

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

RECEIVED

APR 26 2013

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

SHARON SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUES ON APPEAL

I.

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II.

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VI.

Counsel's performance was not deficient for failing to confer with Respondent

about whether or not to request a jury instruction on accident.

VII.

The PCR court erred in granting relief on the basis that counsel should have moved for a continuance concerning the State's rebuttal witness, particularly where no evidence of what benefits would accrue from further preparation were presented to the PCR court and where counsel's performance in cross-examining the witness was not deficient.

VIII.

The PCR court erred in finding counsel ineffective in regards to juror misconduct where no evidence was presented that the misconduct affected the jurors' impartiality and where Respondent failed to provide any additional affidavits or testimony from the other jurors to ascertain the possible prejudice from the misconduct.

STATEMENT OF THE CASE

Respondent Smith was indicted for murder and tried before the Honorable Reginald I. Lloyd on June 20-23, 2005. Smith was found guilty as charged and sentenced by Judge Lloyd to forty-eight years imprisonment. Smith was represented at trial by April W. Sampson, Esquire, and Debra Ahrens, Esquire of the Richland County Public Defender's Office.

Smith's trial counsel filed a notice of appeal on June 30, 2005 and the Court of Appeals granted appellate counsel's motion to be relieved and dismissed the appeal pursuant to Anders v. California, 386 U.S. 738 (1967), on May 22, 2007. Remittitur was issued on July 12, 2007.

During the pendency of the appeal, Sampson filed a motion for new trial on July 1, 2005, seeking a new trial based on jury misconduct. This motion was heard on August 15, 2005 and denied by written order dated February 2, 2006. Trial counsel filed a notice of appeal from the denial of the new trial motion, but the appeal was dismissed on the State's motion on May 5, 2008 because the hearing was held without seeking leave of the Court of Appeals, which still had jurisdiction at the time of the motion and hearing.

Smith filed an application for post-conviction relief (PCR) on March 6, 2009. The State made its return and an evidentiary hearing was held on October 21, 2011 before the Honorable L. Casey Manning. Judge Manning granted relief by order dated September 14, 2012.

This petition for writ of certiorari follows.

STATEMENT OF FACTS

The homicide occurred on May 11, 2003. The first witness at trial was Officer Andrew Scott Wilson who was the first to respond to the scene. Smith and Daniel Parker were present. Smith was upset but relatively calm. She told Wilson "I did it" and led Wilson to the body. App. pp. 110-117; see App. p. 169 (Sargent Thornton testifying that Smith told officers that she did it).

Daniel Parker, Smith's stepfather, testified that he went to victim's house to get some kids' games and knocked on the door. Smith answered with blood on her clothes and said she stabbed victim. She later changed her clothes. App. p. 178.

Law enforcement examined the scene and found blood spots on the carpet by the victim, transfer blood on the bathroom door knob, and a knife wiped clean with a towel. Smith had blood on the bridge of her nose. A gun was found underneath victim's body. App. pp. 198-215.

In a statement to law enforcement, Smith stated that she arrived at the residence and the victim had a knife in his hand. They began to tussle, then victim told Smith that she stabbed him. At first, she did not think it was serious, but then victim stumbled into the bedroom while Smith was on the phone. She terminated the call and called 911. Smith testified that neither she or victim had the gun during the confrontation and she did not know how the gun ended up under the victim. Smith admitted changing her clothes afterwards. She told law enforcement she was an LPN. Smith told law enforcement that the argument was over a lease agreement and that she was headed to the bedroom to get a copy of the lease. App. pp. 232-249. Smith never told law enforcement that the death was the result of accident. App. p. 271.

Doctor Clay Nichols, a forensic pathologist, testified that the knife went through the rib cage and the heart. He testified that it would take a lot of force to put the knife through the ribs. Dr. Nichols opined that the victim would have died in minutes. App. pp. 297-305.

Smith testified in her defense. She testified she is currently a registered nurse. At the time of the offense, she was a licensed practical nurse (LPN) and prior to that was a certified nursing assistant (CNA). Based on Smith's testimony, she had lived with victim until they broke up. He was supposed to be moving out. Smith testified that when she came to the door, he had a knife and she could smell food. She did not see the knife again until later. He wanted her to leave, but she tried to fetch a copy of the lease from the bedroom. He began pushing her and she struggled with him, pushing him hard at one point. He then told her that she stabbed him. Smith testified she attempted to perform CPR to no avail. She changed clothes because they were torn in the struggle. Smith never saw the gun and also testified that the victim never came at her with the knife. On cross-examination, Smith admitted telling law enforcement that she did it. App. pp. 387-412; p. 418; p.438.

