

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2008-CP-40-3397
Appellate Case No. 2010-166367

Richard G. Jordan, Petitioner,

v.

State of South Carolina, Respondent.

BRIEF OF RESPONDENT

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S.C. SUPREME COURT

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STATEMENT OF ISSUE ON APPEAL

Is there evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner was fully advised of and voluntarily waived all potential conflicts of interest arising from Counsel's concurrent representation of Petitioner and his girlfriend, and that Petitioner failed to carry his burden in convincing the post-conviction relief court that an actual conflict of interest ever existed?

STATEMENT OF THE CASE

Petitioner is presently incarcerated within the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted during the May 2004 term of the Richland County Grand Jury for Possession with Intent to Distribute Methamphetamine (2004-GS-40-07950) and Trafficking in Methamphetamine (2004-GS-40-07951). Harry DePew, Esquire, (hereafter "Counsel") represented Petitioner on the charges. On June 23, 2004, Petitioner proceeded to jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted and sentenced to ten years imprisonment for Possession with Intent to Distribute Methamphetamine and to twenty-five years imprisonment for Trafficking in Methamphetamine. Both sentences were to be served concurrently.

A timely Notice of Appeal was filed and perfected. Following the submission of an Anders¹ brief and Petitioner's *pro se* brief, the Court of Appeals granted appellate counsel's request to be relieved and dismissed the appeal. State v. Jordan, Op. No. 2007-UP-216 (S.C. Ct. App. August 2, 2007).

Petitioner subsequently filed an application for post-conviction relief on May 14, 2008 (2008-CP-40-03397). Tricia Blanchette, Esquire, represented Petitioner on the application. The State was represented by Assistant Attorney General Brian T. Petrano of the South Carolina Attorney General's Office. An evidentiary hearing was convened before the Honorable L. Casey Manning on March 30, 2009, at the Richland County Courthouse. At the conclusion of the hearing, the record was left open for Counsel's testimony at a later date. A subsequent hearing was held on December 8, 2009, at the Richland County Courthouse before Judge Manning, during which Counsel testified and

¹ Anders v. California, 386 U.S. 738 (1967).

the record was closed. By order dated May 4, 2010, and filed May 5, 2010, Judge Manning denied and dismissed the application with prejudice. Thereafter, Petitioner filed a “Motion to Alter/Amend” pursuant to Rule 59(e), SCRCP, which Judge Manning denied by written Order filed June 11, 2010.

A timely Notice of Appeal was filed and a Johnson² Petition for Writ of Certiorari was filed on Petitioner’s behalf. By Order dated March 7, 2012, this Court denied counsel’s request to be relieved and instructed both sides to addressing the issue of whether the post-conviction relief court erred in finding trial counsel did not have an actual conflict of interest when representing Petitioner at trial. The parties subsequently submitted the Petition for Writ of Certiorari and the Return to the Petition for Writ of Certiorari. On April 18, 2013, this Court granted certiorari and requested briefing. On May 2, 2013, Petitioner served his Brief of Petitioner on Respondent. This Brief of Respondent follows.

² Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988).

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, 119, 386 S.E.2d 624, 626 (1989) (emphasis added).

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 the 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 (1984); Butler at 441, 334 S.E.2d at 813.

The proper measure of performance is whether counsel 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. A petitioner must overcome this presumption in order to receive relief. Cherry v. State, 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." Id. 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." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

There is evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner was fully advised of and voluntarily waived all potential conflicts of interest arising from Counsel's concurrent representation of Petitioner and his girlfriend, and that Petitioner failed to carry his burden in convincing the post-conviction relief court that an actual conflict of interest ever existed.

As a preliminary note, Respondent respectfully submits that the post-conviction relief court's ruling as set forth in its Order of Dismissal was not that "trial counsel did not have an actual conflict of interest" as set forth in the Court's Order in response to the Johnson petition filed by Petitioner's counsel, but rather that it was not "convinced that there was ever an actual conflict of interest to waive." (App. p. 796, l. 22). The post-conviction relief court did not make an affirmative finding that no conflict existed, but rather that Petitioner *failed to carry his burden* in "convincing" the post-conviction relief court that an actual conflict existed. Additionally, it is important to note that the post-conviction relief court dismissed the allegation on several independent grounds aside from whether an actual conflict existed, finding "[C]ounsel...made Petitioner aware of all potential conflicts of interest," which "Petitioner waived...though not in writing"; and by finding that a "failure to abide by the rules of Professional Conduct [has] no bearing on the constitutionality of a conviction." (App. p. 796, ll. 11 – 15). Respondent presents these additional findings as it is crucial to take into account the entirety of the post-conviction relief court's ruling on the alleged conflict of interest to properly evaluate the issue at hand.

At the evidentiary hearing, Petitioner testified that after being released on bond, he rode with his girlfriend, Cynthia Summers (hereafter "Summers"), to Counsel's office, where he retained Counsel to represent him on the charges. (App. p. 721, ll. 15 – 25).

