

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

G. Thomas Cooper, Jr., Circuit Court Judge

2009-CP-40-2523
Appellate Case No. 2013-001792

Jaime E. Marrero..... Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

ARGUMENT.....6

CONCLUSION.....12

ISSUE PRESENTED

- I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to object to the plea proceedings where, the trial judge inquired of the parties whether disposition without trial had been explored.

- II. Probative evidence supports the PCR court's finding that finding Counsel was not ineffective for failing to file a direct appeal where Counsel testified there were no objections made during the plea proceedings.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Petitioner was true bill indicted at the June 2006 term of the Richland County Grand Jury for Murder and Attempted Armed Robbery (2006-GS-40-02620, -02621). He was represented by then Assistant Public Defender James H. May on the charges. On September 25, 2008, Applicant proceeded to a jury trial before the Honorable Lee S. Alford. After three days of trial, Applicant accepted a state plea offer for a recommended forty year cap sentence under which he pled guilty to the charges as indicted. Judge Alford sentenced Petitioner to thirty-eight years imprisonment for Murder and twenty years imprisonment for Attempted Armed Robbery, with the sentences running concurrently.

Thereafter, Petitioner filed an application for PCR on April 7, 2009, asserting his guilty plea was involuntary due to ineffective assistance of Counsel. An evidentiary hearing into the matter was held the Honorable G. Thomas Cooper, Jr. on Monday January 14, 2013, at the Richland County Courthouse. Petitioner was present at the hearing with Counsel, Ethan Ware, Esquire, and Amber Martella, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office. By Order dated March 8, 2013 and filed March 8, 2013 Judge Cooper, Jr. denied Petitioner's post-conviction relief application with prejudice. Petitioner filed a Petition for Writ of Certiorari on September 20, 2013.

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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.

Where there has been a guilty plea, the Petitioner 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); Hyman v. State, 397 S.C. 35, 48, 723 S.E.2d 375, 382 (2012); Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011); Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

ARGUMENT

I. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to object to the plea proceedings where, the trial judge inquired of the parties whether disposition without trial had been explored.

Petitioner asserts the post-conviction relief (PCR) court erred in finding that James May (Counsel), Esquire, was not ineffective for failing to object to the plea proceedings. Petitioner argues the plea proceedings were inherently coercive because they were urged by the trial judge, not by the parties.

Respondent submits that this issue is not properly before the Court. The record conclusively demonstrates that this issue was not raised before the lower court during the PCR proceedings and therefore, was not ruled upon in the Order of Dismissal. Although the issue of judicial bias was raised during the PCR proceedings, Petitioner never argued that Counsel should have objected to the plea proceedings as being inherently coercive due to the trial judge's involvement. In fact, Petitioner's argument centered solely around whether Counsel was ineffective for failing to move for the trial judge's recusal due to the alleged bias of the trial judge. It is incumbent upon Petitioner to file a motion, pursuant to Rule 59(e), SCRCP, to alter or amend judgment, if he feels that there was an issue before that court which was not ruled upon. However, as the record reflects, the argument was never brought before the lower court; therefore, there was nothing for the judge to rule upon.

However, assuming this Court finds the issue properly preserved for appellate review, the record provides ample evidence to support the PCR court's finding that Counsel was ineffective for failing to object to the plea proceedings. In support of his argument Petitioner relies on Harden v. State, 276 S.C. 2489, 277 SE.2d 692 (1981) (finding appellant could not reasonably have felt coerced by the judge to accept the plea bargain). The South Carolina Supreme Court

adopted the position of the ABA Standards for Criminal Justice, Standard 14-3.3, Pleas of Guilty, Responsibility of the Trial Judge, which reads, in pertinent part:

(e) Where the parties have neither advised the judge of a plea agreement, nor requested to meet for plea discussion purposes, the judge may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur.

(f) All discussions at which the judge is relating to plea agreements *should be* recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions *should be* held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in the standard, the judge should never through word or demeanor either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Id. at 253-55, 277 S.E.2d 694-95 (emphasis added). The Supreme Court stated, "the standard is designed to prevent both the fact and the appearance of the trial judge's becoming an advocate against the desires of the defendant or the State of a particular resolution. Id. at 257, 277 S.E.2d, 695.

In the instant case, Petitioner argues Counsel was ineffective for failing to object or intervene to the allegedly coercive plea proceedings because the trial judge inquired as to whether the parties had considered a plea during the course of *in camera* hearing. Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Counsel testified during pre-trial meetings, the trial judge asked about factual context of the case. (App. p. 94 line 6—p. 95 line 16). Counsel testified the Solicitor explained to the trial judge that it was a murder case with the shooters caught on surveillance video. (App. p. 94 line 6—p. 95 line 16). Counsel testified the trial judge asked why the defendant was not pleading if he was caught on video. (App. p. 94 line 6-16).

Counsel responded to the trial judge's question by explaining that Petitioner was not one of the two masked men in the video. (App. p. 94 line 6-16). Counsel testified the trial judge did not suggest that a plea was appropriate at that time. (App. p. 95 line 14-18).

