

2011-187189

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

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2010-CP-10-6960
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SYLVESTER SCOTT,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

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PETITION FOR WRIT OF CERTIORARI
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ISSUES PRESENTED

- I. Did the PCR Court err in finding that plea counsel was ineffective for failing to contact a potential alibi witness where counsel relied on Respondent's family to provide contact information for the witness and Respondent's family failed to do so?
- II. Did the PCR Court err in finding that plea counsel failed to properly investigate and prepare for trial?
- III. Did the PCR Court err in finding that plea counsel coerced Respondent to plead guilty?
- IV. Did the PCR Court err in finding that plea counsel was ineffective for failing to obtain the cell phone store records where counsel was not appointed to represent Respondent until two months after the incident and the cell phone store only kept receipts for two months?

STATEMENT OF THE CASE

The Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Respondent was indicted at the August 2009 term of the Charleston County Grand Jury for entering a financial institution with intent to steal (2009-GS-10-6471). Andrew Grimes, Esquire, represented the Respondent. On March 16, 2010, the Respondent pled guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced him to confinement for twelve (12) years. The Respondent did not appeal the guilty plea or sentence.

The Respondent filed an application for post-conviction relief on August 26, 2010. The State made its Return on November 16, 2010. An evidentiary hearing into the matter was convened on January 24, 2011 at the Charleston County Courthouse. The Respondent was present at the hearing and was represented by David J. Parrish, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the State. By Order dated February 17, 2010 and filed on February 23, 2010, the Honorable Roger M. Young, Sr. granted post-conviction relief. The Petitioner filed a timely Notice of Appeal. This Petition 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in the 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 applicant 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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, 466 U.S. 668. The applicant 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 applicant 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 applicant 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.

ARGUMENT

I. **The PCR Court erred in finding that plea counsel was ineffective for failing to contact a potential alibi witness where counsel relied on Respondent's family to provide contact information for the witness and Respondent's family failed to do so.**

The PCR Court found that plea counsel was ineffective for failing to contact a potential alibi witness. Petitioner submits that the PCR Court erred in so finding because neither Respondent nor his family provided counsel with any contact information on the potential alibi witness.

At the PCR hearing, plea counsel testified that Respondent provided him with the name of a potential alibi witness, Michael Castain, but Respondent did not provide him with any contact information on Mr. Castain. (App. p. 95, lines 16-23). Counsel testified that Respondent's brother was supposed to provide counsel with Mr. Castain's contact information, but Respondent's brother failed to return counsel's messages. (App. p. 95, line 24 – p. 96, line 4). Counsel testified that he was relying on Respondent's family to provide contact information for the potential alibi witness. (App. p. 99, lines 13-22).

The PCR Court's Order states that "Counsel conceded that he never attempted to contact the alibi witness and did not attempt to follow up with [Respondent] to obtain that (sic) the witness' contact information." (App. p. 149). Petitioner submits that the PCR Court mischaracterized the testimony. Counsel clearly stated that he relied on Respondent and his family to provide contact information on the potential alibi witness, and both Respondent and his family failed to provide this information to counsel.

Respondent failed to demonstrate either prong of Strickland with respect to this allegation. Consequently, Respondent has failed to establish ineffective assistance of counsel and there is no probative evidence to support the PCR Court's finding. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court.

II. The PCR Court erred in finding that plea counsel failed to properly investigate and prepare for trial.

The PCR Court found that counsel was ineffective for failing to properly investigate and prepare for trial. Petitioner submits that plea counsel conducted a proper investigation and would have been prepared for trial had Respondent elected to proceed to trial.

At the PCR hearing, Respondent testified that on the day of the incident he ran into a guy that frequents his neighborhood at the bus stop, told the guy it was his birthday, and smoked marijuana in the woods with this person. (App. p. 73, line 7 – p. 74, line 12). Respondent further testified that this acquaintance asked him to open a package for him, and the package contained a disguise. (App. p. 74, lines 4-12). Respondent testified that he told counsel that his DNA must have come into contact with the disguise when he opened the package, but he asserted that counsel did not believe this explanation was sufficient as a defense. (App. p. 77, line 12 – p. 78, line 3).