Petitioner testified that while he was aware that Summers was “a suspect at the same time,” he knew that she had not been arrested for any charges related to the incident. (App. p. 722, ll. 1 – 5). Petitioner stated he “didn’t know [Counsel] had represented [Summers] in the past and...found out during that time he...represented her presently.” (App. p. 722, ll. 12 – 16). Petitioner stated he did not know Counsel was representing Summers on unrelated pending Lexington County charges at the time of Petitioner’s arrest and trial. (App. p. 725, l. 23 – p. 726, l. 1). Petitioner testified that if he had been aware that Summers had served as a confidential informant and that Counsel was representing her on Lexington County charges, he would have taken the plea offer previously extended by the State. (App. p. 727, ll. 3 – 7). Petitioner further testified that he did not sign a waiver to Counsel’s conflict of interest in representing Summers and himself simultaneously. (App. p. 744, ll. 14 – 17). On cross-examination, Petitioner readily admitted he was unaware of what cases, if any, on which Summers worked as a confidential informant, including his own case. However, he testified that he and Summers had been in a relationship for roughly three years before his arrest and lived together. (App. p. 747, ll. 4 – 16; p. 753, ll. 11 - 18).

Counsel testified at the post-conviction relief hearing that he was retained by Petitioner upon the recommendation of Petitioner’s girlfriend, whom counsel said he “had previously defended.” (App. p. 763, ll. 11 – 18). Counsel elaborated that his representation of Summers “may have” overlapped with his representation of Petitioner, but that he didn’t “have any independent recollection” of the timeframe for which he represented Summers. (App. p. 764, ll. 14 – 15; ll. 1 – 4). Counsel testified that he reviewed the waiver of attorney-client privilege with both Petitioner and Summers

because both were attending meetings together and he felt the need to advise both that this would have an impact on attorney-client privilege and his representation of each. Specifically, Counsel testified that “[Petitioner] was aware of [Summers’] situation and...[he] discuss[ed] it with [Petitioner].” (App. p. 767, ll. 22 – 23). He reiterated Petitioner’s knowledge of Counsel’s on-going representation of Summers and their discussions about how that may affect his representation, saying “[Petitioner] was aware of [it] [and] in fact...he may have even taken her to one or two appearances in Lexington County”, and “[Petitioner] expressed the opinion that he was aware of everything she was doing [a]nd...even spoke with her about what she was doing in Lexington County.” (App. p. 768, ll. 6 – 11; p. 774, ll. 2 - 6). Counsel conceded he did not have Petitioner sign a formal waiver of any potential conflict of interest, but testified he had fully disclosed the potential conflict of interest with Petitioner. (App. p. 767, l. 25 – p. 768, l. 1; p. 780, ll. 20 – 23). On cross-examination, Counsel testified that Summers was never charged with a crime relating to the methamphetamine operation at Petitioner’s house, nor did he represent her on any charges stemming from the event. (App. p. 781, ll. 19 – 23).

In its Order of Dismissal, the post-conviction relief court not only found Counsel’s testimony to be credible, but conversely found Petitioner’s testimony “not credible.” (App. p. 798). This factual finding by the post-conviction relief court served as the foundation of the court’s determination that Petitioner was aware of the alleged conflict prior to his trial, which Petitioner either expressly or implicitly waived. The court went on to find that while Counsel’s failure to have the waiver in writing may be a violation of the Rules of Professional Conduct, such a violation has no bearing on the

constitutionality of Petitioner's conviction. The court also noted it was not "convinced" by the evidence presented by Petitioner at the hearing "that there ever was an actual conflict of interest" in this instance.

Petitioner alleges Counsel was ineffective for failing to disclose that he would be representing both Petitioner and Summers on the same charges. Based on Counsel's testimony at the evidentiary hearing, which the post-conviction relief court found to be credible, Summers did not have charges arising from this incident. Petitioner did not introduce any evidence to show that Summers' on-going Lexington County charges, which Counsel *might* have represented Summers on at the same time, had any correlation whatsoever to the charges which Petitioner was facing.³ Petitioner's self-serving statement regarding Counsel's representation of both parties on "the same charges" is a mischaracterization of the record before this Court and wholly unsupported by the credible testimony and evidence presented at the post-conviction relief hearing.

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). "The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be

³ According to the Lexington County Clerk of Court's Online Public Index of cases, the charge which counsel represented Summers on that was introduced at the post-conviction relief hearing and is now included in the Appendix before this Court (App. p. 856 – 857) was an Accessory after the Fact charge stemming from an original Burglary charge.

detrimental to his other client.” Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979)). Further, the mere possibility trial counsel may have a conflict of interest is insufficient to impugn a criminal conviction, nor is counsel’s failure to advise of a potential conflict of interest. See State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Finally, while Petitioner need not demonstrate prejudice if there is an *actual* conflict of interest, “until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for [a] claim of ineffective assistance.” Duncan, 281 S.C. at 438, 315 S.E.2d at 811.

