

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Ferrell Cothran, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2021-001136

RASHEED GLOVER.....Petitioner.

v.

STATE OF SOUTH CAROLINA.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENTS OF THE ISSUE

PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

Whether the lower court erred for failing to find counsel provided ineffective assistance during sentencing and post-trial motion hearings and that prejudice resulted.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the PCR court properly found that Counsel's representation was not ineffective because he employed an objectively reasonable trial strategy in the sentencing phase of the trial, and where no other actions would have reasonably changed the outcome of trial.

STATEMENT OF THE CASE

Rasheed Glover (hereafter “Petitioner”) is presently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its March 2015 term, Petitioner was indicted for armed robbery (2018-GS-26-01237). Petitioner was represented by Johnny Gardner, Esquire, and Assistant Solicitors Lauree Richardson and Thomas G. Terrell, III, of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. On October 12, 2015, Petitioner proceeded to trial before the Honorable R. Ferrell Cothran, circuit court judge, and a jury. Petitioner failed to appear and was tried *in absentia*. The jury found Petitioner guilty as indicted on October 13, 2015. Judge Cothran then issued a bench warrant for Petitioner’s arrest, prepared a sentence, and sealed it pending Petitioner’s arrest and future appearance.

Petitioner was apprehended and appeared on March 15, 2016, before the Honorable Steven H. John, circuit court judge. Judge John unsealed, read, and imposed a sentence of twenty-five years’ imprisonment. Applicant, through counsel, moved for a new trial and reconsideration of his sentence. Judge John denied both motions on March 17, 2016.

Applicant appealed and the appeal was perfected by Kathrine H. Hudgins, Esquire, who filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), raising the following issue:

Did the judge who unsealed and pronounced sentence following a trial in the Appellant’s absence abuse his discretion in refusing to reconsider the twenty-five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect an appropriate basis for the disparate sentence?

Applicant subsequently filed a *pro se* brief. The South Carolina Court of Appeals affirmed Applicant’s conviction. *State v. Glover*, Op. No. 2017-UP-210 (S.C. Ct. App., filed

May 17, 2017). The remittitur was issued on June 2, 2017.

Applicant filed his current application for post-conviction relief on May 2, 2018, alleging:

1. "Ineffective Assistance of Counsel"
 - a. Applicant cites to and reproduces Fed.R.Crim.P. 43, and thereafter argues:
 - b. "My counsel Johnny Gardner failed to raise the above issue before the Courts resulting in trial to permit in my absence, with me having no knowledge that trial would permit in my absence. To my knowledge, I (Rasheed Glover) was not present at the above (a)(1), (a)(2) and for trial to permit in my absence is a violation of my fifth, sixth and fourteenth Amendments which protects me as a matter of due process. Johnny Gardner's failings to propose this issue to the Courts resulted in trial to begin in my absence."

Respondent made its return and motion to dismiss on August 1, 2018 and moved to summarily dismiss the application because the allegations raised lacked merit. Petitioner filed an amended application on February 24, 2020, alleging:

1. Ineffective assistance of counsel for failure to actively negotiate a plea offer and/or ensure that Applicant had the opportunity to properly reject the opportunity to enter a guilty plea.
2. Ineffective assistance of counsel for failure to properly advise Applicant about being tried in his absence if he did not appear for trial.
3. Ineffective assistance of counsel for failure to move for a continuance prior to jury selection and/or object to the trial in Applicant's absence.
4. Ineffective assistance of counsel for failure to offer meaningful representation during the sentencing phase of Applicant's trial.
5. Ineffective assistance of counsel related to the hearing to open Applicant's sentence and for post-trial motions, specifically, but not limited to:
 - a. Failure to have knowledge of, prepare for and be present at the hearing opening Applicant's sentence. Additionally, failure to ensure that the representative that appeared on his behalf was properly prepared and advocating for Applicant.
 - b. Ineffective assistance of counsel for failure to make an oral or written request and/or objection for additional time and/or for the trial court to hear Applicant's post-trial motions.
 - c. Ineffective assistance of counsel for failure to be properly prepared to

provide information beneficial to Applicant or make arguments at the final motion hearing.

The evidentiary hearing convened on March 31, 2021, before the Honorable Paul M. Burch, circuit court judge, virtually via WebEx. Petitioner was represented by Tricia Blanchette, Esquire. Then-Assistant Attorney General William H. Ray represented Respondent. Petitioner testified, along with his mother Roslyn Glover, girlfriend Samantha Daley, and trial counsel, Attorney Johnny Gardner.

