STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari from Laurens County

Thomas A. Russo, Circuit Court Judge

DOMONIQUE BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212940

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether trial counsel rendered ineffective assistance, in derogation of Mr. Domonique Brown's (hereinafter referred to as "Mr. Brown") Sixth Amendment Rights, and in violation of Rule 1.2 of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, by withdrawing a substantive pre-trial motion against Mr. Brown's wishes?

Introduction

This is before the court pursuant to a Post-Conviction Relief proceeding initiated by Mr. Brown alleging ineffective assistance of counsel and a violation of his Constitutional rights. On May 18, 2009 Mr. Brown plead guilty to murder, armed robbery, and possession of a weapon for a negotiated sentence of Thirty Years for the murder charge with concurrent sentences for the charges of armed robbery and possession of a weapon. App. p.2, l.14. Sometime before this plea took place, Mr. William S. Mcguire, Mr. Brown's trial counsel, withdrew an important pre-trial motion without Mr. Brown's consent. The motion, which was fundamental to Mr. Brown's decision making process regarding his trial strategy, could have suppressed certain key evidence the prosecution intended to use at trial. Having had this fundamental motion withdrawn against his wishes, Mr. Brown was forced, by his counsels actions, to take the only course of action he felt was left to him, pleading guilty on May 18, 2009. After the plea, Mr. Brown filed an application for Post-Conviction Relief on July 6, 2010. The motion was heard on June 4, 2012 where Judge Thomas A. Russo took the

decision under advisement and later denied the relief. Mr. Brown then appealed the decision to this court.

A. Relevant facts

Trial counsel, William S. Mcguire (hereinafter referred to as "trial counsel" or "Mr. Mcguire"), filed a number of pre-trial motions in this case. App. p.39, l.22-23. The particular motion at issue was filed to suppress a statement from Mr. Brown about where the murder weapon was located and to suppress certain physical evidence, including but not limited to the murder weapon itself. App. p.39, l.22-23. Mr. Mcguire admitted this was "not an insignificant motion." App. p.40, l.14-15. The motion was held under advisement by the trial judge. App. p.40, l.17. While the motion was under advisement, Mr. Mcguire used what he felt was "a pretty good motion based on a pretty good investigation to have the prosecutor withdraw the death notice." App. p.41, l.4-6. Mr. Mcguire then approached Mr. Brown where Mr. Brown clearly objected to Mr. Mcguire withdrawing the motion. App. p.40, l.11-12. In fact, Mr. Brown "wanted to have the judge decide the motion before making any other decisions with regard to a trial or plea." App. p.40, l.17-19. Mr. Mcguire came to the Laurens County Detention Center, where Mr. Brown was being housed, and informed Mr. Brown that despite his clear and unequivocal wishes, the decision was already made to withdraw the motion, and that the motion had in fact been withdrawn. App. p.55, l.22-24. Mr. Brown, being incarcerated, then took the only action available to him and commanded Mr. Mcguire to return to the solicitor and put the motion back on the table. App. p.55, l.24. Again despite Mr. Brown's feverent wishes, Mr. Mcguire let Mr. Brown know in a heated discussion there was no way he was going back to put the motion on the table. App.

p.55, l.24; App. p.56, l.1. Having had the critical motion withdrawn against his wishes and commands, Mr. Brown was in essence forced into taking the plea agreement negotiated by trial counsel. App. p.54, l.23-25; p.55, l.1-3.

B. DISCUSSION

I. Counsel rendered ineffective assistance, in derogation of the Sixth Amendment to the United States Constitution, and in violation of rule 1.2 of the South Carolina Rules of Professional Conduct, by failing to obtain the consent of Mr. Brown before withdrawing a pending motion to suppress essential physical evidence in the pre-trial phase of Mr. Brown's case.