Furthermore, Counsel testified during the fourth day of trial during an *in camera* hearing that the trial judge explained to the Solicitor that he needed to make Petitioner a plea offer. (App. p. 96 line 2-4). Counsel testified the Solicitor could have refused to offer a plea deal. (App. p. 96 line 9-14). Counsel further stated the Solicitor did have a choice about whether to extend a plea offer to Petitioner and noted the Solicitor could have said no to the judge's request to extend an offer. (App. p. 96 line 15-16). Counsel testified the judge did not indicate a minimum or maximum number of years for the Solicitor to consider when making a plea offer. (App. p. 99 lines 11-17). Counsel testified the Solicitor came back with an offer of a forty year cap. Counsel testified the trial judge commented that a cap of forty years was a fair offer, but he could not tell them what sentence he would give if Petitioner elected to plead guilty. (App. p. 99 lines 18-21)

Counsel testified he told the trial judge he did not believe Petitioner would accept the offer. (App. p. 96 lines 4-9). However, Counsel testified that he—without the instruction of the trial court—presented the plea offer to Petitioner, because “as a criminal defense attorney you have a duty to relay any offers to your client...” (App. p. 96 line 21—p. 97 line 14). Counsel testified he explained to Petitioner that if he committed the murder he needed to plead guilty, but if he didn't “we need to reject it; we need to try to walk you out of the front door.” (App. p. 97 lines 15-25). Counsel testified he explained to Petitioner “we're going to try to win; but if you did this...you need to be a free man to see your child at some point. However, if you didn't, you don't need to plea to this.” (App. p. 98 lines 3-6). Counsel testified Petitioner was given

approximately thirty minutes to decide if he was going to accept the plea offer. (App. p. 101 line 22—p. 201 line 3). At no point in time prior to the Petitioner pleading guilty did the trial judge inform Counsel that Petitioner would be sentenced to a harsher sentence if he continued with trial and were found guilty. Harden, S.C. 277 S.E.2d at 693. Furthermore, Counsel felt that Petitioner had all the necessary information to make a voluntary and intelligent decision on whether to proceed with trial or plead guilty. (App. p. 219 lines 5-10).

Additionally, the guilty plea reveals after the recess, Petitioner and Counsel came before the court to enter a guilty plea to the charges he faced. The court thoroughly reviewed the Petitioner's wanting to enter the guilty plea. The record shows, in part: the Petitioner had not taken any medications, alcohol, drugs nor did he suffer from any mental, emotional, or nervous conditions that would interfere with his judgment to understand the court proceedings. (App. p. 50 lines 13-22). Petitioner testified that he fully discussed the charges he was facing with Counsel. (App. p. 291 lines 10-13). Petitioner was fully satisfied with counsel's services. (App. p. 49 lines 7-10). The court firmly established that Petitioner was pleading guilty since he wanted to plead guilty, and he was guilty. (App. p. 50 line 23—p. 51 line 13). The Petitioner had not been pressured whatsoever or coerced in any way to enter the plea. (App. p. 49 lines 1-6). The Petitioner affirmed that he was pleading guilty of his own free will. (App. p. 50 lines 23-25). The court explained that he did not have to plead guilty; rather, he had the right to a jury trial, and he could only be convicted if all twelve jurors agreed that the state have proven each and every element of the crime beyond a reasonable doubt. (App. p. 46 line 4—p. 47 line 6). The court explained the constitutional rights that the defendant would waive by entering his guilty plea. (App. p. 46 line 4—p. 47 line 6). The court then asked if the Petitioner was guilty of the charges to which the Petitioner responded he was guilty. (App. p. 51 lines 1-13). Therefore

probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to object to the allegedly coercive plea proceedings, where the evidence presented during the post-conviction relief hearing reveals no direct coercion by the trial judge was involved in the original plea. Harden, S.C. 277 at 695.

II. Probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to file a direct appeal where Counsel testified there were no objections made during the plea proceedings.

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for failing to file a direct appeal. Petitioner argues Counsel should have objected to the allegedly coercive plea proceedings thereby preserving an issue for direct appeal. However, this argument is without merit as probative evidence supports the PCR court's finding that Counsel was not ineffective in regards to this issue.

As stated in the first issue, Counsel was not ineffective for failing to object during the plea proceeding. Further, even assuming, *arguendo* counsel was ineffective for failing to object during the plea proceeding evidence supports the PCR court's finding that counsel was not ineffective for failing to file a direct appeal. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want an appeal or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to direct appeal from a guilty plea. Roe v. Flores-Ortega, 120 S.Ct. 1029, 528 U.S. 470 (2000). The South Carolina Supreme Court has applied this standard to guilty pleas as well, saying:

...absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to appeal from a guilty plea...The base assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal.

Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (S.C. 1995). Therefore, even if taken as true, an allegation that counsel did not inform Applicant of the right to direct appeal is not *per se* reason to warrant a belated direct appeal. (App. p. 53 lines 13-17; App. p. 113 line 22—p. 113 line 24).

Regardless, the guilty plea reveals that Petitioner was fully informed of the right to appeal, but did not request one to be filed. (App. p. 53 lines 13-17). Counsel testified it his general practice to advise every client of their right to appeal. (App. p. 129 line 20—p. 130 line 3). Furthermore, Petitioner failed to present any evidence—other than his bare assertion—that he requested Counsel to file an appeal on his behalf. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (holding an Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial). Therefore, probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to file a direct appeal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

By: 
ATTORNEY FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 6, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
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JAIME E. MARRERO,

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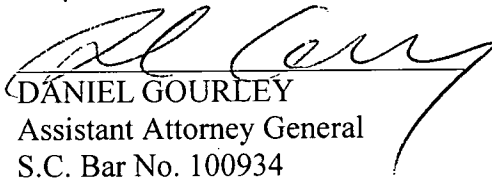
PROOF OF SERVICE

I, Daniel Gourley, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Amber B. Carter, Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 6th day of January, 2014.


DANIEL GOURLEY
Assistant Attorney General
S.C. Bar No. 100934

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

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JAN - 6 2014

January 6, 2014

S.C. Supreme Court

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

Re: **Jaime E. Marrero v. The State of South Carolina**
Appellate Case No. 2013-001792

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Daniel Gourley
Assistant Attorney General
S.C. Bar No. 100934

DG/ko
Enclosures

cc: Amber B. Carter, Esquire
Trisha Allen, Victim's Services