Plea counsel testified that he investigated Respondent's story about smoking marijuana in the woods with an acquaintance and opening a package containing a disguise. (App. p. 96, lines 5-13). Counsel asserted that he and his investigator went to the scene, spoke with people that hung out there, and took photographs. (App. p. 96, lines 13-20). Counsel testified that he did not recall whether Respondent gave him the name of his acquaintance. (App. p. 96, lines 21-23). Counsel testified as follows:

[T]here was some stuff that helped us, some stuff that hurt us, but I don't think we could ever come up with a good, feasible argument on the DNA. Ultimately, I think that was – what I told [Respondent], I said, I know we can beat the other two charges, but I don't know how we get around the DNA.

(App. p. 99, lines 1-6).

Counsel testified that he believed the Respondent would have gone to trial solely on the Tideland's bank robbery to which he pled guilty. (App. p. 100, lines 16-18). Counsel testified that he

subpoenaed several witnesses for trial, including bank customers and employees of the Hocus Pocus store where the disguise was purchased. Although counsel testified that he was not prepared to go forward on the alibi defense, Petitioner submits that – as stated above – Respondent’s failed to provide counsel with contact information on the alibi witness.

The Respondent failed to demonstrate either prong of Strickland. Consequently, Respondent has failed to establish ineffective assistance of counsel and there is no probative evidence to support the PCR Court’s finding. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court.

III. The PCR Court erred in finding that plea counsel coerced Respondent to plead guilty.

The PCR Court found that counsel coerced Respondent into pleading guilty to the Tidelands bank robbery. At the PCR hearing, Respondent contended that he was forced to plead guilty because his attorney did not give him any alternative for a defense and told him he did not have any chance of winning at trial due to the overwhelming evidence. (App. p. 80, lines 4-22; p. 83, lines 17-21). He also asserted that at the time of the plea he was not aware that witnesses from the Ameris Bank robbery had not positively identified him from a photo lineup. (App. p. 83, line 22 – p. 84, line 4).

Petitioner submits that the record reflects that Respondent’s plea was entered freely, intelligently, and voluntarily. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). “A defendant’s knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished

by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’” Hill, 474 U.S. at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). “In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

In Holden v. State, 2011 WL 3206875 (S.C.), this Court found that any deficiency in plea counsel’s representation was cured by the plea colloquy. This Court found that Holden never testified that she would not have pled guilty if plea counsel had properly explained the charges, the elements of the offenses, or reviewed the State’s evidence with her. Holden, 2011 WL 3206875 (S.C.).

Here, Petitioner relies on the guilty plea transcript. At the plea hearing, Respondent indicated that he understood the natures of the charge and the possible punishments. (App. p. 2, lines 11-22). He told the plea court that he understood he was giving up his right to a jury trial by pleading guilty. (App. p. 4, lines 7-12). Respondent told the plea court that no one threatened him or promised him anything to get him to plead guilty. (App. p. 4, lines 13-16). He also indicated that he agreed with the solicitor’s recitation of the facts in the case. (App. p. 6, lines 4-6). Moreover, Respondent addressed the court during the plea hearing and essentially admitted guilt. Respondent addressed the

court as follows:

First of all, I would like to apologize to the court and I'd like to apologize to the victim. I realize that – I want to let the court know, let you'all (sic) know that the person that did this was not the person I really tend to be. I have a – I was dealing with a heroin addiction. I can't take it away, it's – I've destroyed my family, I've let them down. My fiancée and my daughter were facing an eviction notice during that time – (emotional). I just wanted to come through for them one time, -- (emotional), just one time. Again, I would like to apologize to my family for screwing up. I'd like to also – also apologize to the lady at the bank.