Although certainly more learned in nature than most services, the professions of medicine and law are at their core service industries. Accordingly, just as with any service, the party requesting the services dictates the ends and goals of the master servant relationship. While a patient would certainly not instruct a doctor on how to conduct his heart transplant, it is, even if the patient is terminal without the doctor's life-saving care, within the patient's domain to make the decision of whether to accept or refuse the doctor's care. Though usually less directly affecting matters of life and death, just as the doctor-patient relationship, it is the client in the attorney-client relationship that dictates the ends of the master-servant relationship, even if the chosen ends of the client leave the client open to receiving the death penalty. This is such a fundamental element of the attorney-client relationship that it is a cornerstone of the South Carolina Rules of Professional Conduct, holding a position of primacy amongst the myriad rules that govern the conduct of attorneys. Specifically Rule 1.2 states:

> a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a

> criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

South Carolina Rules of Professional Conduct, Rule 407, SCACR. Without these Rules, and specifically Rule 1.2 of the Rules of Professional Conduct, an attorney knows best mentality would permeate and dominate the attorney client relationship, resulting in a situation where the substantive outcomes of litigation are those desired not by the client, but dictated to the client by his attorney. Such a result is in clear contravention of Rule 1.2 and the case law concerning the Rule in which the Court has often restated the long of the rule as a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, he shall consult with the client as to the means by which they are to be pursued. IN RE PSTRAK, 357 SC 1,7, 591 S.E. 2d 623 (2004)

If the Rule itself and the accompanying case law were not sufficiently clear, Comment [1] to Rule 1.2 unequivocally states that it is the client that has the ultimate authority to determine the purposes to be served by legal representation. Mr. Mcguire disregarded the very foundation of this rule when he refused to abide by Mr. Brown's wishes to obtain a ruling on the pre-trial motion before taking the case to trial. Mr. Mcguire stated that Mr. Brown "wanted the judge to decide it and I, over his objection, withdrew it to have the death notice withdrawn." App. p.41, l.9-11. It is clear Mr. Brown wished to have a final ruling on the pre-trial motion, as he testified that he told Mr. Mcguire to return to the solicitor and put the motion back on the table. App. p.55, l.24;App. p.56, l.1. By disregarding Mr. Brown's wishes, Mr. Mcguire, in essence, disregarded the very foundation of what the Rules of Professional Conduct are designed

to protect against. Mr. Mcguire did not let the client exercise the "ultimate authority" about the objectives of the representation to which Mr. Brown was entitled, instead choosing to take the action Mr. Mcguire believed in his own opinion to be best for Mr. Brown. Consequently, Mr. Mcguires decisions dominated the representation and led to a substantive outcome that was not desired by Mr. Brown. Substituting counsel's opinion as to what was "best" for Mr. Brown is utterly antithetical to the intended nature of the attorney-client relationship. Allowing counsel to pervert the balance of power in the attorney-client relationship also starts the attorney-client relationship down a slippery slope that ends with permitting attorneys of lesser moral caliber to dictate settlement or pleas to the clients simply by directing the means of a case in such a manner that the client has but one path to follow. Such a result is patently against public policy, what is best for the legal profession, and the best interest of the clients.

Moreover, Mr. Mcguire stated that this motion was not an insignificant motion. App. 1, 40. 14-15. This motion was to suppress a statement and evidence that may have been the fruit of the poisonous tree. Mr. Mcguire admitted the prosecutor was taking very seriously the problems that he had in the case. App. p.39, l.25; App. p.40, l.1. By withdrawing the pre-trial motion, Mr. Brown was allowing all evidence the prosecutor admittedly had problems with to be used against Mr. Brown if a trial were to take place. At this point Mr. Brown was backed into a corner by trial counsels actions that were in contravention of Mr. Brown's substantive decision and was thereby forced to un-voluntarily take a plea deal against his wishes.

