STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2012-213166

Robert D. Brown, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR judge properly find Petitioner failed to carry his burden of proving trial counsel ineffective for failing to exclude the use of Petitioner's prior conviction as a predicate offense under the recidivist statute?

STATEMENT OF THE CASE

In April 2008, the Georgetown County Grand Jury indicted Petitioner for assault and battery with intent to kill ("ABWIK") (2008-GS-22-213); assault and battery of a high and aggravated nature ("ABHAN") (2008-GS-22-214); and kidnapping (2008-GS-22-215). (App. p. 781-89). C. Reuben Goude, Esquire, ("trial counsel") represented Petitioner. (App. p. 2) On July 29, 2008, Petitioner went to trial before the Honorable James E. Lockemy and a jury. (App. p. 1) The jury found Petitioner guilty, and Judge Lockemy sentenced him to life without parole ("LWOP"), pursuant to S.C. Code Ann. section 17-25-45[1] ("the recidivist statute"), for the ABWIK and kidnapping offenses, and ten (10) years, concurrent, for ABHAN. (App. p. 638). The predicate "most serious" offenses for the LWOP sentences were 1979 convictions for armed robbery and armed kidnapping[2] from Washington, D.C. (App. p. 630).

A notice of appeal was timely filed, and Wanda H. Carter, Esquire, perfected the appeal with the filing of an Anders[3] brief. (App. p. 645). Petitioner also filed a *pro se* brief in response. (App. p. 657). The South Carolina Court of Appeals affirmed the convictions in an unpublished opinion on February 1, 2010. State v. Brown, 2010-UP-072 (Ct. App. filed Feb. 1, 2010). The Court of Appeals denied Petitioner's *pro se*

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[1] Section 17-25-45(A)(1)(b) reads, in pertinent part:

> [U]pon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has ... one or more prior convictions for ... a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section.

[2] Armed Robbery and Kidnapping are both "most serious offenses" under the recidivist statue. S.C. Code Ann. § 17-25-45(C)(1).

[3] Anders v. California, 386 U.S. 738 (1967).

petition for rehearing on March 19, 2010. (App. p. 690). The remittitur was returned to the circuit court on April 23, 2010. (App. p.690).

Petitioner filed this Application for Post-Conviction Relief on May 11, 2010. (App. p. 684). Respondent made its Return on July 8, 2010. (App. p. 689). Petitioner filed an amended application on August 14, 2012. (App. p. 965). The Honorable Thomas A. Russo ("PCR judge") convened an evidentiary hearing into the application on August 31, 2012, at the Georgetown County courthouse. (App. p. 700). Petitioner was present and represented by Ian A. Taylor, Esquire. (App. p. 700). Tyson A. Johnson, Esquire, represented Respondent. (App. p. 700). The PCR judge denied relief in an order dated September 10, 2012, and filed September 24, 2012. (App. p.775).

ARGUMENT

I. The allegation trial counsel was ineffective for failing to argue Petitioner's prior conviction was a juvenile conviction is not preserved for appellate review.

Petitioner asserts the PCR judge erred by finding trial counsel was not ineffective for failing to argue Petitioner's prior conviction was a juvenile conviction. However, the PCR judge did not reach the issue of whether trial counsel should have objected to the conviction as a juvenile conviction. Therefore, Respondent submits that this issue is not preserved for appellate review.

In his order, the PCR judge found "counsel argued the prior conviction was too remote to be used against [Petitioner]." (App. p. 778). However, the PCR judge did not address whether trial counsel should have argued the conviction was a juvenile conviction. This issue was directly presented to the PCR judge during the hearing on the application. (App. p. 768). Applicant did not file a Rule 59(e), SCRCP, motion to alter or amend the order to address specifically trial counsel's failure to argue Petitioner's conviction was a juvenile conviction. Therefore, the issue is not preserved for this Court's review. See Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007); Odom v. State, 337 S.C. 256, 260 n.2, 523 S.E.2d 753, 755 n.2 (1999). See also Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) ("The circuit court did not specifically address the issue, and where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review." (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997))).

II. Probative evidence supports the PCR judge's finding that trial counsel was not ineffective for failing to exclude the use of Petitioner's prior conviction as a predicate offense under the recidivist statute.

Even if the issue is preserved, probative evidence exists to support the PCR judge's findings that counsel was not ineffective. Therefore, Respondent submits the PCR judge properly denied Petitioner's application.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. The Court presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 668). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. First, the applicant 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. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant 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.

On appeal, this Court must affirm the circuit judge's denial of post-conviction relief when there is probative evidence to support the findings of the circuit judge. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

At the PCR hearing, Petitioner testified he had 1979 convictions for armed kidnapping and armed robbery. (App. p. 709). He testified he was sentenced under section 5010(c) of the federal youth corrections act. (App. p. 710). Petitioner entered into evidence a copy of his sentencing sheet from the Criminal Division of the Superior Court for the District of Columbia. (App. p. 773-774). Trial counsel testified he made a motion *in limine* to exclude the conviction for sentencing purposes because it was a "pretty old" conviction. (App. p. 745). Trial counsel also testified he also moved to exclude the conviction as a juvenile or youthful offender sentence in a motion *in limine*. (App. p. 747). Trial counsel renewed his objection to the age of the conviction at sentencing. (App. p. 628). The record reflects trial counsel did not re-raise the objection to the prior conviction as a juvenile conviction at that time. (App. p. 628-30). However, trial counsel was not deficient because such an objection was meritless.