THE STANDARD OF REVIEW AND THE STANDARD REQUIRED TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984). An applicant must overcome this presumption in order to receive relief. Cherry.

Allegations of ineffective assistance of counsel are evaluated under a two-pronged test. First, the applicant 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 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.

ARGUMENT

I.

The PCR court erred in finding counsel was ineffective in regards to not objecting to solicitor's closing argument and in not further researching Respondent's degree of training as a nurse.

The PCR Court found counsel ineffective for failing to object to the following portion of the prosecution's closing argument:

Malice aforethought, it can either be expressed, I'm going to kill somebody; or it's permissible to infer it from the use of, yes, a deadly weapon. And that's what the law says. That's one reason I am going to ask you to infer malice but not the biggest reason. The biggest reason, as I'll get to later, **is this licensed practical nurse let him sit there and bleed to death.** And I think there's overwhelming evidence of that. That's the true malice, the true meanness in this case.

App. p. 530, line 24 – p. 531, line 8 (emphasis added).

The PCR court's order erroneously indicates that this argument was objectionable, citing State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (Ct. App. 2003) for the proposition that the prosecution's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Id., 355 S.C. at 549, 586 S.E.2d at 156.

The argument was not remotely objectionable as evidence was presented to the jury tending to show that Smith at the time of trial was a licensed practical nurse and that she allowed the victim to bleed to death. Further, the argument is hardly one that could be considered calculated to arouse the jurors' passions or prejudices. The prosecution "may argue the State's version of the testimony presented, and furthermore may comment on the

weight to be accorded such testimony.” State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999); see State v. Bamberg, 270 S.C. 77, 240 S.E.2d 639 (1977) (finding inasmuch as defendants testified they were at a club on the night of the murder, defendants were not prejudiced by solicitor’s comment that they “hung out” there).

Given that the solicitor’s argument was not objectionable, counsel’s performance was not deficient. Further, Smith was not prejudiced. On cross-examination, she testified she was at that point an LPN. App. p. 438. At the time of trial, she was a registered nurse. App. p. 388.

Intertwined in the PCR court’s ruling was the finding that counsel should have spent more time with Smith to determine her precise level of training so that counsel could refute the assertion that Smith should have been able to provide medical attention to the victim. The State did not explicitly present testimony on this point, but instead made this inference from the testimony presented at trial. Accordingly, counsel was not required to be clairvoyant and determine the prosecution’s closing argument on each and every point. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel was not ineffective for failure to interview the victim who already gave a damaging statement to the police – counsel, “unless clairvoyant, could not have reasonably known that any additional benefit would accrue to his client”); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996) (finding counsel cannot be incompetent in failing to receive discovery materials from prosecution that they had no reason to know existed) *overruled on other grounds by Jackson v. State*, 342 S.C. 95, 435 S.E.2d 926 (2000).

Additionally, the record discloses Smith had practical experience as a certified nursing assistant before going to nursing school and further, she claimed at trial that she

attempted to give CPR to the victim. App. pp. 406-07. Finally, her own testimony was she was an LPN at the time of the homicide. App. p. 438. Regardless, Smith had ample opportunity at trial to explain her medical experience or lack thereof. Counsel's performance was not ineffective and the PCR court erred in so ruling.

II.

The PCR court erred in granting relief on the basis of failing to interview or present various witnesses where these witnesses did not testify at the PCR hearing and evidence of prejudice from the alleged deficiency of counsel was not presented.

The PCR court found counsel was ineffective for failing to interview various witnesses that Smith contended could have testified to an abusive history with the Victim, who could have seen Victim packing belongings, or could have provided evidence of her good character. However, none of these proposed witnesses testified at the PCR hearing, and therefore, no evidence of prejudice was presented. Accordingly, the PCR court erred in granting relief on these grounds. Bannister v. State 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992). “A PCR applicant cannot show that he was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814-815 (2005). Any prejudice to Smith is speculative. Dempsey, (finding any prejudice speculative where purported favorable witnesses not called by trial counsel were not called at PCR hearing).

III.

The PCR court erred in granting relief on the basis that counsel was ineffective for failing to request a charge on accident where the trial court's instructions to the jury made clear that they had to find the State proved beyond a reasonable doubt that the act of stabbing the victim was deliberate.

The PCR Court granted relief on the basis that counsel failed to request a charge on accident. However, the lack of an instruction on accident was not prejudicial to Smith because it was made clear to the jury that the State needed to prove an intentional act by Smith to convict on the charge of murder.

A homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. State v. Chapman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). In the PCR context, the question is whether trial counsel's refusal of the trial court's offer to charge accident was prejudicial under Strickland.

