



ALAN WILSON
ATTORNEY GENERAL

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MAR 25 2014

March 25, 2014

S.C. Supreme Court

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

Re: Stacy Raysor v. State of South Carolina
Appellate Case No. 2013-000428

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: Wanda H. Carter, Esquire, Appellate Defense
Trisha Allen, Victim's Services

STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 25 2014

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

J. Ernest Kinard, Circuit Court Judge

2011-CP-40-00299
Appellate Case No. 2013-000428

Stacy Raysor 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 REVIEW6
ARGUMENT8
CONCLUSION.....12

ISSUE PRESENTED

Probative evidence supports the PCR Court's finding that Counsel was not ineffective for failing to object to the resentencing judge's comment that he tended not to consider Petitioner's South Carolina Department of Corrections records where counsel had previously explained the records and her reasoning for wanting the plea judge to consider them?

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 September 1999 term of the Richland County Grand Jury for Murder (1999-GS-40-44509). Hemphill Pride, II, Esquire, represented Petitioner. On August 13, 2001, Petitioner appeared before the Honorable L. Casey Manning where he pled guilty to the lesser included offense of Voluntary Manslaughter. Judge Manning sentenced Petitioner to twenty nine years imprisonment.

A Notice of Appeal was submitted on Petitioner's behalf, but by order on or about December 11, 2002, the Court of Appeals dismissed the appeal. State v. Raysor, 2002-UP-765 (S.C. Ct. App. 2002).

Petitioner filed an application for PCR on December 8, 2003 (2003-CP-40-5846). The State made its Return on July 29, 2004 and the matter was scheduled for an evidentiary hearing before the Honorable John C. Hayes, III. At the hearing, Judge Hayes granted Petitioner's motion for summary judgment thereby vacating Petitioner's sentence, and ordered Petitioner be sent back to General Sessions Court for resentencing. The State thereafter filed a timely Notice of Appeal and Petition for Writ of Certiorari in the South Carolina Supreme Court. The Court granted the Petition and the parties proceeded to briefing. Following the submission of briefs, the Court dismissed the appeal as improvidently granted by order on or about July 13, 2009. State v. Raysor, 2009-MO-0038 (S.C. 2009). The Remittitur was issued July 29, 2009.

Petitioner appeared before the Honorable G. Thomas Cooper on February 9, 2010, represented by counsel, Nicole Singletary, Esquire, for re-sentencing. The State was represented by Aaron Johplin, Esquire, Assistant Solicitor for Richland County. Judge Cooper sentenced

Applicant to twenty-five years imprisonment with credit for time served since his original incarceration in 1999.

Subsequently, Petitioner filed a second application for PCR on January 18, 2011 (2011-CP-40-00299). The State made its Return on February 9, 2012. An evidentiary hearing into the matter was convened at the Richland County Courthouse on September 10, 2012 before the Honorable J. Ernest Kinard, Jr. Petitioner was present and represented by Robert C. Fitzsimons, Esquire. By Order dated February 1, 2012 and filed February 6, 2013, Judge Kinard denied and dismissed Petitioner's application with prejudice. Petitioner appealed Judge Kinard's order of dismissal.

This Return to the Petition of 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, 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.

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

Probative evidence supports the PCR Court's finding that Counsel was not ineffective for failing to object to the resentencing judge's comment that he tended not to consider Petitioner's South Carolina Department of Corrections records where counsel had previously explained the records and her reasoning for wanting the plea judge to consider them?

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for failing to object to the resentencing judge's refusal to consider Petitioner's mitigation evidence in the form of South Carolina Department of Corrections (SCDC) records. However, this argument is without merit, as the record provides ample evidence to support the post-conviction relief court's finding that Counsel was not ineffective in regards to this allegation.

Court's evaluate allegations of ineffective assistance of counsel using a two-pronged test. 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*. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (*quoting Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). 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. Furthermore, where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

Additionally, in State v. Franklin, 267 S.C. 240, 245, 226 S.E. 2d 896, 898 (1976), the South Carolina Supreme Court rejected a claim by the defendant that a trial court should not

have considered his probation report, which included charges for which the defendant had not been tried. Franklin, 267 S.C at 245, 226 S.E. 2d at 898. The court found it significant that that the trial court gave the defendant an opportunity to respond to the allegations. Id. The court determined that a trial judge has wide discretion in determining what sentence to impose. Id. In deciding a proper sentence, the trial judge “may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come.” Id.

