

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

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

Appellate Case No. 2012-213435

Donald Hugh Johnson,..... Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- I. Did the PCR Court properly held that Counsel was not ineffective for failing to research and inform Petitioner about the Interstate Corrections Compact, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice?
- II. Although not specifically raised and presented to the PCR Court and therefore not ruled upon, is it correct that not only was Counsel was not ineffective for failing to convey a conversation between Counsel, prosecutors, and a judge, but Counsel was not ineffective for failing to properly investigate plea negotiations, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice?
- III. Did the PCR Court properly hold that Counsel was not ineffective for failing to object to the victim's testimony regarding Petitioner's prior bad acts, 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 May 2006 term of General Sessions for three counts of criminal sexual conduct with a minor, second degree (06-GS-42-1618, -1619, -1620), contributing to the delinquency of a minor (06-GS-42-1621), and committing or attempting lewd acts upon child under sixteen (06-GS-42-1622). Andrew J. Johnston, Esquire, represented the Petitioner.

On June 12, 2007, a jury convicted the Petitioner of these charges. The Honorable J. Derham Cole sentenced the Petitioner to confinement for eighteen (18) years for each of the three criminal sexual conduct with a minor, second degree, three (3) years for contributing to the delinquency of a minor, and fifteen (15) years for committing or attempting lewd act upon child under sixteen, all to run concurrent.

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. Johnson, Op. No. 2009-UP-606 (S.C. Ct. App. filed December 22, 2009). A Petition for Rehearing was filed on behalf of Petitioner and denied by written Order on May 4, 2009. A Petition for Writ of Certiorari was filed on the Petitioner's behalf and subsequently denied by the South Carolina Supreme Court on December 17, 2009. The Remittitur was issued on January 7, 2010.

The Petitioner subsequently filed a PCR application on October 6, 2010. The Respondent made its Return on or about July 15, 2011. An evidentiary hearing into the matter was convened on September 22, 2011, at the Spartanburg County Courthouse. The Petitioner

was present at the hearing and was represented by Tara D. Shurling, 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 February 23, 2012. Petitioner filed a Rule 59(e) Motion on March 8, 2012 asking for Judge Hayes to amend or alter the Order. Respondent filed their Return and Motion to Dismiss on March 21, 2012. Judge Hayes denied Petitioner's Motion to Alter or Amend by Order dated October 31, 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.

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 inform Petitioner about the Interstate Corrections Compact, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.**

Petitioner was charged with three counts of criminal sexual conduct with a minor, second degree, contributing to the delinquency of a minor, and committing or attempting lewd acts upon child under sixteen, following a report by the victim, his step-granddaughter, and investigation by police. Petitioner voluntarily turned himself in after warrants were issued, and the case proceeded to trial. Petitioner alleged that Counsel was ineffective for failing to adequately research the Interstate Corrections Compact and discuss with Petitioner regarding provisions that might be available to protect Petitioner, a former Spartanburg City police officer, if he were incarcerated.

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 asserted his innocence throughout the entire proceeding and did not want to plead guilty. (App. p. 470). Petitioner testified that he was afraid of being incarcerated in a South Carolina prison because he was a retired police officer. (App. p. 472). Petitioner stated he “probably put some of those guys in prison.” (App. p. 471, lines 24-25). Furthermore, Petitioner testified that had he been notified of the possibility of serving his prison sentence outside of the state he would have considered a plea bargain. (App. p. 473). However, Petitioner testified on cross-examination that he was mainly on the road doing traffic stops for most of his police career and that he had never been an investigator or a detective. (App. p. 474).

Counsel testified that he was aware Petitioner had fear about being placed in prison with

people that he had possibly arrested previously. (App. p. 402). Counsel testified that he understood that as a general rule, former law enforcement officers are placed in some sort of the protective custody once they are in prison. (App. p. 402). Counsel also testified he was not aware of the Interstate Corrections Compact and he did not research the availability of procedures with other states regarding law enforcement officers who are incarcerated. (App. p. 402).

Respondent submits that the PCR court properly found that the Petitioner failed to demonstrate that the Interstate Corrections Compact would have been applicable to the Petitioner's case. (App. p. 511). "The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application." Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Petitioner failed to prove that Counsel was deficient in failing to research or discuss the Interstate Corrections Compact with Petitioner or that the lack of research and discussion affected the outcome of the proceedings.

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.

II. Although not specifically raised and presented to the PCR Court and therefore not ruled upon, Respondent submits that not only was Counsel was not ineffective for failing to convey a conversation between Counsel, prosecutors, and a judge, but Counsel was not ineffective for failing to properly investigate plea negotiations, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.

Petitioner filed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRCP, following the receipt of the signed and filed Order of Dismissal. (App. p. 516-8). Petitioner argued that the Order did not properly address a claim that Counsel was ineffective for failing to communicate to Petitioner a conversation held with prosecutors and a judge in which the

possibility of a probationary sentence was mentioned. (App. p. 516). The court found that the Order properly addressed the issues raised at the hearing, as it focused on the overall allegation raised at the hearing regarding Counsel's failure to properly pursue plea negotiations, which the court interpreted to include testimony regarding the conversation. (App. p. 524). However, if the issue as raised in the 59(e) by Petitioner was addressed on its merits, Petitioner still failed to establish deficient performance and any resulting prejudice.

