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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Hon. Robin H. Stilwell, Circuit Court Judge
Appellate Case No. 2018-001531

Antwon M. Baker, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

Whether trial counsel was ineffective for not presenting Baker as a witness in his pretrial immunity hearing where counsel gave a valid strategic reason, and whether Baker has shown the result of the immunity hearing would have been different if he had testified.

STATEMENT OF THE CASE

In July 2012, a Spartanburg County grand jury indicted Petitioner Antwon Baker for murder (2012-GS-42-3668). In July 2013, Baker was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. Robert E. Ianuario, Esquire, and Matt Canady, Esquire, represented Baker at trial. Assistant Solicitors Derrick B. Bulsa and Lindsey Overby prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. On June 3-6, 2013, Baker proceeded to trial before the Honorable J. Derham Cole. A jury found Baker guilty of the lesser included offense of voluntary manslaughter and unlawful carrying of a pistol. Judge Cole sentenced Baker to eighteen years imprisonment for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Baker filed a timely notice of appeal. Appellate Defender Wanda H. Carter, Esquire, represented Baker on appeal. The South Carolina Court of Appeals affirmed Baker's conviction in an unpublished opinion. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Baker filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Baker filed a Petition for Writ of Certiorari. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

Baker filed a PCR application on December 21, 2015. Respondent made its return on July 12, 2016, moving for a more definite statement and requesting an evidentiary hearing. On December 30, 2016, Baker submitted an Application Addendum with additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Baker was present and represented by Susannah C. Ross, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney

General's Office. Baker testified on his own behalf. Respondent called trial counsel Robert Ianuario and trial prosecutor Derrick Balsa as witnesses. The PCR court denied relief in a written order dated July 8, 2018. Baker petitioned for certiorari. This Court granted certiorari on the first issue presented on November 21, 2021. Baker filed a brief on March 7, 2022. This brief of respondent follows.

STATEMENT OF FACTS

Baker was convicted of murder and unlawful carrying of a pistol arising out of the shooting death of Anthony Young (Victim) in Spartanburg County, June 3, 2012. Victim and Baker were both present at a Waffle House, located on Highway 29 in Spartanburg, SC. (App. p. 93). There was a history of prior physical altercations between Baker and Victim. (App. p. 98). On the night of the shooting, Baker drove into the parking lot of Waffle House at the same time as Victim was standing outside the restaurant. (App. p. 98). Baker witnessed Victim and a group of friends standing and, before exiting his vehicle, Baker placed a loaded pistol in his waistband. (App. p. 98). Baker entered the restaurant but came back outside when the group Victim was with called him outside. After exiting the restaurant, Baker encountered Victim and a group of friends and an argument began. (App. p. 98). Baker turned to walk back inside the Waffle House and was struck in the back of his head. (App. p. 99). Evidence presented at trial indicated it was not Victim who struck Baker in the head. Baker removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (App. p. 99). As Victim was running away, Baker shot Victim in the back five times. (App. p. 94). Baker fled the scene, changed clothes, and placed the pistol in the trunk of his girlfriend's vehicle. (App. p. 229-246). Law enforcement officers located Baker and his vehicle at an apartment complex and Baker was then placed under arrest. (App. p. 229-242).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

Trial counsel provided competent representation even though he did not present Baker as a witness at the pretrial immunity hearing because his decision was based on reasonable trial strategy. Furthermore, Baker was not prejudiced because he failed to show he acted in self-defense.

A. Trial counsel's decision not to present Baker as a witness was based on reasonable trial strategy.

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). 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. Id. at 692. The Sixth Amendment 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.

At the evidentiary hearing, trial counsel testified he decided not to present Baker as a witness at the immunity hearing because he “did not want to subject him to cross-examination” because he believed his sense of “bravado” would come off as disrespectful, and the solicitor would be able to use Baker’s testimony and insights about his demeanor to prepare for trial. (App. 645–46; 656). Trial counsel believed he could elicit sufficient evidence from the State’s investigator to make a valid self-defense case. (App. 645). Trial counsel further stated Baker preferred not to testify. (App. 647, lines 21–25).

