

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Devario Marshatt Simpson, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Did trial counsel err in failing to file a motion to be relieved as counsel after Petitioner filed a grievance against him prior to trial because the summary of the complaint was in effect that his defense was compromised due to counsel's failure to properly investigate into the case in that he did not view the police videotape or present certain defense witnesses at trial?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner for trafficking cocaine (2003-GS-23-4310), resisting arrest (2003-GS-23-4316), and assault and battery of a high and aggravated nature (2003-GS-23-6205). (App.pp.430-33). Steven W. Sumner, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty of trafficking cocaine and resisting arrest. On April 28, 2005, the Honorable G. Edward Welmaker sentenced Petitioner to concurrent terms of thirty (30) years for trafficking cocaine and one (1) year for resisting arrest. (App.pp.321-22).

A notice of appeal was filed at the South Carolina Court of Appeals. Aileen P. Clare, Esquire of the South Carolina Office of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Simpson, Op. No. 2007-UP-304 (S.C. Ct. App. filed June 8, 2007). (App.pp.324-27).

Petitioner filed an application for post-conviction relief (PCR) on June 3, 2008 (2008-CP-23-4201). (App.pp.328-33). A hearing was convened at the Greenville County Courthouse on February 23, 2010. (App.pp.340-419). Petitioner was present and represented by Lawrence W. Crane, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order dated April 26, 2010 and filed April 29, 2010. (App.pp.421-29).

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 because he did not file a motion to be relieved as counsel.

Prior to trial, Petitioner told the trial judge that he did not know where his witnesses were. (App.pp.114-16). Trial counsel explained that, while he had received numerous letters from Petitioner, he was only informed of these witnesses the day before. (App.p.115). The trial judge stated there was still time for these witnesses to arrive and that Petitioner could address his concerns on the record later. (App.p.116). In the midst of trial, Petitioner told the trial judge he wanted to relieve trial counsel – because counsel had a “conflict of interest” – and that his family were attempting to retain new counsel. (App.pp.227-33). Petitioner stated he had filed a grievance against trial counsel. (App.pp.228-29). Trial counsel stated the fact that a grievance had been filed had not affected his representation. (App.p.229). Both trial counsel and the assistant solicitor noted Petitioner raised the same issue at a hearing six (6) weeks prior and that Judge Miller informed him that he could retain new counsel but that the case would proceed. (App.pp.239-40). The trial judge, noting Petitioner did not want to proceed pro se,

ordered the trial would proceed. (App.pp.227-33). After the jury went into deliberations, Petitioner stated he had wanted Ikeetha Brown and Steve Smith to testify and for the jury to have seen the video of the stop. (App.pp.305-09). Petitioner admitted he gave this information to trial counsel once they were at the courthouse. (App.pp.308-09).

At the PCR hearing, Petitioner confirmed he filed a grievance against trial counsel prior to trial. (App.p.353). Petitioner also confirmed he mentioned this fact to the trial judge. (App.p.354). Petitioner stated the grievance had been dismissed prior to trial and that trial counsel never filed a motion to be relived. (App.pp.356-57; p.359). Petitioner confirmed that, once at trial, he asked the judge to relieve trial counsel because he had not viewed the videotape and counsel had not subpoenaed several witnesses. (App.pp.354-55). Petitioner stated these were the issues he raised in the grievance. (App.p.356).

Trial counsel also confirmed Petitioner filed a grievance against him prior to trial. (App.p.392). Trial counsel testified that, to the best of his recollection, this grievance concerned (1) Petitioner not getting a bond and (2) believing counsel was not visiting him enough. (App.p.392). Trial counsel testified that, even after Petitioner filed the grievance, he did not move to be relieved as counsel because of an order from Chief Justice Toal that a grievance was not a valid basis to be relieved from representation. (App.p.394). Trial counsel testified that, as mentioned in the trial transcript, Petitioner did not give him any witnesses' names until right before the trial began. (App.p.411). Trial counsel also testified none of these witnesses ever contacted him. (App.p.413).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving trial counsel should have filed a motion

to be relieved.” The PCR judge found “trial counsel represented [Petitioner] to the best of his ability” and noted the jury actually acquitted him on the charge of assault and battery of a high and aggravated nature. The PCR judge concluded Petitioner “failed to show that trial counsel’s performance was in any way affected by the fact that [Petitioner] had filed a grievance against him.” (App.pp.427-28).