In the instant case, Petitioner’s Counsel, Nicole Singletary (Counsel) presented mitigation evidence in the form of SCDC records. However, during the course of the Petitioner’s mitigation testimony, the Solicitor stated to the sentencing judge that “we’re here before you for you to decide a sentence based on the facts brought before you today, not on what’s transpired in the past years, but what happened ten years ago.” (App. p. 123 lines 7-10). In response, Counsel argued:

the defense is allowed to do whatever mitigation it deems appropriate...the records were not to show that my client has per se done since 1999. However, it is to show that my client does not have a history of violent acts. Prior to this he had no record. This is an isolated incident, Your Honor, and that why we actually showed his records, to show that he is still trying to be productive even though he is in a bad situation.

(App. p. 124 lines 12-22). Counsel further stated since his time in the SCDC, Petitioner has reformed his life, including becoming a better father to his daughter and establishing a healthier relationship with his ex-wife. Counsel stated Petitioner had no prior record prior to this crime and respectfully asked for time served or in the alternative a fifteen to twenty year sentence. Following Counsel’s mitigation testimony, the sentencing judge heard statements from Petitioner’s ex-wife and adopted father. (App. p. 120 line 16—p. 122 line 18). Additionally,

Petitioner spoke on his own behalf, apologizing “for [his] untold pain and wrongfulness that [he] caused.” (App. p. 124 lines 3-11). Similar to that in Franklin, both Counsel and Petitioner were given the opportunity to present their testimony regarding Petitioner’s past character.

After hearing all mitigation testimony, the sentencing judge stated “I have to evaluate this case based on *what I’ve heard today*, not on what – frankly, not on his disciplinary record at the Department of Corrections – *and I tend to have not considered that in my judgment of this case*. (App. p. 126 line 3-8) (emphasis added). The sentencing judge ultimately sentenced Petitioner twenty-five years, a term four years less than his original sentence. (App. p. 126 lines 23-25). As stated in Franklin, the sentencing judge may conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. Franklin, 276 S.C. 245, 226 S.E. 2d. 898.

During the PCR hearing, Counsel testified that SCDC records were admitted and the sentencing judge heard the mitigation evidence. (App. p. 158 lines 6-8). Counsel further stated that she used the evidence to show Petitioner’s good conduct as it relates to the time spent in the Department of Corrections. (App. p. 154 lines 17-22). Counsel stated in her opinion the fact that the sentencing judge did not consider the SCDC records in mitigation was not an objectionable issue because it is “strictly up to the discretion of the trial judge.” (App. p. 156 lines 6-8). Counsel reasoned:

if I would have put up witnesses who wanted to attest to [Petitioner’s] character and they were there in the courtroom live, I mean, the trial judge could consider what they said to him in...mitigation for [Petitioner] or the trial judge could not consider their live testimony as to his character in front of him. So, therefore, as it relates to giving the judge the actual...track record of [Petitioner’s] behavior in the Department of Corrections, I knew that that is something that the judge could in his own discretion use to give him a lower sentence than what the judge gave him or

actually just keep the sentence the way that it was when he -- when he initially pled guilty.

(App. p. 156 lines 10-24). Counsel further stated, in her opinion, it would not have been beneficial to object to the judge's comment "that he tended not to consider the SCDC records" in fashioning an appropriate sentence because the judge has broad discretion and she would not want to get into an argument or disagreement with the judge, when he is about to sentence her client. (App. p. 159 lines 3-10). Here, Counsel clearly articulated a valid strategic reason for not objecting to the sentencing judge's comment that he tended not to consider the SCDC records when determining the appropriate sentence for her client. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

Furthermore, Petitioner has failed to show any resulting prejudice. The sentencing judge heard the mitigation evidence prior to sentencing and chose to give it minimal weight. It is evident by the sentencing judge's comments that the evidence presented had little impact on the sentence. Furthermore, the sentence imposed by the sentencing judge was well within the statutory limits for Voluntary Manslaughter and was four years lower than his original sentence imposed by Judge Manning. Therefore, it cannot be said that the alleged deficiency resulted in prejudice to Petitioner.

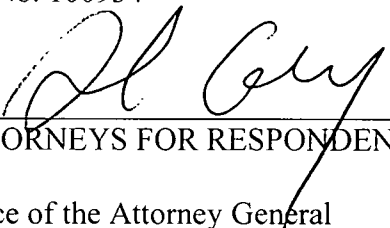
CONCLUSION

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: 

ATTORNEYS FOR RESPONDENT

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

March 25, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable J. Ernest Kinard, Circuit Court Judge
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STACY RAYSOR,

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v.

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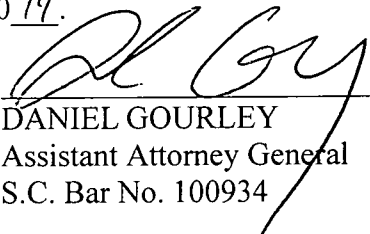
PROOF OF SERVICE

I, Megan E. Harrigan, 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:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

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

This 25 day of March, 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