There is no evidence in the record to demonstrate Counsel’s duties to Summers on the wholly unrelated Accessory After the Fact charge in Lexington County interfered in any way with his representation of Petitioner on the current drug charges from Richland County. At the post-conviction relief hearing, Petitioner vehemently attempted to draw a link between Summers’ previous work as a confidential informant for police and the unknown identity of the informant in his case to establish the necessary “adverse” relationship, but entirely failed to bring forth even one shred of evidence to back up the outlandish theory. Rather, the theory was grounded entirely in speculation and conjecture; in fact, Counsel went on to testify a “Mr. Jones” was in fact the confidential informant against Petitioner in the case and not Summers. (App. p. 774, ll. 19 – 25; p. 781, l. 24 – p. 782, l. 1). Petitioner also attempted to paint an adversarial relationship between his and Summers’ representation by alleging counsel failed to present a third-party guilt theory at trial pointing to Summers as the actual subject of the police investigation. This theory also failed as the testimony presented and evidence in the

record clearly established Counsel was presenting such a theory against a “Mr. Hutchinson,” as the majority of the evidence regarding third-party guilty pointed to Hutchinson and not Summers as the perpetrator. (App. p. 770, l. 23 – p. 771, l. 3; p. 773, ll. 4 – 11). Petitioner offered no other theory as to how he and Summers’ interests were adverse to each other based on Counsel’s representation of Summers on the unrelated Lexington County charges. Accordingly, there is evidence of probative value in the record to support the post-conviction relief court’s finding that it was not “convinced that there was ever an actual conflict of interest to waive” as Petitioner failed to carry his burden in proving such. Additionally, there is nothing set forth in the record to prove that an actual conflict of interest existed in this instance, regardless of Petitioner’s failure to carry his burden in proving such.

Petitioner alleged that had he known Counsel was actively representing Summers and that she had worked as a confidential informant, he would have accepted the State’s plea offer. (App. p. 726, l. 24 – p. 727, l. 7). There is overwhelming evidence in the record to support the post-conviction relief court’s finding that Petitioner not only was aware of Counsel’s on-going representation of Summers and Summers work as a confidential informant, but also that Petitioner waived any potential conflict of interest in those regards. Counsel plainly testified throughout the course of the post-conviction relief hearing that he had discussed his on-going representation of Summers with Petitioner, and noted that Summers had “told [Petitioner] that she was [working as a confidential informant] in [Counsel’s] presence” which they “discussed...all three of [them].” (App. p. 768, ll. 12 – 24).

Finally, the post-conviction relief court properly evaluated Petitioner's waiver of the potential conflict of interest and Counsel's failure to have Petitioner sign such an official waiver. First, it is important to note that the requirement of signed waivers in potential conflict situations is a standard imposed by the Rules of Professional Conduct, which "have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993). In Lomax v. State, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008), this Court specifically noted that counsel's failure to advise a client of a potential conflict of interest did not affect the constitutionality of the subsequent conviction. In the instant case, the *potential* conflict was reviewed collectively with Summers and Petitioner repeatedly during pre-trial meetings. Petitioner willingly proceeded to trial with Counsel, knowing Counsel also represented Summers on unrelated Lexington County charges. Therefore, any alleged conflict of interest was waived by Petitioner and Counsel's failure to have such a waiver in writing has no bearing in this post-conviction relief action.

Accordingly, there is evidence of probative value in the record to support the post-conviction relief court's finding that Petitioner failed to carry his burden in proving an *actual* conflict of interest existed, as well as in finding the absence of a formal, signed waiver form had no bearing on the constitutionality of Petitioner's conviction. Further, because the record before this Court shows no *actual* conflict existed, Petitioner was precluded from proving resulting prejudice. Therefore, Respondent respectfully requests this Court affirm the post-conviction relief court's order denying the action with prejudice, as counsel was not ineffective for failing to disclose the conflict and because there was no *actual* conflict of interest in this case.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Respectfully submitted,

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By: Megan E. Harrigan
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July 3, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
The Honorable L. Casey Manning, Circuit Court Judge
Case No. 2008-CP-40-3397
Appellate Case No. 2010-166367

RICHARD G. JORDAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

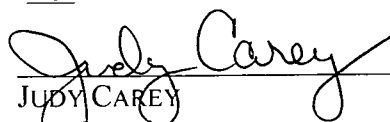
PROOF OF SERVICE

I, Judy Carey, certify that I have served the within **Brief of Respondent** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 3rd day of July, 2013.



JUDY CAREY
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July 3, 2013

The Honorable Daniel E. Shearouse
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Re: **Richard G. Jordan v. State of South Carolina**
Appellate Case No. 2010-166367
Lower Court Case No. 2007-CP-40-3397

Dear Mr. Shearouse:

I am enclosing the original and six copies of the **Brief of Respondent** in the above case.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH/lm

cc: Robert M. Pachak, Esquire
Trisha Allen, Victim Services

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