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 failed to meet his burden of proving trial counsel should have filed a motion to be relieved. It is undisputed both that Petitioner filed a grievance against trial counsel and that the grievance was dismissed prior to trial. Petitioner, however, cannot prove trial counsel erred in not moving to be relieved simply because a grievance was filed. The filing of a grievance is not a valid basis for a motion to relieve oneself from representation of a client. This Court has noted,

for example, that the filing of a grievance against a post-conviction relief attorney “should not result in automatic removal of appointed counsel.” See Richardson v. State, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008). It was not incumbent upon trial counsel to file a motion to be relieved merely because his client became upset with him and filed a grievance with the Office of Disciplinary Counsel. The grievance was dismissed prior to trial, trial counsel informed the judge that the filing of a grievance had not affected his representation, and trial counsel argued a well-researched and prepared at trial. Trial counsel, therefore, would not have been able to “establish good cause” for his withdrawal from this case. See Matter of Anonymous Member of the Bar, 298 S.C. 239, 240, 379 S.E.2d 723, 723 (1989). Petitioner’s claim that trial counsel erred in not moving to be relieved is without merit.

In addition to being unable to prove trial counsel committed an error, Petitioner cannot prove he suffered any prejudice. Petitioner failed to demonstrate that trial counsel’s decision not to file a motion to be relieved after the grievance was filed did not result in any sort of conflict of interest. A PCR applicant alleging his conviction was unlawful due to a conflict of interest from counsel’s representation bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel’s performance. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980)); Padgett v. State, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997). Petitioner did not present any credible evidence that trial counsel operated under a conflict of interest in this case simply because a grievance had been filed against him. Rather, the record indicates trial

counsel aggressively represented Petitioner at trial. Trial counsel argued against requiring Petitioner to wear a stun belt during the trial. (App.p.11; pp.13-14). Trial counsel thoroughly argued a lengthy motion to suppress the evidence seized from both the vehicle Petitioner was driving and his hotel room.¹ Trial counsel made several objections during the trial and preserved various issues for appeal. (App.p.147; p.174; p.214; p.246; p.266; pp.268-69). Trial counsel requested a lesser-included charge of possession with intent to distribute – though the request was denied. (App.p.273). The jury, in fact, acquitted Petitioner of one of the charges he was tried upon – the charge of assault and battery of a high and aggravated nature. (App.p.315). Furthermore, the issues Petitioner complained of as the basis for the grievance – counsel not contacting defense witnesses or viewing the video – were not proven to be viable issues. While Petitioner told the trial judge he wanted Ikeetha Brown and Steve Smith to testify, trial counsel stated he had only been given this information the day before. Trial counsel was found to be the more credible witness. (App.p.426). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge’s findings on the credibility of witnesses). Petitioner failed to present Smith at the PCR hearing and the PCR judge found Brown would not have been a credible witness at trial. (App.p.427). Petitioner also failed to present the videotape at the PCR hearing to demonstrate counsel should have reviewed it with him prior to trial.² Petitioner, therefore, cannot prove he was prejudiced by trial counsel’s decision not to file a motion to be relieved in this case after a

¹ At the start of the hearing, trial counsel clearly articulated the points upon which he was attacking these searches and seizures. (App.pp.31-32).

² In fact, there was not a copy of any such videotape in the solicitor’s file. (App.p.421).

grievance was filed against him.

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

July 22, 2011

STATE OF SOUTH CAROLINA
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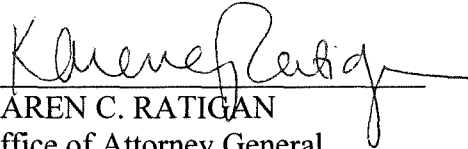
CERTIFICATE OF SERVICE

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:

Wanda H. Carter, 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 22nd day of July, 2011.


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