The PCR court denied post-conviction relief on May 7, 2021, via written order, finding:

1. Petitioner failed to establish ineffective assistance of counsel because:
 - a. Petitioner failed to show that a plea offer would have been accepted but for Counsel's errors and did not meet his burden of proof in proving deficiency or prejudice from Counsel's handling of plea negotiations.
 - b. Petitioner failed to show Counsel inadequately advised him that he would be tried in his absence if he failed to appear for trial because Petitioner knew of the trial date and that he was expected to be present but failed to appear.
 - c. Petitioner failed to establish Counsel was ineffective in representing him during sentencing because Counsel acted reasonably given the last-minute notice of the hearing and his competing professional obligations and because no trial transcript existed at the time. Additionally, Petitioner failed to show how any deficiency on the part of Counsel prejudiced him.
 - d. Petitioner failed to show Counsel was ineffective for failing to request additional time for post-trial motions because there was no showing that a denial of a continuance would have amounted to an abuse of discretion, that it would have prejudiced Petitioner, or it would have been made more likely to succeed by delaying the consideration.
 - e. Petitioner failed to establish Counsel was ineffective for failure to provide beneficial information or arguments at sentencing because he failed to produce evidence that, had it been presented, it would have reasonably altered the outcome of the sentencing hearing.
 - f. Petitioner is not entitled to relief based upon his allegation that he received a "trial tax" because Petitioner rejected a plea offer that would have given him a more lenient sentence and the sentence, though stiff, was not improper.

Petitioner filed a motion to alter or amend, pursuant to Rule 59(a) and (e), SCRCF on July 2, 2021. The court denied the motion on August 30, 2021. This appeal follows.

STATEMENT OF THE FACTS

On January 1, 2015, the Scotchman convenience store in Conway was robbed at gunpoint by two men who ran inside, pointed a gun in the clerk's face, and took twenty-eight dollars out of the register. (App. 40-43). Fearing for her life, the clerk kept her eyes on the floor and noticed one robber had on a muddy pair of Nikes and the other had on red sneakers. (App. 42). She described the one in the red shoes as having on a red sweatshirt, and the other wore fake diamond earrings, skinny blue jeans, and black gloves. (App. 42). The robbers fled after unsuccessfully attempting to access the safe. (App. 43-44). On the way out they grabbed a box of cigarillos and the clerk's cellphone before heading towards Four Mile road. (App. 44-45). The clerk then hit the panic button and hid behind the counter, waiting for the police. (App. 44, 46).

Around this time a customer in a white pickup truck pulled up to a gas pump. (App. 46). The clerk yelled for him to call 911, which he did, and told him not to come inside the store for his own safety. (App. 46-47, 73-74). He testified that he pulled up to the pump and saw two men run out of the store. (App. 72). He stated they were wearing blue jeans, either black or red jackets and appeared to be carrying something. (App. 73-75). Police responded to the scene, established a perimeter, and began searching for the suspects. (App. 53, 56, 78-80, 90-93). An officer spotted a black knit hat laying on the ground near the scene. (App. 80, 119).

Meanwhile, a van was spotted leaving the parking lot of the nearby Horry County Schools Education building around 2:00 AM. (App. 57). As it passed, officers realized it was a taxi and a young black male in a red shirt was in the passenger seat. (App. 57, 92). The vehicle was stopped, a lot of movement was noticed among the passengers, and everyone was asked to place their hands on the ceiling. (App. 58-59). The taxi driver coincidentally pulled over in the parking lot of the Scotchman that had just been robbed. (App. 82-83).

The passengers were asked to step out of the vehicle and the officer noticed that some had muddy shoes. (App. 61). The clerk identified one of the passengers, Tyreke Phillips, as a perpetrator. (App. 63, 65). A cell phone matching the description of the one stolen was seen in plain view on the vehicle's floorboard. (App. 94, 118). A search of the vehicle revealed a black handgun under the front passenger seat, a red hoodie behind the front seat, a black hoodie between the center seats, and a plastic bag in the rear of the vehicle containing cigarillos and another handgun. (App. 95-96, 102, 117). Petitioner was in the back of the van wearing a white shirt. (App. 84).

