

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2021-000107

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Nov 04 2021

S.C. SUPREME COURT

DERRICK FISHBURNE,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT
OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

- I. The PCR Court's finding that Trial Counsel employed an unreasonable trial strategy which characterized Respondent as a "usual suspect" and introduced otherwise inadmissible evidence concerning Respondent's pending charges is supported by law and the facts in the record.

STATEMENT OF THE CASE

The decedent was shot outside of a night club during the early morning hours of April 10, 2009. Later that morning, when Fishburne showed up for roll call on unrelated charges, Fishburne was detained, questioned and arrested for the murder. During questioning, Fishburne gave a false alibi.

Fishburne was indicted by the Colleton County Grand Jury for the offenses of murder and possession of a firearm during a violent crime. App. 461-467. Fishburne's case was called to trial on July 19, 2010, before the Honorable Perry M. Buckner. David Matthews represented Fishburne. Deputy Solicitor Sean Thornton represented the State.

Trial Counsel attempted to present what he characterized as a third-party guilt defense. App. 492, ll. 12-18. To support this theory Trial Counsel called Jarrod Fraizer to testify that Fishburne was leaving the club approximately 10 minutes before the shooting. App. 351-353. Trial Counsel also called Matthew Smoak to testify that the person who got in an argument with Decedent outside was Fishburne. App. 358—362. However, Trial Counsel attempted to establish that Smoak's description of the person could not have been Fishburne due to the fact that he had different hair the next morning. App. 366-367.

Trial counsel also believed that he had to explain the statement Fishburne gave to law enforcement. App. 613; App. 494, ll. 1-22. Based on this belief, Trial Counsel pursued a strategy of characterizing Fishburne as a "usual suspect." App. 135, ll. 2-11; App. 372, l. 24—373, l. 20. Fishburne supported his usual suspect theory by allowing in evidence of Fishburne's pending charges and the fact Fishburne's brother was in prison.

On July 21, 2010, the jury found Fishburne guilty on both counts. App. 419, ll. 14-23. Judge Buckner sentenced Fishburne to forty years imprisonment for murder, and five-years imprisonment for possession of a weapon during a violent crime. App. 427, ll. 6-22.

Fishburne appealed his conviction. For the appeal, Fishburne was represented by Chief Appellate Defender Robert M. Dudek. Mr. Dudek filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). App. 434-448. The Court of Appeals dismissed the appeal on June 20, 2012. App. 449-450.

Fishburne filed a PCR application on October 16, 2012. App. 452-458. An evidentiary hearing was held on October 27, 2014, before the Honorable Edgar Dickson. App. 483.

At the hearing, Fishburne moved to amend the PCR to include a claim that Trial Counsel was ineffective for introducing prior bad acts and for arguing that Fishburne was the “usual suspect.” App. 487, ll. 2-8. Over the State’s objection, Judge Dickson allowed the oral amendments. App. 487, ll. 14-23.

On December 21, 2015, the PCR Court denied Fishburne’s Application. App. 514-518. The findings of fact and conclusions of law states the following:

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant 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, 80 L.Ed.2d 674, 692 (1984); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

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. *Butler, Id.* The Applicant must overcome this

presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant 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.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility.

The Court finds that Applicant has failed to meet his burden of proof in establishing ineffective assistance of counsel. Applicant did not provide his alleged alibi witnesses at the evidentiary hearing nor did he locate and/or interview those witnesses within 30 days from the evidentiary hearing as ordered by Judge Dickson. *See Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial). Therefore, this application for post-conviction relief is denied.

App. 515-517.

Fishburne appealed the denial of post-conviction relief. This Court granted certiorari and remanded for a supplemental order. *See Fishburne v. State*, 427 S.C. 505, 517, 832 S.E.2d 584, 590 (2019)¹; App. 577—588. Remittitur was sent on September 27, 2019.

On remand, the PCR court chose not to conduct a hearing. Instead, the PCR Court requested a proposed order denying PCR from the State. This order was emailed to the PCR court on November 8, 2019 and was adopted verbatim when signed on November 20, 2019. App. 608; App. 603-607. Filed a Motion to Alter or Amend on Monday December 23, 2019. App. 608-609.

¹ For the sake of clarity, Respondent will refer to the previous appeal as *Fishburne I*.

In an order filed January 11, 2021, the PCR Court Granted Fishburne's motion to Alter or Amend and granted post-conviction relief. App. 610—614. The State did not file a motion pursuant to Rule 59(e), SCRCP challenging the order granting PCR.

Petitioner filed the Notice of Appeal for the current case on February 5, 2021.

STANDARD OF REVIEW

The post-conviction relief (PCR) court's factual findings will be upheld by the appellate courts if supported by probative evidence. *See Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E. 2d 836 839-40 (2018); *see also Van Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (“This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.”). Only pure questions of law will be reviewed *de novo* without deference to the lower court. *See Smalls*, 422 S.C. at 180-81, 810 S. E. 2d at 839-40.

ARGUMENT

The PCR Court's finding that Trial Counsel employed an unreasonable trial strategy which characterized Respondent as the "usual suspect" and introduced otherwise inadmissible evidence concerning Respondent's pending charges is supported by law and the facts in the record.

Relevant Facts

As this Court noted in its opinion in *Fishburne I*, in his opening Trial Counsel told the Jury the following:

I think the evidence will show that [law enforcement] made a decision that before the morning was out, once they had the name Derrick Fishburne, once they had that name, they had their guy. I think the evidence will show they picked him up from roll call on Friday, the next day. He was already in court. **He might qualify as a usual suspect.** He was an easy guy for them to get, because he was in court anyway. They picked him up from roll call on April the 10th, and they took him back to the Sheriff's Office Annex and they interviewed him. Now, because he had involvement with them before, I think the evidence will show he said, "I wasn't there." I think the evidence will show that there's a long video tape and you will have a chance to look at that.