However, viewing the cold record, as the PCR court necessarily was required to do to determine prejudice, Smith was not prejudiced by the lack of an accident charge as the trial court's instructions made clear that the State was required to prove an intentional act. The trial court instructed the jury that criminal intent must be proven by the State beyond a reasonable doubt. App. -p. 582, lines 16-17. The trial court instructed the jury that the State was required to prove beyond a reasonable doubt that Smith "killed another person with malice aforethought." App. p. 585, lines 14-16. The trial court then defined malice

as “the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury under circumstances that the law will infer an evil intent.” App. p. 585, lines 17-22. The trial court further charged “there must be a combination of the previous evil intent and the act.” App. p. 586, lines 8-9.

Trial counsel seemed unwilling to provide her reasons for refusing the trial court’s offer to instruct the jury on accident, but regardless, the jury would be fully aware that an intentional act was required for the State to prove murder and that Smith’s version of events did not include an intentional act. In the affidavit, the juror discloses: “Based on our understanding of the State’s definition of malice and our common believe [sic] that she intentionally stabbed the victim, all of the jurors felt that we had no alternative but to find Ms. Smith guilty.” App. p. 722. The jury simply rejected Smith’s version of events, and an accident instruction would not have any bearing on the jury’s credibility determination. Therefore, the PCR court erred in finding prejudice.

IV.

The PCR court erred in finding that counsel was ineffective for failing to request a charge on evidence of good character.

The PCR court found that trial counsel was ineffective for failing to request a charge on Smith's good character, relying on State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (2000). However, unlike Harrison, where the defendant presented a character witness and testified that his involvement in drugs that night was not part of his normal lifestyle, Smith did not present any evidence of her good character. Accordingly, such a charge was not warranted. Therefore, counsel was not deficient, nor was Smith prejudiced in this regard, as the purported error was unlikely to affect the outcome of the trial. Strickland. Accordingly, the PCR court erred in this regard.

V.

The PCR court erred in finding counsel was ineffective in regards to the trial court's consideration of adding instructions to the jury based on counsel's closing argument and in regards to the quality of counsel's closing argument.

The PCR court found counsel was ineffective for failing to object to the trial court changing the jury charge based on her closing argument. However, the trial court did not alter its charge, so Smith was not prejudiced in this regard. Strickland. Further, the PCR court concluded that counsel was ineffective based on her testimony that she felt hamstrung by the trial court's comments about potentially changing the jury charge. However, viewing the same cold record the PCR court necessarily had to refer to, trial counsel's performance during the remainder of the closing argument was hardly deficient, nor is Smith able to show prejudice from the remainder of counsel's closing argument. Strickland.

Instead, following the conference, trial counsel continued to argue that the State needed to prove an intentional act and that Smith's testimony showed that the death was not the result of an intentional act. Her detailed and adamant closing argument continues approximately nine pages past the moment she was supposedly hamstrung. App. p. 518, line 13 – p. 527, line 15. Accordingly, the PCR court's grant of relief on this ground is not supported by probative evidence. Holland.

VI.

Counsel's performance was not deficient for failing to confer with Respondent about whether or not to request a jury instruction on accident.

The PCR court further found that trial counsel was ineffective for failing to confer with Smith about the decision to not request an accident charge. The PCR court's reliance for this proposition is Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). The case is inapplicable as that case stands for the proposition that all plea offers should be conveyed to a defendant.

Not all strategic decisions during a trial need to be jointly decided by trial counsel and her client. "An attorney undoubtedly has a duty to consult with the client regarding important decisions including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560, 160 L.Ed.2d 565, 578 (2004) (internal quotation omitted). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" Id. (Internal quotation omitted). For instance, this Court, relying on Nixon, found no error where counsel offered mitigation evidence over his own client's objection. State v. Wrinkler, 388 S.C. 574, 698 S.E.2d 596 (2010). The PCR court's ruling is in error and should be reversed.

VII.

The PCR court erred in granting relief on the basis that counsel should have moved for a continuance concerning the State's rebuttal witness, particularly where no evidence of what benefits would accrue from further preparation were presented to the PCR court and where counsel's performance in cross-examining the witness was not deficient.

The PCR court ruled counsel was ineffective for failing to move for a continuance in order to confer with an expert and properly cross-examine the State's rebuttal witness, an EMS supervisor who testified that when EMS arrived at the scene, victim's core body temperature was cool and victim had been deceased for at least half an hour. The PCR court opined in part as follows:

In order for Ms. Sampson to properly cross-examine the State's expert, she should have requested a continuance in order to have the time to properly investigate the information in the form. Ms. Sampson asked a few questions with the most notable question being whether it was Lieutenant Fortner's job to decide the time of death. Here, counsel made no meaningful challenge to the evidence of body temperature and time of death presented by the State. Counsel's failure to do so was ineffective, denying Applicant of a fair trial. . . .

