STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No. 2012-212588

James Michael Dover,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for not investigating the reason Petitioner's acceptance into drug court was withdrawn as counsel neglected the opportunity to have the problems resolved in order for Petitioner to be allowed to return to drug curt and thus avoid a jury trial?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the July 2006 term of General Sessions for distribution of methamphetamines within proximity of a school (2006-GS-39-1134) and distribution of methamphetamines (2006-GS-39-1135). (App.pp.291-94). John W. DeJong, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On July 27, 2006, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to concurrent terms of ten years for distribution of methamphetamines within proximity of a school and twenty years for distribution of methamphetamines, third offense. (App.p.186; pp.295-96).

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Dover, Op. No. 2009-UP-246 (S.C. Ct. App. filed May 28, 2009).

Petitioner filed an application for post-conviction relief (PCR) on March 9, 2010 (2010-CP-39-0457). (App.pp.188-93). A hearing was convened at the Pickens County Courthouse on February 27, 2012. (App.pp.199-262). Petitioner was present and represented by James S. Erwin, III, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison Hill denied relief in an order dated June 12, 2012 and filed June 14, 2012. (App.pp.281-89).

STANDARD OF REVIEW

The proper standard for review of a PCR 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). 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, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

Petitioner argues trial counsel was ineffective because he did not investigate why Petitioner's acceptance into the drug court program was withdrawn. This argument is without merit.

At the PCR hearing, Petitioner stated he received a letter dated May 2, 2006 that noted he was accepted into the drug court program and would plead guilty on May 19, 2006. (App.pp.218-19; p.270). Petitioner stated he owed more than $2000 in child support but that his father hired an attorney to have his ex-wife release him from paying child support. (App.pp.219-21). Petitioner stated he believed this problem was taken care of by May 15, 2006 and that he would plead guilty on May 19th. (App.pp.221-22). Petitioner stated he believed his daughter and parents had "just went ahead and paid [the child support arrearage] all off themselves." (App.p.222). Petitioner stated his daughter had spoken to someone with the drug court program who said he could still be accepted – and would plead guilty on June 30, 2016 – if he satisfied the arrearage. (App.p.223;

pp.225-26). Petitioner stated trial counsel told him in early June, however, that drug court was no longer available. (App.p.223; p.226).

Petitioner's daughter, Jessie Burton, stated she learned Petitioner's arrearage in child support payments would be a hindrance to entering the drug court program. (App.p.230). Ms. Burton stated an attorney was supposed to draw up paperwork so the recipient of the child support would stop the support and waive the arrearage. (App.p.231). Ms. Burton stated she then took money to the clerk of court so the amount "was paid down to the balance that it needed to be." (App.p.231). Ms. Burton admitted she never spoke to trial counsel about the child support arrearage issue. (App.p.235).

The assistant solicitor who prosecuted the case, Lucas C. Marchant, testified he approved Petitioner's application to the drug court program. (App.p.237). Solicitor Marchant confirmed the child support arrearage issue was the impediment to Petitioner's entry into that program. (App.p.237). Solicitor Marchant testified Petitioner was never "caught up to the point where he would be allowed to enter the program." (App.p.238). Solicitor Marchant testified Petitioner's financial obligations were not resolved before May 19, 2006 – the original plea date. (App.p.238). Solicitor Marchant testified he was confident he discussed the issue of Petitioner's child support arrearage with trial counsel. (App.p.239).

Trial counsel testified he recalled Petitioner had been accepted into drug court. (App.p.248). Trial counsel testified it appeared Petitioner was rejected from that program shortly before his May 19th plea date but that he could not recall specifically why Petitioner was rejected. (App.pp.248-49). Trial counsel testified that, if there was a child

support issue, he would have spoken to Solicitor Marchant about it but that he did not recall one way or the other if he had such a conversation. (App.p.252).

In denying Petitioner's application for post-conviction relief, the PCR judge addressed this issue as follows:

> This Court finds [Petitioner] failed to meet his burden of proving trial counsel should have had this case resolved by a guilty plea into the drug court program. It is undisputed that [Petitioner] was initially accepted into the drug court program but later rejected because of an outstanding child support arrearage. This Court finds there was no evidence presented that [Petitioner] communicated the arrearage issue to trial counsel. This Court finds there was no evidence presented that trial counsel could have rectified the arrearage issue. To the contrary, Assistant Solicitor Marchant testified [Petitioner] was never "caught up enough" on his arrearage to enter the drug court program. This Court finds Marchant's testimony is credible.

(App.pp.287-88).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "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 trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective. Petitioner failed to prove trial counsel did not render "reasonably effective assistance" under prevailing professional norms. See Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2064; Porter v. State, 368 S.C. at 383, 629 S.C. at 356. As the PCR judge noted, it is undisputed by the parties that Petitioner was accepted into the drug court program. Exhibit 7 from the PCR hearing is a Drug Court Referral Report dated May 1, 2006 from the drug court program manager to Solicitor Marchant which noted Petitioner was "eligible for Drug Court as long as he pays his child support." (Supp.App.p.1). Exhibit 4 from the PCR hearing is a May 2, 2006 letter to Petitioner from the drug court program manager which served as notification of both his acceptance in to the program and the May 19, 2006 plea date. (App.p.270). Petitioner admitted he knew that he was in arrears with his child support payments and this was an impediment from his participation in the drug court program. While Petitioner argues he was not in arrears prior to the original May 19th plea date – as the result of a payment made by Ms. Burton – that is not supported by the evidence. Exhibit 5 from the PCR hearing is a printout of Petitioner's child support payment history. It is clear from examining this printout that Petitioner was in arrears between the original May 19, 2006 plea date and the eventual July 27, 2006 trial date. (App.pp.271-76). Petitioner was responsible for satisfying the arrearage in his child support payment before he could plead guilty and enter the drug court program. It was not incumbent upon trial counsel to hound Petitioner about making his payments or investigate whether Petitioner, in fact, satisfied his financial obligations. Trial counsel's role in this matter was to provide legal

representation to Petitioner, not manage or monitor his financial obligations. Petitioner has failed to prove trial counsel did not satisfy his professional obligation to provide competent legal representation. See id.

Further, Petitioner failed to meet his burden of proving trial counsel's lack of investigation into the child support arrearage prejudiced his case. Petitioner has failed to present compelling proof that – had trial counsel investigated the child support arrearage issue – he would have been allowed to plead guilty and enter the drug court program. As noted supra, Exhibit 5 indicates there was a payment made to the family court clerk of court but that Petitioner remained in arrears both at the time of the May 19, 2006 plea date and the July 27, 2006 trial date. (App.pp.271-76). Petitioner did not present any testimony from an employee of the clerk of court's office to explain whether or not Petitioner was actually in arrears. Petitioner also did not present any testimony from the attorney who Petitioner allegedly hired to draw up paperwork for Petitioner's ex-wife to waive the arrearage. Without such testimony, it is speculative to engage in a discussion of what trial counsel may have found if he investigated whether Petitioner had actually taken the steps necessary to satisfy his child support arrearage. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the 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); see also Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

October 1, 2013

STATE OF SOUTH CAROLINA
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The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2012-212588

James Michael Dover,..... Petitioner,

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 1st day of October, 2013.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

October 1, 2013

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

Re: James Michael Dover v. State of South Carolina
Appellate Case No: 2012-212588
Lower Court Case No: 2010-CP-39-0457

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Victim Services Counselor