Though Mr. Mcguire's actions would likely be grounds for a client complaint to the ODC for violation of Rule 1.2 of the Rules of Professional Conduct, where a petition such as this is involved, the applicant must satisfy the two-prong test to prevail

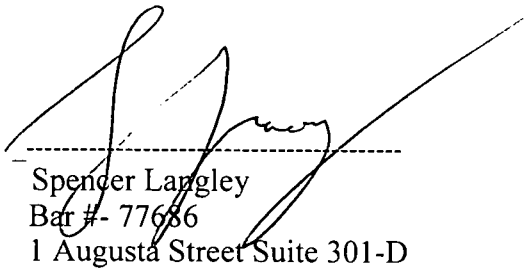
on a claim of ineffective assistance of counsel. First, under Strickland v. Washington, 466 U.S. 668, 687, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. The court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115,117, 386 S.E.2d 624,625 (1989), (citing Stickland, 466 U.S. 668 (1984)). Reasonable professional conduct in this case should be dictated by rule 1.2 of the Rules of Professional Conduct requiring a lawyer to abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued. Mr. Mcguire clearly disregarded Mr. Brown's objectives in this case which was to have a ruling on the pre-trial motion before continuing his case. This was obviously an important motion which would have had a direct impact on the resolution of Mr. Brown's case. This shows a clear disregard for Rule 1.2 which renders Mr. Mcguire's performance below an objective standard of reasonableness. While Mr. Mcguire's desire to have the death notice is admirable, pursuant to Rule 1.2 the choice was not Mr. Mcguire's to make. It was Mr. Brown's life that hung in the balance, and accordingly, the decision to obtain a decision regarding his evidentiary motion, even if that meant that the death penalty would remain on the table, was for Mr. Brown and Mr. Brown alone to make.

Turning to the second prong of the Strickland test, an applicant then must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687; Alexander v. State, 303 S.C, 539, 541-42, 402 S.E.2d 484, 485 (1991). Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have

insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). There is no doubt the result of this proceeding would have been different but for Mr. Mcguire's unprofessional errors. Regardless of whether the trial court granted or denied Mr. Brown's motion he almost certainly would have proceeded to a trial of his case. Had the judge denied Mr. Brown's motion, the plea Mr. Brown took would have been off the table while the death penalty would have remained, requiring Mr. Brown to proceed to trial in hopes to avoid a death sentence. Conversely, had the judge granted Mr. Brown's motion and suppressed the evidence, Mr. Brown would almost certainly have taken his case to trial due to the serious evidentiary holes that would have been poked in the State's case. Accordingly, but for Mr. Mcguire's inappropriate withdrawal of the evidentiary motion in question, Mr. Brown almost certainly would have proceeded to trial. Instead, with all the overwhelming evidence stacked against Mr. Brown because of the withdrawn motion, Mr. Brown was backed into a corner by his own attorney who believed that he knew better than his client with respect to the goals of his client's case. Hemmed in by actions diametrically opposed to his unequivocally expressed wishes, Mr. Brown had no choice but to walk the path dictated to him by his attorney. When it comes to decisions of the nature of a guilty plea, when the decision has been forced upon the deciding individual, voluntariness is nothing but a farce perpetuated upon the individual, the legal system, and society at large. As our criminal justice system is based on the faith of the public and the full presence of propriety and forthrightness, the court must be particularly sensitive to situations such as Mr. Browns.

C. CONCLUSION

Mr. Mcguire rendered ineffective assistance of counsel in violation of the Sixth Amendment and Rule 1.2 of the SCRPC by withdrawing a substantial substantive pre-trial motion without the consent of Mr. Brown. Had Mr. Mcguire not withdrawn the pre-trial motion, there is a reasonable probability that Mr. Brown would have followed through to the trial phase with certain key evidence excluded from his case. For the foregoing reasons, the Court should grant certiorari.



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This 9th day of December, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on the Assistant Attorney General, J. Rutledge Johnson, Esquire, at P.O. Box 11549, Columbia, SC 29211.

P.O. Box 1159, Columbia, SC 29211
this 9th day Of December, 2013.

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