Asia Collier testified she was charged with armed robbery because she drove Petitioner, Amontre Ellerbe, Tyreke Phillips, and Aikeem Coles to the Scotchman that night. (App. 128). She stated she was dating Petitioner at the time and knew Ellerbe, Phillips, and Coles through him. (App. 130). They planned the robbery earlier that day at Petitioner's mother's house, which consisted of her driving Petitioner's brother's truck, while Petitioner and Ellerbe went into the store and the other two remained outside. (App. 129-30, 132-33). She first drove everyone to Walmart where they purchased black gloves, then dropped them off near the Scotchman. (App. 133-34). All four men got out, and about five minutes later they returned, panicked, and told her to drive. (App. 136-37). She drove them to a nearby apartment complex, stopped, and told them to get out and call a cab because she did not want to be further involved. (App. 139-40).

She noted that Ellerbe and Phillips had weapons, and that Ellerbe was wearing a black jacket and a hat. (App. 137-38). They all attempted to brush the mud off their shoes and Ellerbe took off his hat when he re-entered the truck. (App. 138). Collier stated that Petitioner had carried an extra pair of shoes with him and changed into them after the robbery. (App. 139). Petitioner told her to throw away the shoes and gloves, which she did after they left the vehicle.

(App. 143).

Collier stated that she became involved because Petitioner was very manipulative and she wanted his approval. (App. 141). She turned herself into police several weeks later and gave a written statement inconsistent with her testimony in court. (App. 145-46). She explained that Petitioner told her what to tell the police and she made the misleading statement because she was afraid. (App. 146, 156). Petitioner was the mastermind of the robbery, and him and Ellerbe were the ringleaders. (App. 151).

Amontre Ellerbe testified that he was incarcerated for armed robbery after robbing the Scotchman with Petitioner, Phillips, Coles, and Collier. (App. 159). He entered a guilty plea prior to Petitioner's trial. (App. 159). He and Petitioner were the two men who went into the store with guns and committed the crime. (App. 160). The original plan was for everyone to go into the store, but Coles and Phillips backed out, and chose to stand behind the building. (App. 162). He stated that Petitioner changed his clothes after the robbery, losing his red hoodie and putting on a pair of black Vans, before leaving the shoes in the getaway vehicle. (App. 162-69). Ellerbe testified that he was wearing a black hoodie at the time. (App. 164). He stated that it was Petitioner's plan to rob the store and that he was testifying against him because Petitioner had tried to blame him for everything. (App. 165-66, 168).

Petitioner failed to appear at trial and was tried *in absentia* by a jury and the Honorable R. Ferrell Cothran, circuit court judge. At the close of his trial, the judge stated that "when he's arrested, I don't know if I'll still be here or not but you can bring him before some judge and he'll open this sentence and read it to him and see what happens." (App. 203). His sentence was sealed and a bench warrant was issued for his failure to appear. (App. 203). Two arrest warrants were also issued, one for escape and another for removing an electronic monitoring device, after

his GPS monitor was found in the parking lot of a Conway apartment complex. The two arrest warrants were dismissed in February of 2016.

Petitioner was apprehended the following March and was brought before the Honorable Steven H. John for his sentencing hearing. (App. 205-14). Petitioner's Counsel was involved in another trial at the time, so another attorney, Jarrett Bouchette, was sent to the hearing in his place. (App. 207-08). Attorney Bouchette stated that he had no post-trial motions to make, but requested that the matter be held in abeyance until Counsel could appear. (App. 208).

Counsel appeared two days later and moved for a new trial and for reconsideration of the sentence. (App. 209-14). He stated that after researching the issue, he believed that the Court could reconsider the sentence. (App. 210). The Court agreed with him, stating that "whoever opens the sealed sentence by that Supreme Court decision does have the authority to change the prior sentence issued in this matter." (App. 210). In support of the motion, Counsel argued that Petitioner had no prior record, his co-defendants had received ten years' imprisonment, and he was an unmarried twenty-year old with no children. (App. 210).

The prosecutor responded by arguing that the co-defendants had entered guilty pleas prior to Petitioner's trial, and the two who received ten-year sentences were Phillips and Coles, who had not entered the store. (App. 211). Ellerbe had also entered a plea, but received a fifteen-year sentence, which was reduced to ten after he cooperated with the State by testifying against Petitioner. (App. 211). Judge Cothran was the judge who resentenced Ellerbe, and reduced the sentence to ten years after hearing the trial and determining that the testimony was essential to the conviction. (App. 211). She also pointed out that evidence was presented at trial showing that both Petitioner and Ellerbe were armed, and the robbery was planned during a time when "a lot of clerks were getting killed" in Horry County. (App. 211-12). The State opposed resentencing

because Judge Cothran was the one who heard these facts. (App. 212). After consulting with Petitioner, Counsel requested a ten or fifteen-year sentence. (App. 212).

