STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

Respondent,

vs.

BRAXTON J. BELL,

Appellant.

Appellate Case No. 2010-178807

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

1. Did the PCR judge correctly find counsel was not ineffective for failing to investigate and present testimony from additional witnesses at trial who had knowledge the victim was the aggressor in prior altercations with petitioner?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted petitioner at the April 2005 term of General Sessions for murder (2005-GS-04-618) and possession of a firearm during the commission of violent crime (2005-GS-04-619). (App.pp.653-6). Charles L. Witten, Esquire, "counsel" represented Petitioner.

On July 18, 2005, State called the case to trial. (App.pp.1-540). One eyewitness to the shooting and three other eyewitnesses to the initial altercation between petitioner and the victim testified. (App.p.124; p.226; p.243; p.156). The altercation developed as a result of chance encounter upon petitioner being asked to leave a party where he was not welcomed. (App.p.124). Rachell Tanner testified she heard petitioner tell the victim that he was armed during the altercation. (App.p.226). Additionally, three witnesses testified to petitioner's exculpatory statements given subsequent to the offense. (App.p.160; p.182; p.206). Petitioner admitted to making exculpatory statements when he fled the scene. (App.p.441). Petitioner also stated he was under the influence of alcohol, cocaine, and marijuana during the commission of the offense. (App.p.429). The victim was neither under the influence of a controlled substance or alcohol at the time of his death. (App.pp.321-2).

Counsel argued petitioner acted in self-defense. (App.pp.361-412). Petitioner testified to his version of the offense. (App.pp.403-7). Petitioner stated he was in imminent fear of harm during the altercation due to a condition of his spleen triggered from a recent mononucleosis diagnosis. (App.p.391; p.403). Counsel submitted medical documentation into evidence to establish petitioner's medical condition in corroboration to his testimony. (App.pp.442-7). During cross-examination of both the State's forensic pathologist and trace evidence expert, both

experts testified petitioner's version of self-defense was plausible. (App.p.340; pp.354-5). Counsel also presented testimony of the victim's prior incidents of aggression towards petitioner. Joseph Jones testified to the victim's reputation for violence and to witnessing specific altercations between petitioner and the victim where the victim was the aggressor. (App.p.370).

On the murder charge, the jury returned a guilty verdict for voluntary manslaughter. The jury also returned a guilty verdict on the possession of a firearm during the commission of a violent crime charge. (App.p.521). On July 20, 2005, the Honorable James C. Williams, Jr., sentenced petitioner to thirty (30) years imprisonment on the manslaughter conviction and five (5) years imprisonment on the possession charge. The sentences were to be served concurrently. (App.p.541; pp.657-8).

A notice of appeal was filed at the South Carolina Court of Appeals. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (S.C Ct. App. filed June 4, 2007).

Petitioner filed an application for post-conviction relief (PCR) on December 2, 2008. (App.pp.544-59). A hearing was convened at the Anderson County Courthouse on June 16, 2010. (App.pp.565-644). Petitioner was present and represented by Charles L. Anderson, Esquire. A. West Lee, Esquire, of the South Carolina Attorney General's Office represented Respondent. Petitioner testified. (App.pp.617-631). Additionally Leon Gray, D'Sean Bell, and Joyce Bell-Johnson testified on petitioner's behalf. (App.pp.602-6; pp.606-10; pp.611-17). Trial counsel was present and testified. (App.pp.567-602; pp.632-6). Among other allegations, petitioner alleged counsel was ineffective for failing to investigate the victim's prior history of violence towards him in failing to present testimony from the three PCR witnesses at trial. The

Honorable R. Lawton McIntosh denied relief in an order dated November 15, 2010. (App.pp.645-52). The PCR judge found trial counsel's testimony "that he conducted a pre-trial investigation during which he interviewed witnesses but elected not to call them to testify at trial to be credible." (App.p.649). The PCR judge found trial counsel's strategy on the matter valid. The PCR judge found petitioner failed to meet his burden deficient performance or resulting prejudice. (App.p.649).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge correctly found counsel was not ineffective for failing to investigate and present testimony from additional witnesses at trial who had knowledge the victim was the aggressor in prior altercations with petitioner.

At the PCR hearing, petitioner argued trial counsel was ineffective for failing to investigate necessary witnesses to prove he killed the victim in self-defense. Petitioner stated he provided counsel a list of witnesses that asserted would have benefited his defense in preparation for trial. (App.p.624). Petitioner stated that although he did not know if counsel interviewed all of the persons he requested testify, he knew counsel met with his mother, aunt and other individuals. (App.p.624).

Leon Gray testified petitioner and the victim "got along all right" until "one would say the wrong thing and they'd [sic] end up arguing and fighting." (App.p.604, lines 1-4). Gray further stated "[petitioner] told me that, you know, he was always wanting to fight [the victim]." (App.p.604, lines 7-8). Gray stated he was imprisoned at the time of the offense and during trial. (App.pp.604-5).

D'Sean Bell, petitioner's cousin, testified. Bell stated he was at his grandparents' home on the night of the offense when he learned of the victims' death from a news broadcast. (App.p.606). Bell testified he witnessed altercations between petitioner and victim and stated, "the only thing I know is they used to get into it." (App.p.608, line 6). Bell stated the victim was not armed during the encounters. Furthermore, Bell stated he did not know if the victim even owned a gun (App.p.609). Bell infrequently spent time around petitioner or the victim. (App.p.609). Last he stated petitioner did not fear the victim. (App.p.609).

Joyce Bell-Johnson, petitioner's mother, testified. Bell-Johnson stated she met with counsel and petitioner prior to trial. (App.p.614). She stated petitioner and the victim were

friends. (App.p.611). Bell-Johnson stated the victim harassed petitioner on one occasion as a result of her disposing of the victim's marijuana and contraband she discovered in her home. (App.p.612). She stated petitioner did not fear the victim. (App.p.613).

