STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2013-001428

Duval M. Cooper... ..... 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 that Counsel was not ineffective for not moving for a continuance when there is evidence in the record that Petitioner was fully aware that if he did not appear for trial, he would be tried *in absentia*?

STATEMENT OF THE CASE

Duval M. Cooper, ("Petitioner"), was indicted at the September 2005 term of the York County Grand Jury for Trafficking Heroin (2005-GS-46-3486) and Trafficking Methamphetamine (2005-GS-46-3486). Vick Meetze, Esquire, represented him. On February 15-16, 2006, the Applicant proceeded to a jury trial *in absentia* pursuant to which he was found guilty of both charges as indicted. The sentenced was sealed. On May 20, 2010, the sentence was unsealed and the Honorable Lee S. Alford sentenced Petitioner to confinement for twenty-five (25) years for each charge to run concurrently.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Cooper, Op. No. 2012-UP-465 (filed August 1, 2012). The Remittitur was issued on August 21, 2012.

Petitioner subsequently filed an application for post-conviction relief (PCR) on September 7, 2011. Petitioner claimed, *inter alia*, ineffective assistance of trial counsel "for failing to move for a continuance to prevent a trial in Absentee(sic)." Respondent made its Return on December 6, 2012. On May 16, 2013, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Charles T. Brooks, III, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On June 17, 2013, the Honorable John C. Hayes, III 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 that Counsel was not ineffective for not moving for a continuance when there is evidence in the record that Petitioner was fully aware that if he did not appear for trial, he would be tried *in absentia*.

Petitioner asserts that the PCR court erred in finding that Counsel was not ineffective for failing to move for a continuance when Petitioner was not present for trial and the record does not support a finding that Petitioner had notice of his trial date. This argument is without merit.

In a PCR action, 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). 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, Id.

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. The 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.

Additionally, the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of trial; however, an accused may be tried in his absence should he waive that right. See State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007). Where a court finds that an accused has received notice of his right to be present at trial and where a court finds the accused was warned that trial would proceed in his absence, an accused's right to be present at trial may be waived. State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010). Moreover, "a bond form that provides notice that a defendant can be tried in absentia may serve as the requisite warning that he may be tried in his absence should he fail to appear." Id. Lastly, "[t]he deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice." Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976).

At the beginning of Petitioner's trial, Counsel gave a history of his interaction with Petitioner concerning notice of hearings. Counsel stated he would send letters to Petitioner and even though some of the letters were returned to Counsel, Petitioner would always be where he was supposed to be. (App. p. 4 lines 21-25). Counsel then stated Petitioner rejected any offers from the solicitor, but Petitioner knew his case was supposed to be put on the trial docket for the week of January 3, 2006. (App. p. 5 lines 2-11). Counsel testified Petitioner also knew his case could be called as early as the week of January 30, 2006. (App. p. 5 lines 23-25). While Counsel stated he had not made any specific efforts to contact Petitioner the week of Petitioner's trial because Petitioner did not return Counsel's telephone calls, Counsel stated when Petitioner

would call his office, Petitioner would not leave a reachable telephone number or not supply any other contact information. (App. p. 6 lines 2-20). At that point, the solicitor stated to the trial court that Petitioner had signed bond paperwork on which it was stated that after September 6, 2005, Petitioner must appear or he could be tried in his absence. (App. p. 6 lines 21-22). Later, the trial court had the bailiff call Petitioner's name three times in the courthouse to which there was no response. (App. p. 8 lines 4-14).

At the PCR hearing, Petitioner testified he did not receive notice of his trial, but appeared at roll call three times prior to trial. (App. p. 192 lines 16-22). Petitioner claims he gave Counsel his contact information, yet Counsel only notified him concerning roll call. (App. p. 193 lines 1-10). Petitioner admitted that the reason he did not appear for his trial was that his believed his life was in danger and because he travelled back to his home state of New York. (App. p. 199 lines 11-22).

Counsel testified he had contact information for Petitioner including a local home address, to which he sent letters, and a local phone number. (App. p. 203 line 21-p. 204 line 3). Counsel also testified Petitioner's contact information was listed on the bond paperwork which Petitioner signed. (App. p. 206 lines 9-19). Additionally, Counsel stated it was Petitioner's duty to provide Counsel with up-to-date contact information. (App. p. 206 line 24-p. 207 line 2). Moreover, Counsel testified that on the bond paperwork, it explained that Petitioner was required to first appear in General Sessions court and to appear at each subsequent term of court until his case was disposed of. (App. p. 207 lines 17-25). Further, Counsel testified he sent a letter to Petitioner which read:

> I've been informed by the York County Solicitor's Office that you are required to be in General Sessions court on Monday February 13, 2006 at 8:30 a.m. at the Moss Justice Center on Highway 5. You must remain at the Moss Justice Center until you are excused by your attorney and the solicitor prosecuting

> your case. If you fail to appear or if you leave without permission, a bench warrant will be issued, your bond will be forfeited and you will be arrested and placed in jail until the call and disposition of your case.
>
> To prepare for court, you must meet with me on February the 8th, 2006 at 10:00 a.m. in our office. Our office is also the Moss Justice Center on Highway 5 in York, South Carolina. We are located on the first floor. You must keep this appointment. Please do not be late. Please be aware that **if you fail to appear at any time, that your case is subject to being called, your trial could proceed without you being present. You could be convicted in your absence and sentenced accordingly.** I look forward to speaking with you at your appointment. Sincerely, Vick Meetz.

