STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO UNION COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2013-001271

Tijuan Peake.....Petitioner,

v.

State of South Carolina.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR court properly find Counsel was not ineffective for not objecting to the use of Petitioner's prior criminal history for impeachment purposes had Petitioner testified at trial?

STATEMENT OF THE CASE

Tijuan Peake, ("Petitioner"), was indicted at the March 2008 term of the Union County Court of General Sessions for Distribution of Crack Cocaine (2008-GS-44-0332) and Distribution of Crack Cocaine within proximity of a school (2008-GS-44-0333). He was represented by Ross Burton, Esq. On October 15, 2008, the Petitioner underwent trial by jury, pursuant to which he was convicted of Distribution of Crack Cocaine, 2nd Offense and the corresponding proximity charge. The Honorable John C. Hayes, III sentenced Petitioner to confinement for twenty (20) years for Distribution of Crack Cocaine, 2nd offense and fifteen (15) years, concurrent, for the proximity charge.

A Notice of Appeal was filed on the Petitioner's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction. State v. Peake, 2011-UP-297 (filed June 14, 2011). The Remittitur was issued on July 1, 2011.

Petitioner subsequently filed an application for post-conviction relief (PCR) on December 9, 2011. Petitioner claimed, *inter alia*, ineffective assistance of trial counsel for "failure to object to the trial judge's erroneous instruction to the Petitioner that his prior drug convictions could be used to impeach him if he exercised his right to testify in his defense." Respondent made its Return on March 23, 2012. On October 9, 2012, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Caroline Horlbeck, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On April 18, 2013, the Honorable Edgar W. Dickson denied and dismissed Petitioner's application with prejudice by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR court properly found Counsel was not ineffective for not objecting to the use of Petitioner's prior criminal history for impeachment purposes had Petitioner testified at trial.

Petitioner asserts the PCR court erred "in failing to find trial counsel ineffective for not making a motion for Petitioner's prior drug convictions to not be used for impeachment purposes because they were more prejudicial than probative since Petitioner was on trial for drug offense of distribution and Petitioner would have testified but for the prior convictions being allowed to come in." This argument is without merit.

At trial, the following colloquy occurred:

> **The Court**: All right. We have reached the point in the trial where you have a right to present a defense, if you wish. You are not required to present a defense, because you are presumed innocent. However, you can call witnesses, if you wish, or you can testify, if you wish. If you testify, the State would be able to cross-examine you, that is, ask questions about what happened that evening. Does [Petitioner] have any prior record?
>
> **Mr. Anthony**: Yes, sir.
>
> **The Court**: What kind of impeachment?
>
> **Mr. Anthony**: He has a 2002 conviction for failure to stop for a blue light. And he has a 2005 conviction for distribution of crack, distribution of crack within proximity of a school. Then he has a second 2005 conviction for distribution of crack and distribution of crack within proximity of a school. Were he to testify, I would ask the court to allow me to ask if he's been convicted of a felony that carries more than a year in regard to the drug convictions.
>
> **Mr. Burton**: I agree with the impeachment, the extent of his record, Your Honor.
>
> **The Court**: Mr. Peake, the State would be able to ask you questions concerning those offenses, were you to take the stand. If you choose to remain silent, I would tell the jury that you have exercised your Constitutional Right to remain silent. They could not use that against you. They could not hold that against you in any way whatsoever and that they could not in the jury room discuss or use in their own mind your exercising your right to remain silent against you in any way. Do you understand that?

[**Petitioner**]: Yes, sir.

The Court: Do you have any question about it?

[**Petitioner**]: No, sir.

The Court: What?

[**Petitioner**]: No, sir.

The Court: So do you plan to testify or exercise your right to remain silent?

[**Petitioner**]: Exercise my right to remain silent.

(App. p. 99 line 1- p. 100 line 17).

At the PCR hearing, Petitioner testified while Counsel discussed the State's use of his prior conviction for impeachment purposes, Counsel did not request a hearing on a SCRE 403 analysis. Petitioner also testified had he known that the State could only ask whether he had been convicted of a felony and not the details thereof, he would have taken the stand in his own defense.

