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Aug 19 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO HORRY COUNTY
Court Of Common Pleas

The Honorable Steven H. John, Trial Judge
The Honorable William H. Seals, Jr., PCR Judge

Appellate Case No.: 2018-00054

Theodore Wills,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR REHEARING

On July 20, 2022, this Court filed a published opinion affirming the post-conviction relief court's finding that Counsel was not ineffective for advising Petitioner to enter the proffer agreement. Petitioner filed a petition for rehearing on August 4, 2022, and the Court directed Respondent to file a return to the petition within ten days on August 9, 2022. Rehearing should be denied for the following reasons:

1. Petitioner contends that Trial Counsel was deficient because his understanding of the agreement's terms and his understanding that the agreement was advantageous was incorrect. However, Counsel reasonably believed that Petitioner would not be prosecuted if he entered the agreement and told the truth. (App. 377-79). Counsel also

reasonably believed the only preferable alternative to the proffer was if the charges were dismissed outright, which he acknowledged was never an option. (App. 389-90). The prosecutor also acknowledged that the agreement was in Petitioner's best interest, going so far as to state that he thought the agreement was a big mistake on the State's part and a stroke of genius on the defense's part, further corroborating Counsel's understanding that the agreement was favorable to Petitioner. (App. 429-30). The proffer agreement only switched from being an asset to a liability for Petitioner after Petitioner breached the agreement first by being deceptive; something he was specifically directed against by both Counsel and the prosecutor. (App. 377-78, 418, 421). Counsel's recommendation regarding the proffer was not based upon Counsel's allegedly blatant misunderstanding of the agreement or because the proffer was inherently disadvantageous to Petitioner, but was rather an objectively reasonable belief that Petitioner would not self-destructively breach an otherwise favorable agreement. *See Strickland v. Washington*, 466 U.S. 668, 686, 689 (1984) ("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."). Counsel is not deficient for failing to predict Petitioner's sabotage of his own case.

2. Petitioner contends that Counsel's understanding that Petitioner was truthful with him cannot excuse a deficiency. However, Counsel also stated he knew Petitioner's family for "a long time" and based upon the pre-existing relationship felt like Petitioner was honest with him about what happened, the statements given to him, and the

Solicitor's Office were consistent with one another. (App. 388-89). Petitioner was also advised that the agreement required him to tell the truth. (App. 377-78). Counsel is not expected to anticipate his client will lie to him after being advised that lying is counter to his best interest. This is particularly true in the light of the pre-existing relationship Counsel had with Petitioner. The prosecutor also confirmed Petitioner was advised to tell the truth stated he was under the impression that Petitioner was telling the truth until the results of the polygraph test came back, which corroborates the level of reasonableness Counsel had when believing his client was telling him the truth. (App. 418, 421). It is reasonable to presume that one's client is being truthful, especially when Counsel has a pre-existing relationship with them, is informed that being truthful will lead to a favorable outcome in the case, and all individuals involved believe that Petitioner is being truthful at the time. Thus, it was reasonable that Counsel presumed Petitioner would not actively work against his own best interest and any argument that Counsel should have expected Petitioner to lie after being directed to tell the truth is made with the benefit of hindsight. *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Counsel is not deficient for failing to anticipate Petitioner would lie without any indication he was doing so until the polygraph test results came back.

3. Petitioner contends that the fact that South Carolina Court had not specifically opined on the validity of Rule 410 waivers at the time the case was decided was not

determinative. Specifically, Petitioner argues that defendants have always been permitted to waive their rights and evidence rules in agreements with the State and that the State and the defense have always had the freedom to stipulate to certain matters. However, at the time of trial, no South Carolina cases were instructive on whether a defendant can waive the exclusionary provisions of Rule 410, SCRE, until Petitioner's direct appeal matter was decided, and an opinion published. *State v. Wills*, 390 S.C. 139, 144, 700 S.E.2d 266, 268 (Ct. App. 2010). Respondent contends that Counsel had no way of knowing that Rule 410, SCRE, protections could have been waived for more than impeachment purposes and it is unreasonable to Counsel to be clairvoyant about changes in the law non-existent at the time of trial. *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) (stating that Counsel has never been required "to be clairvoyant or anticipate changes in the law which were not existent at the time of trial."). Counsel is not deficient for failing to foresee how the appellate courts would decide Petitioner's direct appeal and the far-reaching consequences flowing from that decision.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Petitioner has failed to show any error in the Court's opinion. The petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: /s Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the return to petition for rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address listed in the Attorney Information System (AIS):

William G. Yarborough, III, Esquire
bill@wgylaw.com

Lauren C. Hobbis, Esquire
laurenwgylaw@gmail.com

This 19th day of August, 2022.

/s Chelsey F. Marto
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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

August 19, 2022

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211
(By *electronic filing only*)

RE: Theodore Wills v. State of South Carolina
Appellate Case No. 2018-00054

Dear Ms. Kitchings:

Enclosed for filing please find the State's Return to Petition for Rehearing in the above-captioned case. Counsel for Petitioner is also being served with a copy of the same. Please let me know if you need anything additional at this time.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
SC Bar No. 104191

CFM/em
Enclosures

cc: Lauren C. Hobbis, Esquire (by email only)
William G. Yarborough, III, Esquire (by email only)
Victim Advocacy Division