App. p. 865 (citation omitted).

First, no evidence of prejudice was provided to the Court. In order to show that counsel was ineffective for failing to move for a continuance, applicant must show what benefits would accrue from additional preparation. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). "Failure 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." Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001).

Further, counsel's performance did not fall below professional norms when viewing the same cold record the PCR court relied on in its ruling. In her cross-examination, trial counsel elicited testimony from the EMS supervisor that he did not take the victim's body temperature, that he did not know the temperature in the room, that he did not arrive at the scene of the incident until 2:15 p.m., and that he did not call the time of death until 2:20 p.m., even though the coroner's report indicated victim died at 2 p.m. Then on Sampson's cross-examination, the EMS supervisor admitted it was the coroner's job and not the supervisor's job to estimate the time of death. App. pp. 1482-483. Accordingly, probative evidence does not support the finding that counsel's performance was deficient.

VIII.

The PCR court erred in finding counsel ineffective in regards to juror misconduct where no evidence was presented that the misconduct affected the jurors' impartiality and where Respondent failed to provide any additional affidavits or testimony from the other jurors to ascertain the possible prejudice from the misconduct.

The PCR court found counsel was ineffective for failing to properly preserve for appeal the issue of whether a juror's misconduct warranted mistrial. Following the trial, counsel filed a notice of appeal. While the appeal was pending, counsel discovered that a juror had done legal research and discussed his research with other jurors. A hearing was held before the trial court, who found that the juror misconduct did not warrant a mistrial. Counsel attempted to appeal this ruling, but the Court of Appeals found that the hearing was a nullity because jurisdiction had remained with the Court of Appeals. Counsel made no attempt to seek holding the appeal in abeyance and remanding the case to have the juror issue addressed. Further, trial counsel failed to file a Rule 29, SCRCrP motion at the conclusion of the appeal. At the PCR hearing, aside from the transcript of the post-trial motion, no additional evidence was presented on the issue of juror misconduct.

At no point did any jurors testify, trial counsel only presented an affidavit from the juror committing the misconduct to support of the motion, Smith did not present any testimony or affidavits of any other jurors at the PCR hearing.

No evidence was presented that the one juror's legal research affected the jury's duty of impartiality. The information concerned lesser included offenses that were not charged to the jury, and if anything, the extraneous information prejudiced the State. See post-trial transcript, p. 21, lines 12-15. "If the juror misconduct does not affect the

impartiality of the jury, it is not the type of misconduct which will affect the verdict.” State v. Pittman, 373 S.C. 527, 553, 647 S.E.2d 144, 157 (2007). In State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000), this Court found that the trial court did not err in denying a motion for new trial where a juror consulted Black’s dictionary, finding no evidence that the misconduct prejudiced the jury. Likewise, in the instant case, no evidence suggests that the jury did not analyze the charges under the trial court’s instructions on the law. Instead, based on the single affidavit presented at the post-trial motion, the jurors understood the legal issues at hand, chiefly whether the State proved malice. Post-trial Tr. p. 22, lines 9-24.

Therefore, had the issue been properly presented to the trial court and appealed, the appeal would not have been successful. Accordingly, the PCR court erred in finding that counsel’s performance prejudiced Smith and erred in granting relief.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted and the order granting post-conviction relief should be reversed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID A. SPENCER
Assistant Deputy Attorney General

BY: 

DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

April 25, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable L. Casey Manning, Circuit Court Judge

SHARON SMITH, 030885,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

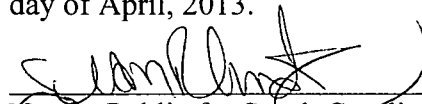
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix has been served upon opposing counsel, Robert M. Dudek 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 26th day of April, 2013.



DAVID SPENCER
ATTORNEY FOR PETITIONER

SWORN to before me this 26th
day of April, 2013.



Notary Public for South Carolina. (L.S.)
My Commission Expires: 3/12/23



ALAN WILSON
ATTORNEY GENERAL

April 26, 2013

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

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APR 26 2013

S.C. Supreme Court

Re: Sharon Smith, 03088 v. State of South Carolina
2009-CP-40-1565
Appellate Case No. 2012-213022

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and the original and (1) copy of the Appendix in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Petition today.

Sincerely,

David Spencer
Assistant Deputy Attorney General
Bar No. 68571

Enclosures

DS/jri

cc: Robert M. Dudek, Esquire