STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

2007-CP-40-03792
Appellate Case No. 2012-212848

RODDREGUS WELLS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

ALAN WILSON
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ATTORNEY FOR RESPONDENT

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ISSUE PRESENTED

Probative evidence supports the PCR court's finding that Counsel was not ineffective for allowing Petitioner to plead guilty to second degree burglary where Petitioner admitted he entered the Victim's house with the intent to commit a crime.

STATEMENT OF THE CASE

Petitioner is presently confined at Lee Correctional Institution pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was indicted at the June 2006 term of the Richland County Grand Jury for two counts of Kidnapping, Assault and Battery with Intent to Kill, Burglary-First Degree, and Armed Robbery. Kana A. Johnson, Esquire, represented Petitioner. Petitioner pled guilty to Armed Robbery, Burglary-Second Degree, Assault and Battery with Intent to Kill, and two counts of Kidnapping. The Honorable Judge L. Casey Manning sentenced Petitioner to eighteen years for each count of Kidnapping; eighteen years for Armed Robbery; fifteen years for Burglary-Second Degree, and eighteen years for Assault and Battery with Intent to Kill with all sentences running concurrently. Petitioner did not appeal.

Petitioner filed a timely PCR application on June 20, 2007, alleging he was being held in custody unlawfully. Respondent made its Return on August 24, 2007, requesting that an evidentiary hearing be held on petitioner's application.

On August 5, 2008, an evidentiary hearing on the matter was convened before the Honorable J. Michelle Childs at the Richland County Courthouse. By Order dated September 28, 2008, Judge Childs denied and dismissed Petitioner's application with prejudice. Petitioner did not appeal the result of the PCR hearing.

On August 11, 2009, petitioner filed a second PCR application requesting an appeal of his first PCR case pursuant to Austin v. State, 305 S.C. 453, 409 S.E2d 395 (1995). The Respondent filed a Return and Motion to Dismiss on September 22, 2011. Respondent filed an amended Return Motion to Dismiss on April 13, 2012, requesting the action be dismissed in part as untimely filed and successive in nature, but requesting a hearing be set solely on the issue of whether Petitioner was entitled to an Appeal pursuant to Austin v. State. On August 15, 2012,

Judge McMahon entered a consent order granting the PCR appeal pursuant to Austin v. State. Judge McMahon denied and dismissed all additional allegations. The Petitioner subsequently filed a Petition for Writ of Certiorari pursuant to Austin v. State on April 15, 2013. This Return follows.

STATEMENT OF TH E FACTS

Brandon Wells (Brandon) visited Alan McClain (Victim) at his home on December 23, 2005. (App. p. 24 lines 4-6). Brandon asked Victim if he had any marijuana, which Victim responded that he did not however they could go buy some. (App. p. 24 line 8-11). After purchasing marijuana, Victim returned to his house followed shortly by Brandon and Petitioner. Petitioner and Victim had never met prior to that night. (App. p. 24 lines 12-18). The three men and Alberta Powell (Powell) sat down in Victims him and began to smoke a single marijuana cigarette. (app p. 24 line 19—p. 25 line 5). Petitioner then asked Victim to use the restroom. (App. p. 24-25). Shortly thereafter, Petitioner returned and drew a rifle. (App. p. 25 lines 2-6). Petitioner ordered everyone to the kitchen and demanded Victims money. (App. p 25 line 7). Victim told Petitioner the money was in his cupboard, when in fact Victim had attempted to hide the money under the kitchen stove. (App. p. 25 line 7-11). After searching the cupboard and finding no money, Petitioner began to accuse Victim of lying. (App. p. 25 line 20-25). At this point, Brandon pointed to the kitchen stove where Victim had attempted to hide his money. (App p. 24 line 25—p. 25 line 2). Petitioner then the money and told the Victim, "I ought to shoot you for lying to me." (App. p. lines 5-10). Petitioner then proceeded to exit the house and Victim stood up. (App. p. lines 5-10). At that point Petitioner then pointed the rifle at Victim and shot him in his stomach. (App. p. 26 lines 11-13). The Petitioner then fled the scene. (App. p. 26 line 20-21). Brandon was interviewed by the Police and gave three varying statements. (App. p. 27 lines 6-20). The third and final statement was a full confession, explaining that he and Petitioner were cousins; he knew Petitioner intended to rob Victim, and the robbery was planned. (App. p. 27 lines 20-23).

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner 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.

Argument

Probative evidence supports the PCR court's finding that Counsel was not ineffective for allowing Petitioner to plead guilty to second degree burglary where Petitioner admitted he entered the Victim's house with the intent to commit a crime.

Petitioner argues Counsel was ineffective for allowing him to plead guilty to second degree burglary. However, this issue is not properly before the Court. The record conclusively demonstrates that this issue was not raised before the lower court during the PCR proceedings and therefore, was not ruled upon in the Order of Dismissal. An issue must be raised to and ruled upon by the circuit court in order to be considered on appeal. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 213 (Ct. App. 2002). "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). It is incumbent upon Petitioner to file a motion, pursuant to rule 59(e), SCRCP, to alter or amend judgment, if he feels that there was an issue before that court which was not ruled upon. As the record reflects, the argument was never brought before the lower court; therefore, there was nothing for the judge to rule upon.