Juvenile adjudications may not be used to enhance a sentence under the recidivist statute. State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). However, a juvenile adjudication is different from a sentence as a youthful offender. In South Carolina, a juvenile is a "person less than seventeen years of age." S.C. Code Ann. § 63-19-20(1). A juvenile is subject to the exclusive jurisdiction of the family court. State v. England, 271 S.C. 129, 130, 245 S.E.2d 608, 609 (1978). Likewise, in the District of

Columbia, a juvenile is generally defined as "an individual who is under 18 years of age[.]" D.C. Code § 16-2301(3). Also like South Carolina, juveniles are subject to the exclusive jurisdiction of the family division. Logan v. United States, 483 A.2d 664, 667 (D.C. 1984) ("[A] person accused of committing a delinquent act before his or her eighteenth birthday—which act would be criminal if committed by an adult—is accorded non-criminal treatment in the Family Division of the Superior Court.").

The record is clear that Petitioner was nineteen (19) when charged with the prior offense. (App. p. 119). Thus, he was not a juvenile under the law of either South Carolina or the District of Columbia at the time of his prior conviction.[4] Furthermore, Petitioner was convicted of the prior offense in the Criminal Division of the Superior Court. (App. p. 773-774). Therefore, petitioner was convicted as an adult, and his prior conviction is not a juvenile conviction that cannot be used as a predicate offense under the recidivist statute. Accord Luck v. United States, 348 F.2d 763, 766 (D.C. Cir. 1965) (allowing admission of a prior conviction for impeachment purposes when the defendant was tried as an adult in the District Court and sentenced under the youth corrections act).

Mere *sentencing* as a youthful offender under the terms of the federal youth corrections act does not make Petitioner's prior conviction a juvenile *conviction* that cannot be used to enhance his South Carolina sentence. Although South Carolina courts have not had an opportunity to address whether a sentence as a youthful offender is a

[4] Petitioner was also charged with armed robbery, which would exclude him from the definition of a "child" in the District of Columbia . See D.C. Code § 16-2301(3)(A) ("[T]he term 'child' does not include an individual who is sixteen years of age or older and ... charged by the United States attorney with ... robbery while armed[.]")

"juvenile conviction," federal courts have held that sentences under South Carolina's Youthful Offender Act ("YOA") are not "juvenile convictions." See United States v. Crumblin, 441 F. App'x 180, 183 (4th Cir. 2011), cert. denied, 132 S. Ct. 1037 (2012) ("Crumblin's 1994 conviction was not a juvenile conviction, despite his YOA sentence..."); United States v. Brown, 324 F. App'x 231, 233 (4th Cir. 2009) ("We agree that the convictions under the state Youthful Offender Act were properly considered in designating Brown a career offender."). The court in Crumblin specifically held that YOA sentences are not juvenile convictions because the family court has exclusive jurisdiction over juvenile offenses. Crumblin, 441 F. App'x at 183. Because the YOA is a sentencing option for individuals up to twenty-four (24) years old, an individual can be sentenced under the YOA and not be a juvenile. Id. The opinion in Crumblin is especially instructive because the District of Columbia also gives the Superior Court Family Division exclusive jurisdiction over juveniles. Logan, 483 A.2d at 667. Also, individuals who are not juveniles may be sentenced under both the federal youth corrections act and the YOA. Compare 18 U.S.C. 5006(e) (defining "youth offender" as individual under 22) and S.C. Code Ann. § 24-19-10(d) (defining "youthful offender as various individuals under 25).

Petitioner was not tried or convicted in the Superior Court Family Division. Rather, his convictions were in the in the Superior Court Criminal Division. Thus, his prior conviction was an adult conviction that may be used as a predicate conviction under the recidivist statute. Therefore, trial counsel was not deficient for failing to argue the conviction was a juvenile conviction.

Furthermore, Petitioner has not shown he was prejudiced by any deficiency in trial counsel's objection. Petitioner claims his prior conviction would have automatically

been set aside under the terms of the federal youth corrections act. However, the act is clear that a youthful offender will be issued a certificate demonstrating the conviction has been set aside. 18 U.S.C. § 5021. See also Gay v. Ariail, 381 S.C. 341, 344 n.2, 673 S.E.2d 418, 419 n.2 (2009) ("Gay concedes expungement is a privilege and not a right."). However, Petitioner did not present any such certificate at the PCR hearing. Therefore, he has not proven his conviction has been expunged or vacated. The only evidence presented at trial and at the PCR hearing were certified copies of Petitioner's sentencing sheet reflecting a conviction as an adult and a sentence as a youthful offender. Because the conviction appears from the record to be still valid, Petitioner has not shown trial counsel would have been successful in excluding it as a prior conviction.

The record contains significant probative evidence that trial counsel acted reasonably and within professional norms when objecting to the use of the prior conviction under the recidivist statute. Furthermore, no prejudice resulted from trial counsel's actions because Petitioner has not proven the conviction was expunged. Therefore, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

October 30, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

The Honorable Thomas A. Russo, Circuit Court Judge

Robert D. Brown,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender David Alexander
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 30th day of October, 2013

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 30 2013
S.C. Supreme Court

October 30, 2013

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

RE: **Robert D. Brown v. State of South Carolina**
Appellate Case No: 2012-213166

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/nb
Enclosures

cc: Appellate Defender David Alexander (2 copies)