STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable D. Craig Brown, Circuit Court Judge

IN THE COURT OF APPEALS
Appellate Case No. 2018-001994

EDWARD MAURICE DUNN, JR.,

Petitioner,

v.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUE STATEMENT

Whether trial counsel provided competent representation when he raised a constitutional challenge to the admission of DNA evidence, and whether Dunn has shown a reasonable probability that he would not have been convicted if counsel had instead moved to suppress based on the argument that retention of his DNA sample violated the DNA Record Database Act.

STATEMENT OF THE CASE

Petitioner Edward Dunn is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Dunn was indicted by a Richland County grand jury for assault with intent to commit criminal sexual conduct (CSC) in the first degree (2011-GS-40-3518), armed robbery (2011-GS-40-3525), kidnapping (2011-GS-40-3526), and burglary in the first degree (2011-GS-40-3527). The facts of the case are summarized in the State's brief filed pursuant to his direct appeal. (App.572–73). He was represented by Victor Li and Deon O'Neil, Esquires. On May 21-24, 2012, Dunn proceeded to jury trial before the Honorable G. Thomas Cooper, Jr. He was acquitted of assault with intent to commit first-degree CSC but was found guilty of the remaining charges. He was sentenced to three concurrent terms of thirty (30) years' imprisonment for armed robbery, kidnapping, and first-degree burglary.

Dunn filed a timely notice of appeal, and Appellate Defender David Alexander, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. On appeal, Dunn raised the following issue: "Whether the trial court erred in refusing to suppress all evidence flowing from the retention and subsequent usage of Applicant's DNA profile, which was taken when he was a juvenile and maintained in a database not authorized by state law, exceeded the scope of the contractual consent given by Applicant, and was otherwise illegal under state law?" Following briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming

Applicant's conviction and sentence. State v. Dunn, Op. No. 2014-UP-249 (S.C. Ct. App. filed June 25, 2014). The Remittitur was issued on July 11, 2014.

Dunn filed an application for post-conviction relief filed March 17, 2015. An evidentiary hearing was held on July 11, 2016, at the Richland County Courthouse before the Honorable D. Craig Brown, circuit court judge. Dunn was present at the hearing and was represented by Jonathan Waller, Esquire. Respondent was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office. Judge Brown dismissed Dunn's application in an order dated October 9, 2018. (App.666–86). This appeal follows.

STANDARD OF REVIEW

The appellate court with defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id.

ARGUMENT

Trial counsel provided competent representation when he raised a constitutional challenge to DNA evidence. Dunn's claim that counsel should have moved to suppress on state law grounds based on the "illegal" retention of Dunn's consensually-given DNA standard in a law enforcement database fails on the merits, and counsel was not ineffective for failing to raise the issue in these terms.

Dunn claims trial counsel was ineffective for failing to move to suppress evidence derived from his DNA sample obtained by law enforcement consensually during the investigation of an unrelated crime. He argues trial counsel should have moved to suppress evidence derived from that DNA sample because its retention by Richland County police violated the DNA Record Database Act, S.C. Code Ann. § 23-3-610 et seq. His argument is meritless because trial counsel had a valid strategic reason for moving to suppress on constitutional grounds. Furthermore, Dunn's underlying claim that the retention of his DNA violated the DNA Record Database Act is meritless because Dunn's sample was not collected pursuant to that act. Even if Richland County was operating a DNA storage "program" that conflicted with the DNA Record Database Act, Dunn's sample still would have been admissible because it was given with his consent. Accordingly, trial counsel acted reasonably by contesting Dunn's consent. Dunn was not prejudiced by counsel's representation because he failed to show his sample would have been excluded had he moved to suppress on the basis that retention of his DNA violated the Act. This Court should affirm.

A. The Strickland standard.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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, 466 U.S. 668. Strickland does not guarantee perfect representation, only a "'reasonably competent attorney." Strickland, 466 U.S. at 687.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Even if there is reason to

think that counsel's conduct "was far from exemplary," a court still may not grant relief if "[t]he record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021).

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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

B. Trial counsel reasonably raised a constitutional challenge to the admission of evidence derived from Dunn's DNA sample, and Dunn was not prejudiced by Dunn's decision not to move to suppress on meritless state law grounds.

Trial counsel reasonably raised a constitutional challenge to the admission of evidence derived from Dunn's DNA sample, and Dunn was not prejudiced by Dunn's decision not to move to suppress on meritless state law grounds. This Court should affirm.

i. Retention of Dunn's DNA sample did not violate the DNA Record Database Act.

The South Carolina DNA Record Database Act established a program authorizing law enforcement officers to compel individuals arrested for certain

felony or sex-related crimes to give a sample of their DNA. S.C. Code Ann. § 23-3-620. The statute provides that arrestees "must" provide a sample. Id. The Act also created a state database to house these DNA samples. The Act provides for uniform storage and maintenance of these samples in a state database administered by SLED. S.C. Code Ann. § 23-3-640.