However, even if this Court finds the issue is properly preserved for appeal, the record demonstrates that Counsel was not ineffective in regards to this allegation. Petitioner argues Counsel failed to adequately review the discovery materials resulting in Petitioner pleading guilty when there was insufficient evidence to establish his guilt. However, Petitioner testified at the PCR hearing that he reviewed all discovery material prior to his trial. (App. p. 54 lines 7-9). Petitioner further testified "...I went over the discovery, I went over discovery on my own..." (App. p. 54 lines 19-20). Counsel testified she conducted discovery, gave the defendant a copy of the discovery materials, and went back to the prison to follow up with any questions the

defendant might have had about it. (App. p. 60, lines 11-18). Counsel further testified Petitioner "explained to me that he was guilty and wanted to plead guilty." (App. p. 59 lines 13-15).

Additionally, Petitioner's argument that there was insufficient evidence to convict him of second degree burglary is without merit. Petitioner was indicted under S.C. Code Ann § 16-11-312, which states one is guilty of burglary if he "enters a dwelling without consent and with intent to commit a crime." The statute further defines "entering a building without consent" as "entering a building by using deception, artifice, trick, or misrepresentation to gain consent from the person in lawful possession." S.C. Code Ann § 16-11-312(3)(b). In State v. Dixon, the South Carolina Court of Appeals found evidence supported defendant's first degree burglary conviction. State v. Dixon, 337 S.C. 455,523 S.E.2d 784. In Dixon, defendant had a previous relationship with victim and was invited into victim's home. Id. However, the court found defendant entered the victim's home with the intent to distract the victim long enough for her co-conspirators to rob him. Id at 459. The court held, "because 'entering without consent' is statutorily defined to include entering through deceit, trickery, artifice, or misrepresentation," evidence supported defendant's conviction of first degree burglary. Id.

In the instant case, Petitioner admitted he entered the Victim's house with the intent to commit a crime. Specifically, Petitioner stated "I mean he (Victim) offered me in but I had an intention to do a crime." (App. p. 18 lines 11-12). Therefore, similar to Dixon, evidence supports Petitioner's guilty plea to second degree burglary.

Furthermore, Petitioner has not alleged any prejudice as a result of counsel's alleged deficient performance. Petitioner merely states "if she (Counsel) had went over [discovery] with me and I understood the evidence that was supposed to have been there, I believe I would have went to trial." (App. p. 54 lines 22-25). However, in Stalk, the Court held the prejudice inquiry

in a guilty plea PCR action will closely resemble the inquiry emerged in by courts reviewing ineffective assistance challenges to convictions obtained through a trail. Stalk v. Stalk, 383 S.C. 559, 681 S.E.2d 592 (2009). Stalk alleged his counsel was so unprepared that he was forced to plead guilty, but the Court held Stalk "needed to present some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful to Stalk, that is something that would have affected counsel's advice to Stalk to accept the plea bargain offered or that would have caused Stalk to decline to accept it." Id. Therefore, satisfying the prejudice prong "ordinarily requires more than simply defendant's assertion that but for counsel's deficient performance he would not have pled [guilty] but would have gone to trial." Id. In the instant case, Petitioner has not alleged the "something more" needed to meet the required prejudice prong.

In addition, Petitioner was not prejudice by any alleged deficient representation because the record provides overwhelming evidence of Petitioner's guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). As evidenced by the record, Petitioner addressed the court and apologized for everything that occurred. Specifically, Petitioner stated, "I ain't going to sit here and lie. I ain't even like that. But I know things happened and I apologize." (App. p. 32 lines 9-12). Petitioner further addressed the Victim, stating "I'm sorry about your daughter. I've got a little boy too. I never want to lose him. I'm sorry for bringing that pain into your life, man." (App. p. 32 lines 12-15). Petitioner additionally stated "...I know that I deserve punishment for what I did." (App. pg. 32 line 24). Therefore, Petitioner cannot show any prejudice as a result of Counsel's alleged deficiency, as there is overwhelming evidence to support Petitioner's guilt.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

By: _____
ATTORNEYS FOR RESPONDENT

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June 14, 2013

STATE OF SOUTH CAROLINA
SUPREME COURT

Certiorari to Richland County
Common Pleas
The Honorable R. Know McMahon, Circuit Court Judge
Case No. 2007-CP-40-03792
Appellate Case No. 2012-212848

RODDREGUS WELLS, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Karen A. Kocsis, certify that I have served the within **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 14th day of June, 2013.

Karen A. Kocsis
KAREN A. KOCSIS
Legal Assistant

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(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

June 14, 2013

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

RE: Roddregus Wells v. State of South Carolina
Appellate Case No. 2012-212848
Lower Court Case No. 2010-CP-40-03792

Dear Mr. Shearouse:

I am in receipt of the Petition for Writ of Certiorari pursuant to Austin v. State in the above matter. Please accept this letter in lieu of a formal Return in this case. The Respondent takes no position on whether or not the Circuit Court's grant of a belated review pursuant to Austin v. State was proper, but rather submits that this is a matter for the sound discretion of this Court.

If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/kk

cc: Wanda H. Carter, Esquire