

STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 23 2013

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2012-213698

Walter Lamont Morgan.....Petitioner,

v.

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

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective in his representation of Petitioner, when Petitioner pled guilty and failed to establish that but for Counsel's alleged errors, he would have proceeded to trial rather than plead guilty?

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 October 2010 term of General Sessions for attempted murder (10-GS-42-6067). The Petitioner was represented by John G. Reckenbeil, Esquire. On November 10, 2010, the Petitioner pled guilty as indicted. The Honorable J. Mark Hayes II sentenced the Petitioner to confinement for a period of fifteen (15) years suspended upon the service of (10) years and five (5) years of probation. The Petitioner did not appeal his guilty plea or sentence.

The Petitioner subsequently filed a PCR application on October 27, 2011. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on September 5, 2012, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Richard H. Warder, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Petitioner testified on his own behalf. Frederick Porter, Jonathan Rainey, Frederick Meadows, and Joshua Meadows also testified on the Petitioner's behalf. Also testifying was John G. Reckenbeil, Esquire. Following the hearing, The Honorable J. Derham Cole denied the PCR application by written Order dated December 7, 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 in his representation of Petitioner, when Petitioner pled guilty and failed to establish that but for Counsel’s alleged errors, he would have proceeded to trial rather than plead guilty.**

Petitioner was charged with attempted murder, following an altercation in which he stabbed the victim. (App. p. 10; 12-13). However, Petitioner claimed that he stabbed the victim in self-defense because the victim was choking Petitioner during the fight. Petitioner ultimately pled guilty and received a sentence of fifteen years suspended to ten years and five years of probation. (App. p. 25). At the PCR hearing, Petitioner alleged that Counsel was ineffective for advising Petitioner that self-defense was not a viable defense. (App. p. 43).

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.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, *supra*, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.

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.

Petitioner testified that when he met with Counsel, he informed Counsel that this was a case of self-defense. (App. p. 45). However, Petitioner testified that Counsel informed him that the case did not meet the criteria for self-defense. (App. p. 45). Petitioner testified that the

victim, Jonathan Rainey, had been his friend for ten years. (App. p. 47). Petitioner testified that he and the victim had gotten into a fight, when victim began choking Petitioner, Petitioner stabbed victim. (App. p. 48). Petitioner testified that he retrieved the knife from his front pocket and stabbed victim once. (App. p. 48). Petitioner testified that he told the police that he stabbed victim because victim threatened to get a gun and shoot and kill Petitioner and he feared for his life. (App. p. 49-50).

Petitioner claimed that he agreed with the facts of the case as indicated by the Solicitor only because Counsel told Petitioner to answer all questions with “yes sir.” (App. p. 52). Petitioner also claimed that when he told the court he was guilty, that he had had plenty of time to consult with Counsel and was satisfied with Counsel’s representation, those answers were what Counsel told him to say. (App. p. 52-3).

Counsel testified that he did speak with Petitioner about the story and the feasibility of a defense of self-defense. (App. p. 62). Counsel testified that there were issues with the elements of self-defense because the fight was a mutual fight over stolen marijuana and the fear of imminent harm was questionable because Petitioner did not mention being choked in his statement. (App. p. 62-3). Counsel testified that Petitioner never included in his statement that victim was choking him. (App. p. 63). Counsel testified that the only evidence to support Petitioner having an imminent threat of serious bodily injury or harm was Petitioner’s statement that the victim threatened to go get a gun and shoot Petitioner. (App. p. 63). However, as testified to by Petitioner and victim, victim did not have a gun at the scene or near the scene. (App. p. 50; 58). Therefore, Counsel testified that had Petitioner gone to trial, the risk was great that the State would focus on the fact that nothing in Petitioner’s statement that should have given Petitioner a subjective belief of imminent death or bodily harm. (App. p. 66). Counsel

testified that he reviewed with Petitioner the questions that he would be asked during the guilty plea, but the answers were all Petitioner's. (App. p. 67).

Respondent submits that the PCR court was correct in finding that Counsel's testimony was more credible than Applicant's testimony. (App. p. 77). The PCR court also found that the testimony of the witnesses who supported Petitioner's version of events was not credible, in light of the fact that the Petitioner himself failed to mention that version of facts to police in his voluntary statement. (App. p. 79). The court also found that Counsel investigated the case, as well as any possible defenses, and discussed those with Petitioner. (App. p. 77). Ultimately, the PCR court found that the Petitioner failed to meet his burden of proof of showing that, but for Counsel's failure to properly investigate or pursue self-defense, he would have proceeded to trial instead of plead guilty. (App. p. 77).

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
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SC Bar #78225

By: 

ATTORNEYS FOR THE RESPONDENT

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Circuit Case No.: 2011-CP-42-4638
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WALTER LAMONT MORGAN,

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STATE OF SOUTH CAROLINA,

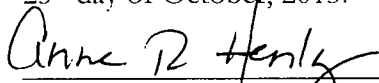
Respondent.

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, Wanda H. Carter, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 23rd day of October, 2013.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
23rd day of October, 2013.


_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: 7/18/2017



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
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October 23, 2013

Via Hand Delivery

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

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S.C. Supreme Court

RE: Walter Lamont Morgan v. State of South Carolina
Circuit Court Case No: 2011-CP-42-4638
Appellate Case No.: 2012-213698

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 Deputy Attorney General

SHW/aam
Enclosures

cc: Wanda H. Carter, Esquire (w/enclosure)