. Failed to petition the S.C. Supreme Court for a petition for certiorari after Court of Appeals decision.
3. "Trial judge erred in not instructing involuntary manslaughter or accident."
- a. "There was testimony from the defendant and Dr. Ross to warrant the trial judge to instruct the jury to involuntary manslaughter and/or accident in the death of the victim."
4. "Trial judge erred in only giving Davis charge, when instructing the jury on self-defense."
- a. "Trial judge should have give addition jury instruction on the use of deadly force in the defense of one's self."
5. "Trial judge erred in amending defective indictment."
- a. "Trial judge erred in amending defective indictment that was presented to the Grand jury on false information, over defendants counsel objection that it be resubmitted to the Grand jury."
6. "Trial judge erred in not granting defendants counsel motion to for a direct verdict to the charges of Armed Robbery and Murder."

- a. "there was no corpus delicti as the Armed Robbery as aledged (sic), only the prosecutors statements in his closing."
7. "Trial judge erred in not charging the lesser included offenses of robbery or larceny."
 - a. "The trial judge erred in his instruction to the jury by not charging the lesser included offenses of Robbery and larceny on the indictment that was submitted to the jury during its deliberation."
8. "Trial judge erred in charging voluntary manslaughter to the jury."
 - a. "There was no evidence to warrant a instruct to voluntary manslaughter and by instructing the jury to such, shifted the burden of having to self defense to the defendant."

Respondent made its Return on May 3, 2011, requesting an evidentiary hearing be held on Petitioner's application.

On November 30, 2011, an evidentiary on the matter was convened before the Honorable Diane S. Goodstein at the Orangeburg County Courthouse. Petitioner was present at the hearing and represented by Carl B. Grant, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney, Esquire. Testimony from Petitioner, Robert Mellard, Esquire (Counsel) and Elizabeth Franklin-Best, Esquire (Appellate Counsel) was presented to the court. By Order dated March 26, 2012, Judge Goodstein denied and dismissed Petitioner's application with prejudice.

Petitioner filed for Writ of Certiorari on February 14, 2013. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘*any evidence*’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel’s deficient performance must have prejudiced the Petitioner such 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, 386 S.E.2d at 625.

ARGUMENT

There is evidence of probative value to support the post-conviction relief court's finding that Counsel was not ineffective for failing to obtain the victim's medical reports and have those reports reviewed by an expert witness, where Counsel reviewed the victim's autopsy report with an expert witness prior to trial, Counsel's trial strategy was to prove self-defense, and Petitioner failed to present the victim's medical records or testimony regarding such records to the post-conviction relief court.

Petitioner contends that Counsel was ineffective for failing to obtain the victim's medical records and for failing to obtain an independent expert to review the medical records in conjunction with the autopsy report. However, Petitioner's claim is without merit, as there is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective in regards to this allegation.

The record demonstrates that Petitioner failed to meet his burden of proving that Counsel's performance was deficient. During the evidentiary hearing, Petitioner asserted that Counsel was ineffective for failing to present an expert witness in an attempt to establish some theory that the Petitioner's actions were not the cause of the victim's death. (App. p. 631 Ln. 3-6.) Petitioner testified that he heard "the defendant had a pre-existing heart condition." (App. p. 630 Ln. 11-12.) Petitioner further testified, "I felt that at the time if they had asked for an expert witness or got an expert witness or either [the victim's] medical records, it could have at least established some type of reasonable doubt in the State's theory of the case." (App. p. 630 Ln. 18-21.) Additionally, Petitioner asserted that medical records would have shown a different cause of death because there "was no weapon used in the actual murder of the [victim] other than him hitting his head or from me hitting him in the head." (App. p. 630 Ln. 14-16.) Petitioner agreed that Dr. Janice Ross (herein "Dr. Ross") testified at trial regarding the results of her autopsy report. (App. p. 651 Ln. 5-14.) During trial, Dr. Ross testified that there was no

evidence that the death resulted in any way from a heart attack or cocaine use. (App. p. 269 Ln. 10-21.)

