

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2008-CP-11-1058

James Keith Grindle,..... 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 hold that Counsel was not ineffective for failing to call the Debbie and Scott Howard as witnesses at Petitioner's trial?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. The Petitioner was indicted at the May 2006 term of the Court of General Sessions for criminal sexual conduct with a minor – 1st degree (2006-GS-11-408). Trent N. Pruett, Esquire, represented him. On December 6, 2008, the Petitioner proceeded to trial after which he was found guilty as indicted. The Honorable J. Mark Hayes II sentenced Petitioner to confinement for a period of thirty (30) years for this charge.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Grindle, Op. No. 2008-UP-618 (filed November 10, 2008).

Petitioner then filed an Application for Post-Conviction Relief on December 5, 2008. An evidentiary hearing into the matter was convened on January 14, 2010, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Sheryl C. Bland, Esquire. Suzanne H. White of the South Carolina Attorney General's Office represented the Respondent. At the hearing, the Petitioner and his mother, Charlene Grindle, testified on his behalf. Trent N. Pruett, Esquire testified on behalf of the State. At Petitioner's request, a deposition was taken of Deborah Howard, on April 2, 2010, and submitted to the Court. On February 10, 2011, the Honorable Roger L. Couch issued a written order denying and dismissing Petitioner's application for post-conviction relief.

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 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 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 held that Counsel was not ineffective for failing to call the Debbie and Scott Howard as witnesses at Petitioner’s trial.

In this case, Counsel represented Petitioner at trial in December 2006, on a charge of criminal sexual conduct with a minor – 1st degree. (App. p. 5). The case presented by the State relied heavily on the testimony of the victim, who was four years old of the time of the incidents, but eight years old at trial. (App. p. 471). Counsel testified that his strategy was to discredit the victim’s testimony that Counsel believed was somewhat bizarre. (App. p. 472-3). At trial, however, because of the vagueness of the victim’s testimony, issues of jurisdiction were raised and Counsel made a directed verdict motion dealing with the State’s failure to prove that the alleged acts occurred in Cherokee County. (App. p. 270-2). Petitioner argued that Counsel should have called Debbie and Scott Howard to testify to establish the lack of jurisdiction of the court and because he did not, he was deficient and Petitioner was prejudiced.

In a post-conviction relief 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). Where ineffective assistance of Counsel is alleged 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, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured 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. Here, Petitioner has failed to meet either prong of the Strickland test and has failed to show that Counsel was ineffective.

At the post-conviction relief hearing, Petitioner argued that Counsel was ineffective for failing to call as witnesses for trial, Debbie and Scott Howard. (App. p. 432). Petitioner testified that he had informed Counsel that the Howards could testify that the Howards could testify that the child victim and the child’s mother were living in North Carolina at the time period alleged in the indictment. (App. p. 432). Petitioner also testified that he believed Mrs. Howard could have testified as to the DSS investigation that was going on in North Carolina and South Carolina during the time alleged in the indictment as well. (App. p. 432-3). Petitioner testified that the issue of jurisdiction was discussed at length at his trial and the testimony of the Howards

could have specifically spoken to whether or not the trial court had jurisdiction in this matter. (App. p. 433). Petitioner also testified that the victim's mother had moved in with her children with the Howards in Cramerton, North Carolina, on approximately March 21st, then moved back to South Carolina at the end of May. (App. p. 438). However, Petitioner testified that the victim's mother did not move back to South Carolina with the children until he had moved to North Carolina. (App. p. 438).

Petitioner acknowledged that he lived in Cherokee County during the time the victim and his mother lived in North Carolina, and the locations were approximately forty-five minutes to an hour apart. (App. p. 445). Petitioner also acknowledged that the indictment alleged that he committed the crime sometime between April 1, 2003, and July 1, 2003. (App. p. 448; p. 519). Petitioner agreed that he did testify at trial that he had contact with the victim in June 2003 in South Carolina. (App. p. 447). Petitioner also agreed that he had testified at trial that for several weeks after the twins were born in March 2003, he spent time with the victim in South Carolina. (App. p. 448).

Counsel testified that going into trial, jurisdiction of the court was not a big issue because the Petitioner had always, just as testified to at court, told Counsel that he had continuing contact with the victim in South Carolina. (App. p. 469). Counsel also testified that he did not think it was an issue because by Petitioner's own admission and because of D.S.S. records, Petitioner was in Cherokee County during the time period alleged in the indictment. (App. p. 469).

Regarding the Howards specifically, Counsel testified that he and the Petitioner had not really discussed calling them as witnesses regarding jurisdiction for the reasons stated previously, that jurisdiction had not really been discussed as an issue before trial. (App. p. 472). Counsel also testified that although jurisdiction became a potential defense because the victim

was very vague as to dates and times of incidents, Petitioner's own testimony established contacts with the victim during the time frame of the indictment, even though he did not live with the victim at the time. (App. p. 473). Furthermore, Counsel testified that had he brought in additional witnesses to contradict what times or when the child or Petitioner was in South Carolina, he would have been impeaching his own witness. (App. p. 482).

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Respondent submits that although Petitioner provided the testimony of Deborah Howard, her testimony was insufficient to establish that the outcome of trial would have changed had Counsel called her as a witness at Petitioner's trial. It is clear that "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).

Clearly, 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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By: 
ATTORNEYS FOR THE RESPONDENT

September 15 2011.

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The Honorable Roger L. Couch, Circuit Court Judge

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JAMES KEITH GRINDLE,

Petitioner,

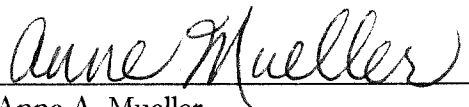
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STATE OF SOUTH CAROLINA,

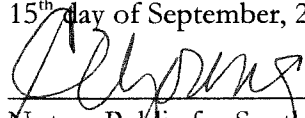
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 15th day of September, 2011.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
15th day of September, 2011.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 10/28/2014