Mr. Burton (Counsel) testified he advised Petitioner that the right to remain silent or right to testify is a very important decision for Petitioner to make. Counsel also testified one advantage of Petitioner testifying is to get Petitioner's side of the story to the jury; however, one of the dangers with a defendant like Petitioner, is that the jury would learn of his prior convictions, as they were committed within the last ten years. (App. p. 198). Counsel further stated it was Petitioner's decision not to testify. (App. p. 199). On cross-examination, Counsel readily admitted that if the jury knew Petitioner had two prior convictions for distribution of crack cocaine, it would be "fantastically prejudicial" to Petitioner's case. (App. p. 202). Yet, Petitioner chose not to testify so the jury never learned of his prior convictions.

In its Order of Dismissal, the PCR court held:

> [Petitioner] was questioned by the trial court whether he understood the State could ask questions about his prior convictions if he testified, to which he replied he did. He also stated he understood his right to remain silent. (citations omitted). [Petitioner] also stated he wanted to exercise his right to remain silent. (Citations omitted). The record demonstrates [Petitioner] decided not to testify understanding the consequences of his choice and directly refutes his claims.

(App. p. 226).

Additionally, the PCR Court found Counsel very credible while finding Petitioner not credible. (App. p. 221). See Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) ("This Court gives great deference to a PCR judge's findings where matters of credibility are involved.").

In a PCR action, Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the 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, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea 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.

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. Rule 609, SCRE." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000).

Here, prior to Petitioner informing the trial court that he chose not to testify, the solicitor requested that he be allowed to simply ask Petitioner whether he has prior felony convictions if Petitioner were to testify. Solicitor never requested to ask about the details of the convictions. Further, Counsel testified at the PCR hearing that because these convictions were well within the ten-year limitation pursuant to SCRE Rule 609(b), he did not object because, in his opinion and experience, this type of questioning would be permissible.

Additionally, Petitioner testified at the trial that he fully understood his right to remain silent or testify. Petitioner did not have any questions concerning his right to testify. Petitioner also never explained to the trial court his lack of understanding as to the use of his prior convictions. It was not until his PCR hearing, that he claimed he was under the impression the State could inquire about the details of the convictions. He also claimed that but for Counsel's lack of explanation of the State's use of his prior convictions, he would have taken the stand in his own defense. Interestingly, the PCR Court found this self-serving testimony not credible.

Petitioner relies on State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) for the proposition that the trial court must conduct a hearing to determine whether prior convictions are admissible for impeachment purposes and whether those convictions bear on a defendant's credibility. Petitioner also cited State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) for the five-factor test a trial court should use in deciding whether to admit prior convictions. Both of these cases concerned remote convictions under Rule 609(b) and whether they could be admitted for impeachment purposes. In the case at bar, Petitioner's convictions were within two years of the charges for which he was convicted in this case. Because Petitioner's prior convictions fall squarely under Rule 609(b), the test for admissibility of remote convictions is inapplicable. Second, both of these cases turned on the fact that the defendants testified and had their testimony impeached with their prior convictions. Bryant's case hinged on his credibility as his defense was a self-defense and his testimony was crucial to his defense. Colf was allowed to be impeached with his prior convictions when he testified in his own defense. In this case, Petitioner made a conscience and fully informed decision to exercise his 5th Amendment right against self-incrimination and not take the stand at his trial. He was not impeached with his prior convictions as he never testified and was subject to cross-examination. As such, Bryant and Colf are inapplicable. Thus, Petitioner's claim that Counsel was ineffective for not requesting a hearing under the aforementioned cases fails.

Nonetheless, even if Counsel was ineffective for failing to request the trial judge perform a SCRE Rule 403 analysis, Petitioner has failed to show resulting prejudice. Specifically, Petitioner failed to present testimony at the PCR hearing that shows how his testimony at trial would have changed the outcome of his trial pursuant to Cherry, *supra*. Petitioner also failed to present the testimony he would have given at his trial had he fully understood the way in which

the State could have used his prior convictions for impeachment. Petitioner only claimed he would have testified at trial, yet never explicitly stated what his testimony would have been. Therefore, the PCR Court correctly held "[Petitioner] has presented no evidence to support how the outcome of his trial would have been different had Counsel moved for a hearing concerning his prior convictions."

Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Therefore, Petitioner has failed to meet her burden of proof as to this argument.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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S.C. Bar # 78871

By: _____
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March 5, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Union County

The Honorable Edgar W. Dickson, Circuit Court Judge

TIJUAN PEAKE, 307699

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire
SC Commission of Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

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

This 6th day of March 2014.

CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

March 6, 2014

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

***RE:* Tijuan Peake, 307699 v. State of South Carolina**
2013-001271

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: LaNelle C. Durant, Esquire
Trisha Allen, Victim Services