(App. p. 208 line 17-p. 209 line 12) (emphasis added).

This letter was introduced into evidence at the PCR hearing. Counsel lastly testified that he mailed this letter to the address Petitioner provided, but Petitioner failed to show up for their meeting. (App. p. 201 lines 6-10).

In the Order of Dismissal, the PCR court held Counsel was effective in his representation of Petitioner and distinguished Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) from this case. (App. p. 226). The PCR court also found that even if Counsel was ineffective, Petitioner was not prejudiced because Petitioner's own actions led to his absence at trial. (App. p. 227).

In the case at bar, the PCR court correctly held Counsel was not ineffective for not requesting a continuance on Petitioner's behalf as Counsel diligently attempted to contact Petitioner in this case. Counsel testified that at the beginning of his communication with Petitioner, Counsel would send letters to Petitioner concerning roll call to the address Petitioner provided on his bond paperwork. Although some of these letters were returned, Petitioner would always appear when and where he was supposed to. This clearly indicates Petitioner received notices of roll call and that the information Petitioner provided to Counsel was correct and up-to-date. Additionally, Counsel testified at the PCR hearing that he sent a letter to Petitioner with the exact date Petitioner's trial was to be called by the solicitor. In this letter, it explicitly stated that

is Petitioner did not show for trial, his case could be tried in his absence and he would be sentenced accordingly. Counsel testified he sent this letter to the address provided by Petitioner.

Moreover, Petitioner had notice that his case would be tried in his absence if he failed to appear for trial. On his bond paperwork, as explained by the solicitor at trial, Petitioner must appear after September 6, 2005 or he would be tried in his absence. Counsel testified at the PCR hearing that on the bond paperwork, it indicated that Petitioner was "first to appear in General Sessions court and **to appear each subsequent term of court until his case was disposed of.**" (App. p. 207 lines 23-25). Pursuant to Ravenell, *supra*, this bond paperwork served as a warning that Petitioner could be tried in his absence if he did not appear for trial. Furthermore, Counsel testified Petitioner knew he was supposed to appear in court on January 30, 2006, a mere two weeks before Petitioner's trial. Counsel specifically testified Petitioner called Counsel on January 30, 2006, asking if he could appear later that week. Counsel stated Petitioner could come in that Wednesday and Petitioner asked if he could come in on Thursday or Friday of that week. (App. p. 7 line 21-p. 8 line 1). Clearly, Petitioner knew his trial date was quickly approaching via his bond paperwork and communication with Counsel. Thus, Petitioner undoubtedly had notice that if he failed to show for his trial, he would be tried in his absence.

The PCR court also correctly distinguished Morris v. State, *supra*, the case on which Petitioner relies, from this one. In Morris, counsel was held ineffective for not requesting a continuance when petitioner arrived at the courthouse and signed a sentencing sheet in anticipation of entering a guilty plea to a lesser-included offense. As Morris testified at the PCR hearing, he left the courthouse only after he asked counsel for a continuance and counsel told Morris he could leave the courthouse. Morris was tried in his absence, convicted of the greater offense and sentenced to the maximum punishment.

In this case, Petitioner never appeared at the courthouse and never communicated to Counsel that he wanted a continuance. Additionally, Petitioner, according to Counsel, rejected any and all plea offers from the State. Unlike Morris, Petitioner can show no prejudice because Petitioner was convicted of trafficking methamphetamine, 28-100 grams and trafficking, heroin, more than 28 grams and the mandatory minimum sentences of those charges is twenty-five (25) years; the sentence Petitioner received. Because Petitioner rejected any plea offers from the solicitor, he would have been tried on these charges regardless of whether not he appeared for trial. Moreover, Petitioner's own actions were the reason he was tried in his absence. Petitioner admitted at the PCR hearing that, while on bond, he left South Carolina and returned to his home state of New York. Further, Counsel also testified he communicated with Petitioner as recently as January 30, 2006 and Petitioner knew he had to appear for court. Clearly, this case is distinguishable from Morris.

Nevertheless, the PCR court held that even if Counsel was ineffective for failing to request a continuance, Petitioner failed to show resulting prejudice. The PCR held that, based on the testimony at the hearing, Petitioner would not have appeared for trial even if he had more specific notice of his trial because, as Petitioner claimed, his life was being threatened by someone with connections in South Carolina. Petitioner made a conscious decision to leave South Carolina and return to New York without contacting Counsel, the Court or his bondsman. The PCR court duly noted that from January of 2006 until Petitioner's arrest in 2010 in New York, there was no evidence of contact with Counsel or the court. Clearly, Petitioner would not have appeared for his trial even if a continuance was requested and granted. As such, the PCR court correctly held that Petitioner could prove no prejudice by Counsel's failure to request a continuance, because by his conduct, Petitioner waived his right to be present for his trial.

Respondent submits that 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 his 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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March 13, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

DUVAL M. COOPER, 340970

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:

Kathrine H. Hudgins, 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 13th day of March 2014.

CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 13 2014
S.C. Supreme Court

March 13, 2014

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

***RE:* Duval M. Cooper, 340970 v. State of South Carolina**
2013-001428

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: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services