Trial counsel’s decision not to present Baker as a witness at the immunity hearing was based on reasonable trial strategy. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (explaining “when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel”). Counsel’s articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992);

Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated: “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690-91.

Trial counsel articulated a valid strategic reason why he did not call Baker as a witness at the immunity hearing. It was reasonable that trial counsel did not want to reveal the substance of Baker's testimony in the pretrial hearing, and that he preferred not to give the solicitor the opportunity to observe Baker's demeanor on the stand because it may have helped the solicitor prepare for cross-examination during trial. Given the availability of other evidence tending to support Baker's self-defense claim, such as the fact that he was outnumbered and was struck in the head, Baker's testimony was not necessary. Finally, counsel testified Baker himself preferred not to testify. The PCR court correctly applied the deferential Strickland standard of review and found trial counsel was not ineffective. This Court should affirm.

B. Baker has not shown prejudice because he failed to show he acted in self-defense.

Even if counsel was ineffective, Baker has not shown prejudice because he has failed to show his testimony would have changed the trial court's opinion that he did not act in self-defense. Baker testified that, had he been called as a witness at the immunity hearing, he would have presented the same testimony that he presented at the PCR evidentiary hearing. (App. 647, lines 17–18.) His testimony at the evidentiary hearing, viewed with the other evidence from the immunity hearing, showed he illegally armed himself with a handgun at 5:00 in the morning and walked into a situation he knew would likely result in violence. These facts establish that Baker

failed to meet his duty to retreat to avoid a deadly conflict.¹ When a conflict inevitably occurred, he shot Victim five times in the back. Baker chose not to testify at trial, suggesting he did not think it would be beneficial to his case, likely for the same reasons trial counsel chose not to call him at the evidentiary hearing. The jury rejected his self-defense claim under a much more favorable standard of proof.²

Baker's testimony at the PCR evidentiary hearing did not materially alter the facts adduced at trial. While Baker was able to explicitly testify to his state of mind, trial counsel was able to make substantially the same point via argument to the jury based on the other evidence presented. There is not a reasonable probability the trial court would have granted immunity on if Baker had testified at the immunity hearing. Because Baker failed to prove the result of the

¹ Baker was not in "a place he had a right be" within the meaning of the Protection of Persons and Property Act. See Code §16-11-420(A) ("It is the intent of the General Assembly to **codify the common law Castle Doctrine** which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.") (emphasis added); Gilchrist v. State, 364 S.C. 173, 180, 612 S.E.2d 702, 706 (2005) (declining to elevate a dance club "to the possessory status of a home or place of business"); see also State v. Davis, 214 S.C. 34, 38, 51 S.E.2d 86, 87 (1948) ("In some jurisdictions the rule has been extended so as to relieve the defendant from the necessity of retreating if attacked in any place where he has a right to be, as when he is lawfully on a public street or highway. We have not gone that far."). However, he was still entitled to seek immunity under the common law of self-defense. Our Supreme Court has recognized that the common law of self-defense is "another provision of law" within the meaning of the Act that may entitle a defendant to immunity in certain circumstances. State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019) (citing S.C. Code Ann. § 16-11-450, which provides a "person who uses deadly force as permitted by the provisions of this article or **another applicable provision of law** is justified in using deadly force and is immune from criminal prosecution") (emphasis added). However, the common law of self-defense includes a duty to retreat unless the person is in their home or place of business. Accordingly, Baker was required to prove he had no probable means of avoiding the danger. In this case, Baker could have simply stayed inside the Waffle House instead of going outside to engage with Victim's group of friends.

² At the immunity hearing, Baker was required to prove the elements of self-defense by a preponderance of the evidence. State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). By contrast, at trial the State was required to disprove self-defense beyond a reasonable doubt.

immunity hearing would have been different if he had testified, he has not shown prejudice. This Court should affirm.

CONCLUSION

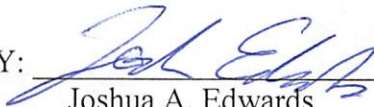
For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the decision of the lower court.

Respectfully submitted,

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