STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000262

Danny Ray Gilliam, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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TABLE OF CONTENTS

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

STANDARD OF REVIEW 4

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective 4

CONCLUSION 9

QUESTION PRESENTED

1. Whether trial counsel was ineffective in failing to preserve for appellate review whether the two prior burglaries used to enhance Petitioner's current burglary charge to first-degree burglary should have just been considered as one offense since they were committed so closely in time to one another?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the April 2006 term of General Sessions for first-degree burglary (2006-GS-39-0847), petit larceny (2006-GS-39-0849), and possession of a stolen vehicle (2006-GS-39-0867). (App.pp.311-14). Robert L. Newton, Jr., Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty of first-degree burglary and petit larceny.[1] On September 5, 2007, the Honorable John C. Few sentenced Petitioner to concurrent terms of life imprisonment for first-degree burglary and ten years for petit larceny. (App.p.199).

A notice of appeal was filed at the South Carolina Court of Appeals. Wanda H. Carter, Esquire of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Gilliam, Op. No. 2010-UP-197 (S.C. Ct. App. filed March 10, 2010). A Petition for Writ of Certiorari was filed at the South Carolina Supreme Court and denied by order dated January 20, 2011.

Petitioner filed an application for post-conviction relief (PCR) on October 28, 2011 (2011-CP-39-1574). (App.pp.201-67). A hearing was convened at the Pickens County Courthouse on December 17, 2012. (App.pp.273-303). Petitioner was present and represented by David R. Price, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W.

[1] The possession of stolen vehicle charge was dismissed as a result of trial counsel's motion for a directed verdict. (App.p.142).

Miller denied relief in an order dated January 17, 2013 and filed January 24, 2013. (App.pp.304-10).

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 the PCR judge erred in declining to find trial counsel was ineffective. Specifically, Petitioner argues trial counsel was ineffective because he failed to argue the two prior burglary convictions used as an element in the first-degree burglary charge at issue in this case should have been considered one offense because the offenses were committed on consecutive days. This argument is without merit.

A.

At some point between 8:00 and 10:30 of the morning in question, the back door of the victim's home was pried open and two guns and multiple CDs were missing. (App.pp.74-78). Officers were patrolling the area near the victim's house that day in order to look for a stolen red Jeep Cherokee. (App.p.80; pp.98-99). A red Jeep Cherokee was spotted leaving the victim's driveway. (App.p.80; pp.92-93; p.100). A deputy

specifically identified Petitioner as the driver of the red Jeep. (App.p.81; p.101). The officers pursued the red Jeep and the driver jumped out and ran away. (App.pp.81-84; pp.101-02). The two rifles stolen from the victim's home were found in the red Jeep. (App.p.82; pp.120-21). After Petitioner was apprehended, he was read his Miranda rights and initialed the waiver of rights form. (App.pp.84-88). Petitioner verbally admitted he was in the red Jeep that day. (App.p.89).

In his motion for a directed verdict, trial counsel argued the State had not produced any evidence of Petitioner's prior burglary convictions. (App.pp.126-27). The State argued it should be allowed to reopen the record to introduce these convictions and the trial judge allowed it over trial counsel's objection. (App.pp.127-29). The State used two prior burglary convictions for incidents committed on September 20 and 21, 1996 (but with different residences and victims). (App.p.130). Trial counsel argued:

> that what the legislature had in mind when it said two prior burglary convictions meant a conviction on one day and then the Defendant goes out and does another crime later after that conviction and gets a conviction a second time. It does not refer to one or more convictions that happened at the same time.

(App.p.130). The trial judge rejected trial counsel's argument and denied the motion for directed verdict. (App.p.131).

B.

In his PCR application, Petitioner argued the two prior burglary convictions that were used to enhance his current charge to first-degree burglary could only be considered to be one conviction because he pled guilty to them on the same date. (App.p.209; p.230). At the PCR hearing, counsel for Petitioner argued the issue of whether the two

prior convictions should be considered to be one was not adequately raised at trial. (App.p.300).

In denying the application for post-conviction relief, the PCR judge found Petitioner "failed to prove trial counsel was deficient because he did challenge the use of two prior convictions for burglaries committed on adjacent days. Regardless, [Petitioner] cannot prove he was prejudiced by the use of these two particular prior convictions because he had eleven prior convictions for either second- or third-degree burglary." (App.pp.308-09).

C.

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 did not prove trial counsel's performance was deficient. Petitioner asserts trial counsel failed to argue the two prior

burglary convictions used as an element of first-degree burglary charge should have been considered one offense because they were committed close in time to each other. Petitioner cites S.C. Code Ann. § 17-25-50 in support of his argument; however, this statute is inapplicable in this case. Section 17-25-50 states:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

This statutory section is intended for use in determining sentencing under the recidivist statute. See Bryant v. State, 384 S.C. 525, 534-35, 683 S.E.2d 280, 285 ("[S]ection 17–25–50 is intended to serve as a legislatively sanctioned safeguard to ensure that a life without parole sentence is not imposed in cases where the multiple section 17–25–45 offenses are "'so closely connected in point of time that they may be considered as one offense.'"). The issue in this case, however, concerns an element of the first-degree burglary statute and not the applicable sentencing scheme under the recidivist statute. As such, Petitioner's argument that trial counsel should have made an argument pursuant to § 17-25-50 is patently without merit. Regardless, it is clear that trial counsel made this very argument to the trial judge. (App.p.130). While trial counsel may not have specifically stated that the prior convictions for offenses on consecutive days should be considered one offense, the substance of his argument was clear to the trial judge. See, e.g., State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) (finding an objection was properly made because "[a]lthough [counsel] did not state a specific objection, it is clear from the trial judge's comments he was aware of the grounds for the objection").

Petitioner failed to meet the first prong of Strickland and demonstrate any error by trial counsel.

Further, the PCR judge did not err in finding Petitioner failed to meet his burden of proving he was prejudiced as a result of trial counsel's representation. One is guilty of first-degree burglary if they "enter[] a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2) (2003). Even assuming arguendo that the two prior burglary convictions offered by the State at trial should have been considered to be one conviction, Petitioner had numerous other convictions that could have been used to satisfy the "two or more convictions" element of first-degree burglary. As recited by the State at trial, Petitioner had 1997 convictions for four counts of third-degree burglary and two counts of second-degree burglary and 1998 convictions for one count of second-degree burglary and three counts of third-degree burglary. (App.pp.188-90). Petitioner has failed to demonstrate that the State would have been unable to use any of his other prior convictions in order to satisfy the "two or more convictions" element of first-degree burglary.

D.

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,

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By: _____
ATTORNEYS FOR RESPONDENT

December 27, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-000262

Danny Ray Gilliam, ... Petitioner,

v.

State of South Carolina, ... Respondent.

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:

Robert M. Pachak, 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 27th day of December, 2013.

KAREN C. RATIGAN
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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

December 27, 2013

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

Re: Danny Ray Gilliam v. State of South Carolina
Appellate Case No: 2013-000262
Lower Court Case No: 2011-CP-39-1574

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: Robert M. Pachak, Esquire
Trisha Allen, Victim Services Counselor