He said, "I'm not saying anything," pretty much. "I wasn't there. I don't know what you're talking about." And at the end of the interview, they arrested him. One of the things he told me was, "I was at my girlfriend's house all night. I was at Lorinda Williams' -- Penny Williams' house," and I think the evidence will show that they went and checked with Penny, that he was not there. That he had, in fact, left the house at some time during a time when he could have been at the club, and I think the evidence will show from different witnesses, I think the State will be able to prove that he was, in fact, at the club. But they arrested him before they checked that out. I think the evidence will show that he was arrested at the end of that interview and they didn't check out Penny's story until later. It didn't check out. He told a lie.

Fishburne, 427 S.C. at 508-09, 832 S.E.2d at 585-86; App. 135, l. 12—136, l. 1.

Trial Counsel elicited testimony that Fishburne was arrested at roll call and allowed portions of a video statement that referenced Fishburne's brother being in prison. *See e.g.*, App. 283, ll. 6-8. additionally stated in his closing, Trial Counsel stated the following:

[Fishburne] was rounded up and the testimony of Detective Williams was that they picked him up from roll call. He is one of the usual suspects. He had been at roll call, so he already had some trouble. They knew him. They took him from here and took him down to the station and Detective Williams told you, he was already under arrest at that time. He was under arrest for murder and it really didn't matter what he said.

One of the things also, what Detective Johnson said in the tape that you got to see is that [Fishburne's] brother is in prison. This is not a pretty fact, but it's the truth of the matter. The Fishburnes had trouble; it's a fact. So what does that mean to [Fishburne]? What does that mean to anybody being rounded up and taken down to the Sheriff's Office to get a statement? Do you think you're going to get a fair trial? He was already under arrest and it -- yeah, they checked out his story and it didn't check out, but if he was already under arrest, it didn't matter.

Fishburne, 427 S.C. at 509-10, 832 S.E.2d at 586; App. 372, l. 24—373, l. 15. Moreover, Trial Counsel later repeated in his closing argument that, “Derrick Fishburne is a usual suspect.” App. 380, l. 20.

During the PCR hearing Trial Counsel testified to the following:

[Trial Counsel]: Well, I had to -- I tried to find a way to explain why he lied to the police. You know, you've got somebody that has you leaving the scene before this happens, so why would you deny that you're there? And you know, you don't need to do that; and it's a lie, and it's an unnecessary lie. And so, how do you explain that? You've got to give the jury -- in my -- my strategy, you've got to give the -- you can't --juries don't like lies, whether the police tell them or the defendants tell them or whether witnesses tell them, and you've got to explain it, somehow. And that was my way to explain why he would lie about being in the club.

[PCR Counsel]: Okay. It's safe to say that that's sort of a double-edged sword. Is that --

[Trial Counsel]: Yes, it's a risk.

[PCR Counsel]: Okay.

[Trial Counsel]: There's no doubt. I mean, you -- you want to present some evidence that, you know, somebody doesn't trust the police, then you have to show prior involvement with the police, which, normally, you work to try not to do. But, yeah, it's a risk. But I don't know how -- but you've got to explain a lie.

App. 494, l. 1-22.

On remand, the PCR Court initially found the following:

It was trial counsel's strategic decision to present the jury [Fishburne's] presence at roll call and that he was a "usual suspect," because trial counsel had no other way to explain Applicant's dishonesty with the police.

App. 605.

However, in his Motion to Alter or Amend, Fishburne noted the following:

Trial Counsel had no duty to explain why Applicant lied to police the first time. Instead, the burden was on the State to prove Applicant was guilty beyond a reasonable doubt.

App. 609.

The PCR Court ultimately made a factual finding that trial counsel employed the usual suspect strategy "based upon the belief that [Fishburne] must explain his statement to law enforcement." App. 613. Based on this factual finding, the PCR Court concluded the following:

This Court concludes that the [Fishburne] has met his burden of proving Defense Counsel was ineffective pursuant to the *Strickland* standard. The basis of Defense Counsel's strategy was the unconstitutional belief that [Fishburne] had the burden to prove why he was lying. As such the defense strategy was objectively unreasonable. Moreover, [Fishburne] was prejudiced by this strategy because it presented [Fishburne] in a negative light. Therefore, [Fishburne] should be granted a new trial.

App. 614.

Argument

Articulating a valid reason for employing a trial strategy may act as a defense to a finding that counsel was deficient, the defense strategy must be objectively reasonable. *See*

Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) (finding that trial counsel ineffective who allowed corroborating hearsay because he wanted the jury to hear that the victim's statements to officers were vague). A trial strategy defense will not prevent a finding of ineffective assistance of Counsel when the defense is based upon trial counsel's erroneous interpretation of law. *See Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.") (citing *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001)).

The PCR Court, made a factual finding that Trial Counsel believed that "he must explain the jury why Applicant lied to law enforcement." App. 613. This finding is clearly supported by the record in part because Trial Counsel testified to the following:

"But, yeah, it's a risk. But I don't know how -- but you've got to explain a lie."

App. 494, ll. 21-22. Clearly the PCR Court found that Trial Counsel's belief was strong enough to make him ignore the burden of proof and feel compelled to present otherwise harmful arguments and evidence.

As to the issue of prejudice, the findings that there is a reasonable likelihood of a different result but for Trial Counsel's deficient performance is also supported by the record. The State's case is built primarily on credibility of eyewitnesses. This information was noted by the PCR Court.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this court deny the State's Writ of Certiorari.

Respectfully submitted,

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