Counsel testified. He stated he subpoenaed a number of witnesses to testify to the victim's past altercations with petitioner. (App.p.580). Counsel stated he would not have called Gray, Bell, or Bell-Johnson to testify "because they were equivocal about the relationship between [the victim] and [petitioner] as to who was the aggressor in the past." (App.p.633, lines 22-24). Furthermore, counsel stated he did not desire eliciting testimony that petitioner and the victim were friends. (App.p.634).

In denying petitioner's application for post-conviction relief, the PCR judge found trial counsel's testimony "that he conducted a pre-trial investigation during which he interviewed witnesses but elected not to call them to testify at trial to be credible." (App.p.649). The PCR judge found trial counsel's strategy on the matter valid. The PCR judge found petitioner failed to meet his burden deficient performance or resulting prejudice. (App.p.649).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 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 of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Evidence of probative value supports the PCR judge's finding counsel competently investigated petitioner's case and presented self-defense at trial. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the case." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011). "[I]t would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to." Id. at 457, 710 S.E.3d at 64-65 (emphasis supplied).

In the present case, counsel's central objective was to establish the forensic evidence comported with petitioner's version of the offense necessary in rebuttal to eyewitness testimony presented during the solicitor's case. Presenting testimony of the victim's pertinent character trait for prior violence towards the victim was secondary and intended to show petitioner was in reasonable apprehension of imminent fear when he shot and killed the victim. (App.pp.587-8). See Walker v. State, 397 S.C. 226, 242, 723 S.E.2d 610, 618 (Ct. App. 2012) ("Evidence of a pertinent trait of character of the victim of the crime offered by an accused is admissible under Rule 404(a)(2) in some circumstances."). As a result, counsel investigated the scene of the offense, interviewed the State's forensic pathologist, and subpoenaed petitioner's treating physicians along with numerous other witnesses. (App.p.572; p.573; pp.578-80). Thus, the PCR judge correctly found counsel conducted a reasonable investigation of petitioner's case.

Furthermore, evidence of probative value supports the PCR judge's finding that counsel's decision not to have Gray, Bell, and Bell-Johnson to testify to the victim's prior violent history with petitioner was a product of a valid trial strategy. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Ingle v. State, 348 S.C. 467,

470, 560 S.E.2d 401, 402 (2002) (citing Roseboro v. State, 317 S.C. 292, 294 454 S.E.2d 312, 313 (1995)). "When counsel articulates a strategy, it is measured under an objective standard of reasonableness." Id.

In the present case, counsel stated he didn't want testimony that the victim was the aggressor in prior altercations "watered down" by calling auxiliary witnesses to testify on the matter. (App.p.633, line15—p.634, line 3). Moreover, counsel's reasoning that the additional testimony would have proved harmful was justified. Gray, Bell, and Bell-Johnson all testified petitioner and the victim were friends and that petitioner did not fear the victim. Gray's testimony even established petitioner's motive for revenge; and Bell Johnson's testimony established petitioner and the victim had engaged in illegal activity. See Edwards, 392 at 457, 710 S.E.2d 60 (citing Murray v. Griffith, 243 Va. 384, 416 S.E.2d 219, 222 (1992) ("finding counsel's failure to interview a particular witness not deficient where the witness's testimony would have been harmful to the defense.")). Thus, the PCR judge correctly found counsel's decision not to call Gray, Bell, and Bell-Johnson to testify was the product of valid trial strategy. Accordingly, petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms.

Evidence of probative value supports The PCR judge's finding that petitioner failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. "When evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." Edwards, 392 S.C. at 459, 710 S.E.2d at 66.

Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011) is instructive to the present case. In Edwards, this Court found Edwards was not prejudiced by his attorney's decision to refrain from

calling a co-defendant to testify at trial where co-defendant's statements from his guilty plea comported with evidence and testimony presented at Edward's trial. Id. In the present case, Gray, Bell, and Bell-Johnson's PCR testimonies were mostly consistent with Joseph Jones' more compelling trial testimony. Gray, Bell, Bell-Johnson, and Jones all stated the altercations did not involve deadly weapons nor resulted in serious injuries. (App.p.376). However, Jones stated the victim was the aggressor in all past encounters; and he referenced a particular incident where he witnessed petitioner act out of fear from the victim's posture. (App.p.370; pp.378-9). Jones additionally testified to witnessing an altercation that occurred between petitioner and the victim just one month prior to the offense. (App.p.377). Simply, Gray, Bell, and Bell-Johnson failed to testify to anything that would have been beneficial to petitioner's defense at the PCR hearing not already brought out by Jones at trial.

Although Jones' credibility was attacked from his prior fifteen year old convictions, Gray, Bell, and Bell-Johnson would also have had credibility issues had they testified at trial. Gray was incarcerated at the time of trial while Bell and Bell-Johnson were related to petitioner. See Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."). However Jones provided unbiased testimony because he had cared for the victim and testified from a position of neutrality. (App.p.379). Thus, the PCR judge correctly found petitioner failed to prove counsel's performance resulted in prejudice.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should affirm the PCR judge.

Respectfully submitted,

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

May 13th, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

BRAXTON J. BELL, # 310304,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esq.
1330 Lady St. Suite 401
Columbia, SC 29201

This 13th day of May, 2013

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 13 2013
S.C. Supreme Court

May 13, 2013

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

RE: **Braxton J. Bell v. State of South Carolina**
Appellate case No.: 2010-178807

Dear Mr. Shearouse:

Enclosed for filing are the original and thirteen (13) copies of the **Brief of Respondent** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: LaNelle C. Durant, Esq. (2 copies with all the attachments)