Petitioner testified Counsel never discussed the conversation Counsel and the prosecutors had with Judge Goode. (App. p. 472). Petitioner stated had he known he would not have been in a South Carolina prison, he would have "considered a plea bargain quicker." (App. p. 473, lines 9-10). However, Petitioner agreed he did not want to plead guilty, and claimed his innocence the entire time. (App. p. 470; 473).

Counsel testified that Petitioner was adamant that he was innocent and was not willing to plead guilty if he had to serve any time. (App. p. 395). Counsel testified that he and the prosecutors did have a hypothetical discussion with Judge Goode about the case and what the judge would sentence Petitioner to if he pled guilty; however, Counsel testified that not only does he believe that Petitioner does not have the constitutional right to pick which judge he wanted to plead before, but he also did not know if he could have even gotten Petitioner to enter the plea. (App. p. 398-9). Counsel did not recall if he notified Petitioner of the discussion with Judge Goode, but reiterated the fact that not only would he had to convince Petitioner to accept a plea, but he would have had to ensure Petitioner pled before Judge Goode. (App. p. 400-1). Counsel's overall recollection was that Petitioner had made it clear to Counsel that he would not plead guilty even if he could get a probationary sentence. (App. p. 401). Further, Counsel testified that from the beginning, Petitioner only indicated that he wanted a trial. (App. p. 432).

Respondent submits that the PCR court was correct in finding that Counsel was not ineffective for failing to pursue plea negotiations and instead preparing for trial. The Order clearly and accurately states the testimony surrounding the Petitioner's desires to go to trial and profess his innocence and addresses the conversation with Judge Goode. (App. p. 510-1). Clearly the court was correct in finding that Petitioner failed to meet his burden of proof as to this claim (App. p. 510).

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.

III. The PCR Court properly held that Counsel was not ineffective for failing to object to the victim's testimony regarding Petitioner's prior bad acts, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.

The Petitioner also alleged that Counsel was ineffective for failing to object to the victim's testimony, when the testimony consisted alleged prior bad acts. Petitioner alleged that the victim testified about several instances when Petitioner attempted sexual intercourse/penetration and although initially objected to pre-trial, Counsel was ineffective for failing to renew the objections to preserve for appellate review.

Counsel testified that he objected and argued against the testimony during pre-trial motions, but acknowledged that in retrospect he probably should have raised an additional objection during trial. (App. pp. 407-8). Counsel also testified that he did acknowledge that the testimony may be admissible if it was shown to relate to motive, identity, existence of a common scheme or plan, or absence of mistake, accident or intent. (App. p. 436). Counsel testified that the victim had not only alleged that the abuse occurred a couple of times as indicated by the number of indictments, but rather had alleged that the abuse occurred over a number of years. (App. p. 438).

Counsel testified that he believed the references to attempted penetration or intercourse could have fit within the parameters of the lewd act charge because it is such a broad statute. (App. p. 439). Petitioner was charged, in addition to charges of criminal sexual conduct with a minor and contributing to the delinquency of a minor, with committing or attempting a lewd act upon a child under sixteen. (App. p. 367-76).

Respondent submits that the PCR court properly found that Counsel was not ineffective for raising additional objections to the victim's testimony. As indicated in the Order, the court found that even if Counsel was deficient for failing to renew his objection, there was no prejudice. (App. p. 512-3). 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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September 5, 2013

STATE OF SOUTH CAROLINA
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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

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

S.C. Supreme Court

Circuit Case No.: 2010-CP-42-5375
Appellate Case No.: 2012-213435

DONALD HUGH JOHNSON,

Petitioner,


v.

STATE OF SOUTH CAROLINA,

Respondent.

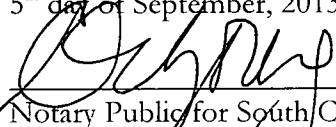
CERTIFICATE OF SERVICE

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, Tara D. Shurling, Esquire, 3614 Landmark Drive, Suite D, Columbia, South Carolina, 29204, on this the 5th day of September, 2013.



Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
5th day of September, 2013.



Notary Public for South Carolina.

My Commission Expires: 10/28/2014

(L.S.)



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S.C. Supreme Court

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PCR FACSIMILE: 803.734.4113

ALAN WILSON
ATTORNEY GENERAL

September 5, 2013

Via Hand Delivery

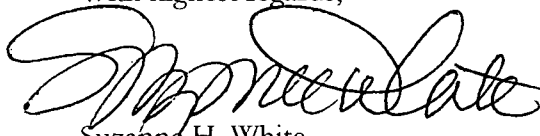
Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Donald Hugh Johnson v. State of South Carolina
Circuit Court Case No: 2010-CP-42-5375
Appellate Case No.: 2012-213435

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: Tara D. Shurling, Esquire (w/enclosure)