Judge John declined to modify the sentence, stating that there was no trial transcript at that time, Judge Cothran was the one who had heard the testimony, and because of the severity of the crime, and the large role Petitioner played in the commission of the crime. (App. 213).

Judge John also refused to grant a new trial because no sufficient showing to grant such a request had been made. (App. 213-14).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the PCR court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCPP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found that Counsel’s representation was not ineffective because he employed an objectively reasonable trial strategy in the sentencing phase of the trial, and where no other actions would have reasonably changed the outcome of trial.

On appeal, Petitioner argues the PCR court erred in denying him relief because counsel provided ineffective assistance during sentencing and post-trial motion hearings and that prejudice resulted. However, the PCR court properly rejected this argument, finding that Counsel acted reasonably, given the circumstances he was under, and no other actions on the part of Counsel would have changed the results at trial. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “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 v.*

Washington, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel's strategy will be reviewed under "an objective standard of reasonableness." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Every effort must be made to eliminate the distorting effects of hindsight and evaluate counsel's decisions at the time they were made. *Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (citing *Strickland*, 466 U.S. at 689). To achieve this goal, an attorney's retrospective testimony that he would have done something differently may be disregarded if his actions at the time were in furtherance of an objectively reasonable strategy. *Id.* 392 S.C. 458, 710 S.E.2d at 65.

Though South Carolina has not yet developed robust authorities on ineffective assistance

of counsel claims concerning motions for reconsideration at sentencing hearings, other states have found that failure to file a motion to reconsider a sentence does not in and of itself constitute ineffective assistance of counsel. *State v. Brooks*, 260 So.3d 713 (La. Ct. App. 2018). Where an applicant alleges that their counsel was ineffective for failing to move for reconsideration of a sentence, they must show that there is a reasonable probability that the motion would have resulted in a different sentence. *State v. Lee*, 636 So.2d 634 (La. Ct. App. 1994).

Respondent contends that Counsel utilized an objectively reasonable strategy in sentencing and, accordingly, was not deficient on this ground. Specifically, Counsel acted reasonably in sending another attorney to be present in his absence, after having the matter held in abeyance until he could be present, after consideration about the risks and benefits of proceeding forward, and after concluding that it would be impossible to have the transcript in time for the motion for reconsideration hearing. (App. 207-10, 337-39). At the PCR hearing, Counsel testified that he moved to reconsider the sentence in front of Judge John, rather than Judge Cothran, because he believed that he would have a better chance of getting the sentence reconsidered. (App. 337-38). He stated that he thought that Judge John was going to reconsider the sentence when Judge John stated, on the record, that he had the authority to do so. (App. 210, 338). Though Counsel acknowledged he was unable to procure a transcript or mitigation witnesses because of the tight timeline, Counsel did present an otherwise reasonable argument in favor of reconsideration. Specifically, Counsel stated that Petitioner did not have a prior record, that all of his co-defendants had received a ten year sentence, and stated that he was a twenty-year-old resident of Horry County who was not married and did not have children. (App. 210). Thus, Counsel did everything that could be reasonably be demanded under the circumstances and

should not be found deficient as a result.

Even if Counsel was deficient on this ground, Petitioner was not prejudiced by the deficiency. Beyond presenting positive statements about Petitioner from several individuals with close, personal relationships with him, Petitioner has failed to show any evidence that could potentially have altered the Court's decision not to reconsider the sentence. Further, Petitioner has failed to meet its burden of proof in showing that this evidence would, in fact, have altered the decision on the motion to reconsider the sentence. Conversely, based upon the Court's findings at the motion for reconsideration hearing, this likely would not have made a difference. Judge John stated he made his determination to leave the initial sentence intact based upon the fact that he was not the trial judge, that armed robbery carries up to thirty years' imprisonment and is classified as violent and most serious, and the facts and circumstances concerning Petitioner's involvement as presented by the State at the hearing. (App. 213). Based upon those considerations, procurement of the transcript of the trial that caused Judge Cothran to set the initial sentence or presentation of several mitigation witnesses with significant personal ties to Petitioner likely would not have led the Court to change the sentence. Thus, even if Counsel was deficient, Petitioner was not prejudiced by the deficiency. Accordingly, relief should be denied on this ground.

CONCLUSION

Based upon the above argument and record before this Court, Respondent respectfully requests that this Court deny the petition for writ of certiorari and affirm the lower court's ruling. However, if this Court grants certiorari, Respondent requests an opportunity for further briefing of the issues addressed herein.

Respectfully submitted

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