STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-0493

FERNANDO MONTES SAENZ, 318934,.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

ORIGINAL

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAELON E. MAY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Was the issue of trial counsel's failure to subpoena Officer Colegrove's history of drug related searches raised and ruled upon the by the PCR Court?

STATEMENT OF THE CASE

The Petitioner was indicted at the March 2006 term of the Oconee County Grand Jury for Trafficking in Cocaine More than 400 Grams (2006-GS-37-0646). (App. p.369-70). He was represented by David Almaraz, Esquire and Beattie Ashmore, Esquire. On November 27, 2006, the Petitioner underwent a bench trial pursuant to which he was found guilty as charged. (App. p.4-206). He was sentenced by the Honorable Howard P. King to confinement for a period of thirty (30) years. (App. p.205)

A timely Notice of Appeal was filed on Petitioner's behalf by appellate counsel, Beattie Ashmore, Esquire. (App. p.230-60). On appeal Petitioner argued that the trial court erred in denying his motion to suppress evidence seized during a search of a vehicle Petitioner was driving because the dog sniff did not reveal drugs were in the vehicle and the detention following the traffic stop violated Petitioner's Fourth Amendment rights. (App. p.230-243). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Saenz-Montes, Op. No. 2008-UP-548 (S.C. Ct. App. filed October 9, 2008). (App. p.259-60).

Petitioner filed an application for post-conviction relief (PCR) on April 20, 2009. (App. p.261-80). The Respondent made its return on October 1, 2009. (App. p.293-97). An evidentiary hearing into the matter was convened on March 14, 2011, at the Oconee County Courthouse. (App. p.298-337). The Petitioner was present at the hearing and was represented by Tjay Bagwell, Esquire. (Id). The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office. (Id). At the hearing, the Petitioner testified on his own behalf. (App. p.314-20). Respondent presented testimony of Petitioner's trial counsel, David Almaraz, Esquire. (App. p.321-30). On May 19, 2011, the Honorable R. Lawton

McIntosh issued an Order of Dismissal denying relief and dismissing the application with prejudice. (App. p.364-68).

The Petitioner filed a timely Notice of Appeal and Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief 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, 386 S.E.2d 624 (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, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington. 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 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 the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

I. The issue whether the PCR court erred in denying relief based on allegations that trial counsel was ineffective in his investigation for failing to subpoena Officer Colegrove's history of drug related searches is not preserved for review. Even if the issue was properly before this Court, it would be without merit.

The issue raised in this Petition for Writ of Certiorari that trial counsel was ineffective in his investigation of Applicant's case for failing to subpoena Officer Colegrove's history of drug related searches was not raised in the PCR proceedings at issue and was not preserved for appellate certiorari review. (App. p.261-368). Any issue not raised before the post conviction court and not ruled on by the post conviction court is not preserved for appellate certiorari review. Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997). Petitioner concedes this issue was not explicitly argued in the evidentiary hearing. (PWC p.14). Petitioner further concedes that this issue was not specifically addressed in the PCR Court's Order of dismissal. (Id).

Petitioner's original Application for PCR contained the following allegations: 1) ineffective assistance of trial counsel for failure to investigate, research and familiarize himself with the facts and circumstances of the traffic stop before moving to suppress; 2) ineffective assistance of counsel for failure to articulate and present meritorious issues at the suppression hearing; and 3) ineffective assistance of counsel for failure to object to the indictment. (App. p.261-80). At the PCR hearing, Petitioner asked trial counsel if there was a reason that trial counsel did not present any evidence on behalf of Petitioner at the suppression hearing, other than the questions trial counsel asked and making the motion to suppress. (App. p.321-22). The transcript of the PCR hearing reflects that Petitioner did not

raise the issue of trial counsel's failure to subpoena Officer Colegrove's history of drug related searches. (App. p.301-36). Additionally, Petitioner argued for the PCR court in closing that Petitioner's case was almost exactly similar to that of State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), and that had Petitioner received effective assistance of counsel like Terry Tindall received, then the evidence would have been suppressed in Petitioner's case. (App. p.330, line19 – p.331, line11). Accordingly, in his Order of Dismissal, the Honorable R. Lawton McIntosh did not make any ruling as to any issue regarding trial counsel's failure to subpoena Officer Colegrove's history of drug related searches. (App. p.364-68). The issue of trial counsel's failure to subpoena Officer Colegrove's history of drug related searches fits squarely into the rule stated in Padgett precluding issues not raised at the hearing level of PCR from being raised on appeal. Moreover, Petitioner admits in his Petition for Writ of Certiorari that the issue was not argued at the evidentiary hearing nor addressed in the order of dismissal. (PWC p.14). Therefore, this Court should dismiss this claim and deny the Petition for Writ of Certiorari because this claim was not preserved.