The record reveals that Counsel's performance was "reasonabl[e] under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Counsel testified at the evidentiary hearing that Petitioner's counsel Andrew Brown, Esquire (herein "Brown") received a copy of the autopsy report in the discovery packet. (App. p. 664 Ln. 4-6.) Counsel testified that Brown sent Dr. Condradi, an expert whom Brown consulted regarding Petitioner's case, the discovery in the case, including the autopsy report. (App. p. 664 Ln. 7-8.) Counsel further testified that Brown spoke with Dr. Condradi on November 2, 2007 and Dr. Condradi was review the autopsy to ensure that the cause of death was "consistent and correct." (App. p. 664 Ln. 7-10.) Counsel testified that he reviewed the autopsy report with Petitioner prior to trial and that both he and Petitioner were well aware that victim's cause of death was due to blunt force trauma or a beating sustained during the altercation. (App. p. 664 Ln. 11-18.) Counsel further testified that the victim's death was not "based on an overdose or anything like that....the death was caused by a beating or blunt force trauma." (App. p. 664 Ln. 18-21.)

Furthermore, Counsel testified that his trial strategy centered on self-defense. (App. p. 662 Ln. 18.) Therefore, any attempt to refute the cause of death would have negated Counsel's trial strategy of proving self-defense. Our courts are understandably wary of second-guessing defense counsel's trial tactics; where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). Based on the foregoing, there is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel's performance was not deficient.

Additionally, Petitioner cannot establish prejudice resulting from Counsel's alleged deficiency, as he failed to present the victim's medical records at the evidentiary hearing or provide any expert testimony to support his assertion that the victim died of causes other than those listed in the autopsy report. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). An applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). As Petitioner failed to present such, Petitioner cannot show prejudice as a result of counsel's failure to call an expert witness to testify as to the results of the medical records or autopsy report because he failed to present any evidence in support of his claims.

Accordingly, the post-conviction relief court properly found that Counsel was not ineffective for failing to obtain and review the victim's medical records in an effort to show the cause of death was something other than what was listened in the autopsy report.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: _____
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Accordingly, the post-conviction relief court properly found that Counsel was not ineffective for failing to obtain and review the victim's medical records in an effort to show the cause of death was something other than what was listened in the autopsy report.

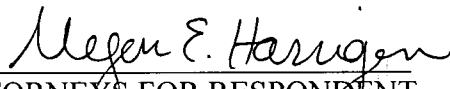
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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April 18, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Orangeburg County
Honorable Diane S. Goodstein, Circuit Court Judge

GEORGE MOSES, 103370,

Petitioner,

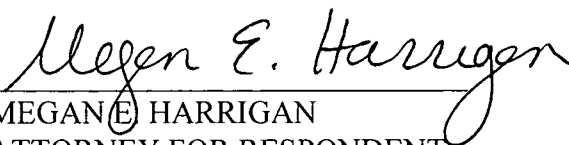
v.

STATE OF SOUTH CAROLINA,

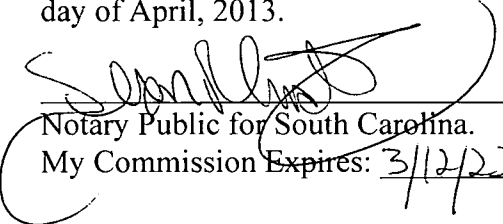
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel, LaNelle DuRant by delivering two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 18th day of April, 2013.


MEGAN E. HARRIGAN
ATTORNEY FOR RESPONDENT

SWORN to before me this 18th
day of April, 2013.


Notary Public for South Carolina.

(L.S.)

My Commission Expires: 3/12/23



RECEIVED

APR 18 2013

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

April 18, 2013

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

Re: George Moses, 103370 v. State of South Carolina
2010-CP-38-1601
2012-212308

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return today.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
SC Bar No. 100108

Enclosures

cc: LaNelle DuRant, Esquire