(App. p. 7, lines 11-24). Petitioner submits that based on the comprehensive questioning and Respondent's answers, the plea judge properly accepted the plea and determined that it was knowing and voluntary.

Plea counsel testified that Respondent was charged with three bank robberies at three different locations – Tidelands Bank, Ameris Bank, and Heritage Trust. Counsel asserted that the State's case was weak in the Ameris Bank and Heritage Trust cases, but he testified that the DNA evidence against Respondent in the Tidelands Bank case was strong. (App. p. 100, line 2 – p. 103, line 12). Respondent pled guilty only to the Tidelands Bank robbery. Since Respondent pled guilty only to the Tidelands bank incident, Petitioner submits that it is irrelevant that Respondent was not aware that some of the witnesses to the Ameris Bank robbery did not positively identify Respondent from the photo lineup. Petitioner submits that the photo lineup from the Ameris Bank case would not have been a consideration in discussions between counsel and Respondent with respect to the Tidelands Bank robbery.

Counsel testified that he did not coerce Respondent to plead guilty. (App. p. 98, lines 11-12). He contended that Respondent was reluctant to plead guilty, but ultimately it was Respondent's decision. (App. p. 97, lines 14-16). Counsel also testified that he believed Respondent made a voluntary, knowing, and intelligent decision to plead guilty. (App. p. 110, line 22 – p. 112, line 8).

Respondent never testified that he would have insisted on going to trial if counsel had contacted the potential alibi witness or obtained the cell phone store receipts.

Petitioner submits that there is no probative evidence to support the PCR Court's finding that Respondent was coerced to plead guilty. Any alleged deficiency in plea counsel's representation was cured by the plea colloquy. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court.

IV. The PCR Court erred in finding that plea counsel was ineffective for failing to obtain the cell phone store records where counsel was not appointed to represent Respondent until two months after the incident and the cell phone store only kept receipts for two months.

The PCR Court found that plea counsel was ineffective for failing to obtain the cell phone store records that could have determined whether Respondent purchased a cell phone on the same day and at the same time that the Tidelands Bank robbery occurred. Petitioner submits that the PCR Court erred in so finding because counsel's investigator looked into the records and discovered that the cell phone store only keeps receipts for two months.

At the PCR hearing, counsel testified that he asked his investigator to go to the cell phone store, and the investigator informed him that the cell store indicated that it would be very difficult to locate the receipt if the phone was purchased more than two months earlier. (App. p. 96, line 24 – p. 97, line 8; p. 106, line 1 – p. 107, line 13). Counsel admitted that there was a year delay before his first attempt to investigate the cell phone matter. However, counsel testified that he was appointed to the case about two months after the Tidelands Bank robbery. (App. p. 113, line 2 – p. 114, line 3). Petitioner submits that Respondent was not prejudiced by counsel's delay in investigating the cell phone store receipts because the store only kept the receipts for two months, and counsel was not appointed to the case until two months after the incident.

The Respondent failed to demonstrate the second prong of Strickland, specifically that he was prejudiced by counsel's delay in investigating the cell phone store receipts. Consequently, Respondent has failed to establish ineffective assistance of counsel and there is no probative evidence to support the PCR Court's finding. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the findings of the lower court.

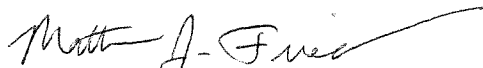
Respectfully submitted,

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August 5, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2010-CP-10-6960

SYLVESTER SCOTT

Respondent,

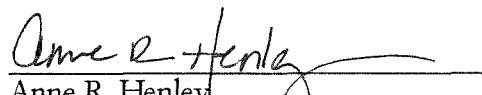
v.

STATE OF SOUTH CAROLINA,


Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari has been served upon opposing counsel, Appellate Defense, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 5th day of August, 2011.


Anne R. Henley
Legal Assistant for Petitioner

SWORN to before me this
5th day of August, 2011.



Notary Public for South Carolina
My Commission Expires: 10/28/2014

(L.S.)