Even if this issue was properly raised and preserved for review, trial counsel was not ineffective in his investigation for failing to subpoena Officer Colegrove's history of drug related searches. Petitioner asserts that trial counsel had a duty to subpoena Officer Colegrove's history of drug related searches where he initially issued a warning ticket, then conducted an exterior dog sniff based on his belief that "crime was afoot," and where his drug dog "alerted," but no drugs were found during the search, to properly cross-examine Officer Colegrove during the suppression hearing. (PWC p.16). The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise

information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995).

Respondent submits that Petitioner did not proffer any questions that trial counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. At the PCR hearing, trial counsel testified that prior to the suppression hearing he filed a memorandum of law to support his motion to suppress and that at the suppression hearing, trial counsel cross-examined Officer Colegrove extensively. (App. p.323-26). At the suppression hearing, trial counsel cross-examined Officer Colegrove on the number of vehicle stops made by the Officer (App. p.51, lines6-12); the number of searches the Officer made on the vehicles detained for traffic violations (App.p.51, lines22-25); the number of citations issued by the Officer since he began patrolling I-85 with his dog (App. p.52, lines9-18); the number of arrests made by the Officer over the past three years on I-85 with the help of the dog (App. p.53-55); and on the number of arrests personally made by the Officer over the past three years on I-85 that were with the driver's consent (App. p.56, lines8-12). Respondent submits that Petitioner did not present any records or testimony concerning Officer Colegrove's history of drug related searches at the PCR hearing.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Respondent submits that

Petitioner failed to produce any witnesses or offer any other evidence at the PCR hearing that would show the outcome of the case would likely have been different had that evidence been developed. Furthermore, Petitioner has not shown that a different approach to cross-examination would have been beneficial to the defense. Petitioner fails to prove counsel's performance was deficient and certainly cannot show resulting prejudice as Petitioner's allegation is supported only by mere speculation as to the result.

At the PCR hearing, trial counsel testified that his motion to suppress was heard over the course of two days, the majority of the bench trial. (App. p.366-67). Trial counsel filed extensive memoranda on the issue of the traffic stop. (App. p.367). Counsel stated and the transcript reflects that counsel conducted extensive cross-examination of the arresting officer. (App. p.367). The PCR Court found that trial counsel's performance in arguing the motion to suppress was within reasonable professional norms. (Id). The PCR Court further found that the issue of whether the trial court erred in denying Applicant's motion to suppress on 4th Amendment grounds was raised on appeal, and the South Carolina Court of Appeals affirmed the trial court's decision. (Id). The PCR Court denied Petitioner's allegation that counsel was ineffective for failing to make a better argument in his motion to suppress. (App. p.367-68). Petitioner specifically pointed to State v. Tindall, supra. The PCR Court found that further argument on this issue would not have changed the outcome at Petitioner's trial as evidenced by the Court of Appeals' decision in Petitioner's case. (App. p.368).

Accordingly, the PCR Court correctly ruled that trial counsel was not ineffective for failing to adequately argue the motion to suppress. Because the PCR Court's findings are supported by evidence of probative value in the record, Respondent submits the PCR Court should be affirmed. Cherry v. State , 300 S.C. 115, 386 S.E.2d 624 (1989).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAELON E. MAY
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

Columbia, South Carolina
April 17, 2012

STATE OF SOUTH CAROLINA

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Certiorari to Oconee County

The Honorable R. Lawton McIntosh, Circuit Court Judge

FERNANDO MONTES SAENZ,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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

Dayne C. Phillips, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 17th day of April, 2012

Lena Pelishenko

Lena Pelishenko
LEGAL ASSISTANT