STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

2010-CP-02-01470
Appellate Case No. 2013-000095

Joe Larke Williams. ..... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED

Probative evidence supports the PCR court's finding that Plea Counsel was not ineffective for failing to move to strike the incorrect prior conviction stated by the Solicitor, where Plea Counsel objected to the misinformation during the plea proceeding.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitoiner was indicted for Distribution of Cocaine Base Within Proximity of a School (2009-GS-02-2008) and Distribution of Cocaine Base (2009-CP-02-2009). He was represented by Norman Staples Wood, Esquire. On January 12, 2010, the Petitioner pled guilty to before the Honorable Doyet A. Early, III. He was sentenced to fifteen (15) years imprisonment for Distribution of Cocaine Base Within Proximity of a School and to twenty (20) years imprisonment for Distribution of Cocaine Base (2^{nd} Offense). The sentences were to be served concurrently. A Notice of Appeal was filed, but the Appeal was dismissed by the South Carolina Court of Appeals on February 22, 2010. The Remittitur was sent on March 16, 2010.

Subsequently, Petitioner filed a timely application for PCR on June 23, 2010. The State made its Return on December 16, 2010. A hearing was convened at the Aiken County Courthouse on Friday, July 15, 2011, at which time the Applicant was present in court and represented by Jeffrey Moorehead, Esquire. The Respondent was represented by Rob Corney of the South Carolina Attorney General's Office. The Honorable James R. Barber, III denied and dismissed the application with prejudice. Petitioner filed a Rule 59(e) motion on September 12, 2011. Judge Barber denied Petitioner's motion by order dated and filed on September 19, 2011. Petitioner subsequently filed a Petition for Writ of Certiorari on March 8, 2013. This Return 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, 104 S.Ct. 2052, 2064 (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, 466 U.S. 668, 104 S.Ct. 2052, 2064. 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. With respect to

guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

ARGUMENT

Probative evidence supports the PCR court's finding that Plea Counsel was not ineffective for failing to move to strike the incorrect prior conviction stated by the Solicitor, where Plea Counsel objected to the misinformation during the plea proceeding.

Petitioner argues that the PCR court erred in finding that Counsel was not ineffective for failing to move to strike the testimony of the Solicitor regarding an alleged 2005 conviction for distribution of drugs, thereby assuring that the information was not considered by the plea judge during sentencing. However, this argument is without merit as there is probative evidence to support the PCR court's finding.

During the plea proceeding, the Solicitor presented the facts on the record. (App. p. 14 line 21—p. 17 line 5). The Solicitor informed the plea court that Petitioner was pleading to a negotiated twenty year sentence for distribution of crack cocaine and fifteen year sentence for distribution of crack within proximity of a school.[1] The Solicitor read Petitioner's prior record to the plea judge, stating:

> [Petitioner] prior record is as follows. He has a CDV in 1997, simple assault in 1997, avoiding payment for telecommunications 1998, malicious injury to personal property in 1998, shoplifting and resisting arrest in 2000. He also has in 2000 a conviction for distribution of crack cocaine within proximity. *In 2005 he has a possession with intent to distribute.* In 2007 and in 2008 he has giving false information to police.

(App.p. 6 lines 13-20) (emphasis added). Subsequently, Plea Counsel stated, "your Honor, I'll agree with all of the facts laid out by the Solicitor...my client also contends that he was in prison in 2005. So, there must be some sort of mistake as far as his record of prior possession with intent to distribute in 2005..." (App. p. 16 line 22—p. 17 line 4).

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[1] Petitioner ultimately pled guilty to distribution of crack cocaine (2009-GS-02-2009) and distribution of crack within proximity of a school (2009-GS-02-2008).

During the PCR hearing, Petitioner testified that a crack distribution within proximity of a school dated November 2004 was incorrect, because Petitioner was incarcerated during that time period. However, Petitioner confirmed that he had a prior conviction for distribution of crack cocaine in 2000 and a prior 2005 conviction for possession of marijuana with intent to distribute in 2005 (App. p. 52 line 6—p. 53 line 1; App. p. 61 lines 3-22). Petitioner disputed whether he was convicted of possession with intent to distribute marijuana or possession of marijuana. (App. p. 61 lines 3-9). Counsel testified he and Petitioner went over Petitioner's prior record "with a fine-tooth comb." (App. p. 82 line 25—p. 83 line 3). Counsel testified he objected to the 2005 distribution charge as read by the solicitor. (App. p. 76 lines 15-25). Counsel further testified regardless of whether Petitioner was actually convicted of a distribution charge in 2005, he could still be sentenced to a Distribution of Crack Cocaine-2nd offense because of his prior 2000 conviction. (App. p. 76 lines 3-18).

Petitioner relies on State v. Franklin, 267 S.C. 240; 226 S.E.2d 896 (1976). The Supreme Court affirmed the sentence imposed in Franklin. While the Supreme Court noted that a sentence should not be based upon false information, and a defendant should be given the opportunity to explain any discrepancy and inform the court of any alleged errors concerning the defendant's record, the Supreme Court ultimately found that the trial court did not abuse its discretion because the appellant in Franklin was provided with an opportunity to address any misapprehension the trial court may have had. Id. at 245-46, 226 S.E.2d at 897-98. Additionally, the court noted that the sentence was "within the limits provided by statute for the discretion of the trial court, and [was] not the result of prejudice, oppression or corrupt motive." Id.

In the instant case, Counsel objected to the 2005 possession with intent to distribute conviction as read by the solicitor. (App. p. 16 line 22—p. 17 line 5). However, assuming

arguendo, that Petitioner's 2005 possession with intent to distribute was an error, Petitioner can show no prejudice as he was properly charged with and pled guilty to Distribution of Crack Cocaine-Second offense.[2] Furthermore, Petitioner pled guilty to a *negotiated* sentence of twenty years for distribution of Crack Cocaine-Second offense and Distribution of Crack Cocaine Within Proximity of a School. (App. p. 5 lines 5-23) (emphasis added). The plea judge accepted and sentenced in accordance with the negations. (App. p. 20 lines 4-11). Therefore, Petitioner has failed to meet his burden of proof because Counsel objected to the alleged inaccuracy, the negotiated sentence was accepted by the plea judge, and Petitioner was sentenced within the statutory limits.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Deputy Attorney General
Bar No. 100934

By: _____
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February 3, 2014

[2] Petitioner did not dispute his prior 2000 conviction for possession with intent to distribute crack cocaine. (App. p. 61 lines 10-15).

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

The Honorable James R. Barber, III, Circuit Court Judge

JOE LARKE WILLIAMS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Wanda H. Carter
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 3rd day of February, 2014

CAROLINE KAISER
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 03 2014
S.C. Supreme Court

February 3, 2014

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

Re: **Joe Larke Williams v. State of South Carolina**
Appellate Case No. 2013-000095
Lower Court Case No. 2010-CP-02-01470

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/ck
Enclosure(s)

cc: Appellate Defender Wanda H. Carter (2 copies)
Trisha Allen, Victim Services (1 copy)