

STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 22 2013

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2012-212591

Robert Young,..... Petitioner,

v.

State of South Carolina,..... Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

SUZANNE H. WHITE
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective for failing to object to the State's references to Petitioner's T-shirt with the slogan "snitches get stitches", when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Petitioner at the February 2007 term of General Sessions for assault and battery with intent to kill (2007-GS-42-0996), grand larceny (2007-GS-42-0997), and armed robbery (2007-GS-42-0998). William McPherson, Esquire, represented the Petitioner. On February 6, 2008, a jury convicted the Petitioner of assault and battery with intent to kill and armed robbery.¹ The Honorable J. Derham Cole sentenced the Petitioner to confinement for thirty (30) years for armed robbery and a consecutive twenty (20) years for assault and battery with intent to kill.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Young, Op. No. 2010-UP-0333 (S.C. Ct. App. June 28, 2010). The Remittitur was issued on July 14, 2010.

The Petitioner subsequently filed a PCR application on October 18, 2010. An evidentiary hearing into the matter was convened on December 5, 2011, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by J. Kenneth Robertson, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing, The Honorable J. Mark Hayes, II denied the PCR application by written Order dated March 16, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

¹ The jury found Petitioner not guilty of grand larceny.

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 Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. The PCR Court properly held that Counsel was not ineffective for failing to object to the State’s references to Petitioner’s T-shirt with the slogan “snitches get stitches”, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.**

Petitioner was charged with assault and battery with intent to kill (ABWIK) and armed robbery, following an incident in which Petitioner shot a local cab driver twice in the back of his head while attempting to rob him. The State charged Petitioner after the cab driver identified Petitioner through a photo lineup and based upon Petitioner’s regular use of the same cab driver over the prior year. The Petitioner alleged that Counsel was ineffective for failing to object to the State’s repeated reference to Petitioner’s black T-shirt with the slogan “snitches get stitches” which was improper character evidence and prejudicial to Petitioner.

In a post-conviction relief proceeding, the Petitioner 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 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. The Petitioner 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 Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured 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.

Petitioner testified he met with Counsel about five times before the trial. (App. p. 414). Petitioner testified he understood the alibi defense Counsel proposed to use at trial, and provided numerous witnesses that would testify on his behalf. (App. pp. 414-15). Also, Petitioner testified he did not take the witness stand because his prior record would have reflected poorly on his character in front of the jury. (App. p. 416). However, Petitioner testified he thought the six instances of stating he was wearing a shirt with "snitches get stitches" made a great difference. (App. p. 417). Petitioner also stated the statements about his shirt came from detectives that were describing his clothes when they came to interview him. (App. p. 424).

Petitioner admitted to calling the victim, cab driver, on the night of the incident. (App. p. 419). Petitioner testified the victim identified him as the shooter from a six man photo lineup. (App. p. 421-22). Furthermore, Petitioner testified the police found clothing at his home, which

tested positive for the victim's blood. (App. p. 422). Petitioner testified Counsel tried to suppress his statements but was denied. (App. p. 423). Petitioner testified Counsel presented several witnesses on his behalf, including ones Petitioner specifically asked for throughout the trial. (App. p. 423).

Counsel was unable to attend the PCR hearing since he now resides in Texas. The sworn testimony of Counsel was presented to the Court by transcript of his deposition by telephone. Counsel testified he has been practicing law for about forty years, and for the last twenty years his work has been 99 percent criminal. (App. p. 423). Counsel testified he advised Petitioner to take a plea offer presented a week before trial. (App. p. 437). Counsel based his recommendation on the overwhelming weight of evidence against Petitioner. (App. p. 438). Counsel testified the State had the victim to testify, the victim's blood on Petitioner's clothes, and phone records showing a call from the Petitioner's home to the victim's cell phone. (App. p. 438).

Counsel testified he did not think the statement on the T-shirt necessitated an objection. (App. p. 443). Counsel testified his main concern was the color of the shirt, since his alibi witnesses stated Petitioner was in a white shirt, and the shirt discussed was black. (App. p. 443). Counsel testified the distinguishing color was more of a factor for the trial than the statement "snitches get stiches". (App. p. 443-44).

Respondent submits that the PCR court was correct in finding that Petitioner was not prejudiced by any alleged deficient representation because there was overwhelming evidence of the Petitioner's guilt. (App. p. 460-1). 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); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v.

State, 305 S.C. 365, 409 S.E.2d 344 (1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming; therefore, this Court held that the applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
SC Bar #78225

By: 
ATTORNEYS FOR THE RESPONDENT

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CERTIORARI TO SPARTANBURG COUNTY
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Circuit Case No.: 2010-CP-42-5566
Appellate Case No.: 2012-212591

ROBERT YOUNG,

Petitioner,

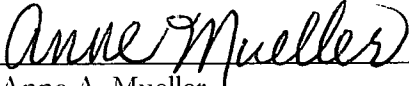
v.

STATE OF SOUTH CAROLINA,

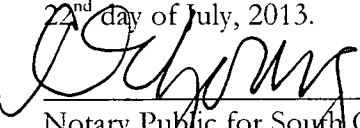
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 22nd day of July, 2013.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
22nd day of July, 2013.


_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: 10/28/2014



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

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S.C. Supreme Court

Via Hand Delivery


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

RE: Robert Young v. State of South Carolina
Circuit Court Case No: 2010-CP-42-5566
Appellate Case No.: 2012-212591

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,



Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: LaNelle C. DuRant, Esquire (w/enclosure)