Contrary to Dunn's claims, the Act does not prohibit local law enforcement agencies from obtaining and storing a suspect's DNA samples by consent. Instead, by its plain terms the Act applies only to those samples obtained pursuant to the Act, i.e. samples taken under compulsion of law enforcement incident to arrest. See S.C. Code Ann. § 23-3-650 ("The DNA record and the results of a DNA profile of an individual **provided under this article** are confidential and must be securely stored . . . .") (emphasis added). Nothing in the Act makes it "illegal" for law enforcement agencies to collect and store DNA samples with the consent of the person giving the sample.

Dunn cites an Attorney General's opinion[1] dated April 7, 2011, concerning a scuttled Orangeburg program for storage of compelled DNA samples from "all individuals arrested by the City of Orangeburg." See letter to Thad Turner dated April 7, 2011, available at https://www.scag.gov/opinions/opinions-archive/april-7-2011/. Contrary to his assertion, the opinion does not "agree with his arguments." Brief of Petitioner at 14. The Orangeburg program discussed in that opinion was for the compelled collection and storage of DNA samples from each inmate at the

[1] Of course, the Attorney General's opinion is not binding on this Court.

Orangeburg jail. The Attorney General's opinion states that the Orangeburg program likely violates the DNA Record Database Act under preemption principles because the Act establishes a uniform state program under a unified scheme. Accordingly, local agencies cannot create a rival program covering the same subject matter—compelled collection of DNA samples from all arrestees—operating independently of the statewide scheme. The opinion does not opine that the statewide DNA collection program implicated any individual privacy interests, or that samples stored pursuant to the Orangeburg program would have to be suppressed at a criminal trial.

Dunn's DNA was collected with his permission. It does not fall within the scope of the Act, which governs the storage of compelled samples taken as a matter of course from all arrestees. There was nothing "illegal" about the Richland County Sheriff's Office retaining Dunn's consensually-given sample.

ii. Even if retention of Dunn's DNA violated the DNA Record Database Act, evidence derived from Dunn's sample would not have been suppressed because it was consensually given. Accordingly, trial counsel properly moved to suppress by raising a consent argument.

Even if Richland County were operating a DNA storage "program" that conflicted with the DNA Record Database Act, Dunn's sample still would have been admissible because it was given with his consent. Accordingly, trial counsel acted reasonably by contesting Dunn's consent. Dunn was not prejudiced by counsel's representation because his sample would not have been suppressed had he argued to suppress on the ground that retention of his DNA violated the Act.

As discussed above, the retention of Dunn's consensually-given DNA sample did not violate the DNA Record Database Act. But even if it had, this would not have been a basis to suppress Dunn's DNA. The Act does not create a new right to privacy in DNA samples seized under its authority. Rather, its procedural safeguards are meant to ensure integrity of the DNA samples for the same reasons the samples are collected in the first place: to serve the public interest in retaining an accurate database of DNA samples taken from persons arrested for felony crimes.

Accordingly, while Dunn claims the retention of his DNA violated a statutorily-created right to privacy, the terms of the Act do not do so. The individual privacy interest at stake is protected not by the Act, but by the Fourth Amendment. Trial counsel reasonably moved to suppress on constitutional grounds, even though his motion was unsuccessful because of the holding in State v. McCord, 349 S.C.477, 485, 562 S.E.2d 689, 693 (2002). Dunn has not explained why the Act should provide greater privacy protections than the United States Constitution.

Dunn even admits that the "first consideration is whether Petitioner had a privacy interest in the wrongfully retained DNA evidence such that the retention of his DNA was a search under the Fourth Amendment and Article 1, section 10 of the South Carolina Constitution. " Brief of Petitioner at 17. He thus raises a constitutional argument despite his assertion that trial counsel was ineffective for raising this issue as a constitutional violation. This seriously undermines his

argument that trial counsel was ineffective for raising the "wrong argument" to the trial court.

Trial counsel had a valid strategic decision to move to suppress on constitutional grounds. As he explained at the evidentiary hearing, he believed the issue was one of "basic consent law." (App.650). As discussed above, this was a reasonable argument. Because trial counsel gave a strategic reason for his decisions, he was not ineffective. See Underwood v. State, 303 S.C. 560, 425 S.E.2d 20 (1992).

Even if the Act was violated, and even if the consent exception does not apply, suppression would not have been appropriate. Dunn made no showing of bad faith, and any deterrent effect on law enforcement would not have justified the substantial social costs of suppression. See Davis v. United States, 564 U.S. 229, 236 (2011). Dunn cannot show prejudice.

Because Dunn's motion to suppress boils down to a consent issue, trial counsel reasonably moved to suppress evidence derived from Dunn's DNA sample based on Dunn's alleged lack of consent. Dunn cannot show prejudice because his underlying claims are meritless, and in any case his motion probably would not have resulted in suppression. This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court affirm the decision of the lower court.

Respectfully submitted,

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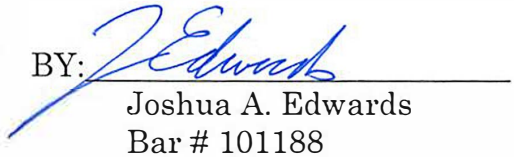
BY: 
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