

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-000739

RECEIVED

APR 16 2014

S.C. Supreme Court

MICHAEL ANTHONY ALLEN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED

- I. Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective in regards to the video surveillance footage, where none of the attorneys involved were aware of the second angle of surveillance footage until the first day of trial, Counsel advised Petitioner that conviction was all but certain based on the overwhelming evidence of his guilt and that he should accept the State's extremely favorable plea offer and Petitioner elected to pursue a trial against Counsel's professional judgment, and there is overwhelming evidence of guilt absent the second surveillance video footage.

- II. Is there evidence of probative value to support the post-conviction relief court's finding that Counsel was not ineffective for failing to advise Petitioner that he could have requested a charge on the lesser included offense of strong arm robbery, where there is no evidence to support a conviction of the lesser included offense of strong arm robbery?

STATEMENT OF THE CASE

Petitioner was indicted during the October 2006 term of the Aiken County Grand Jury for Armed Robbery (2006-GS-02-01685) and Carjacking (2006-GS-02-01684), and at the October 2008 term of the Aiken County Grand Jury for Grand Larceny – More than \$1,000 but Less Than \$5,000 (2008-GS-02-01613). Charles H. S. Lyons III, Esquire, (hereinafter “Counsel”) represented Petitioner. On September 21, 2009, Petitioner proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Following the denial of his pre-trial motions to suppress, opening statements, and testimony from four witnesses including both victims, Petitioner elected to forego his trial and plead guilty as indicted to all three charges. Judge Dennis sentenced Petitioner to confinement for a period of twenty-four years for armed robbery, twenty years for carjacking, and five years for grand larceny, with all sentences to be served concurrently.

A notice of appeal was filed and an appeal was perfected on Petitioner’s behalf. Following the submission of an Anders¹ brief by Appellate Defender Robert M. Pachak, the South Carolina Court of Appeals dismissed the appeal. State v. Michael Allen, 2012-UP-315 (Ct. App. filed June 21, 2011). The Remittitur was sent July 7, 2011.

Petitioner filed an application for post-conviction relief on April 5, 2012, alleging that he was being held in custody unlawfully based on the allegations:

1. Ineffective assistance of counsel;
2. Failure to investigate; and
3. “Denial of 6th and 14th Amends. U.S. Const.”

Respondent made its Return on May 30, 2012, requesting an evidentiary hearing be held. At the evidentiary hearing, Applicant proceeded forward on the following allegations of ineffective assistance of counsel:

¹ Anders v. California, 386 U.S. 738 (1967).

1. Failure to advise of the constitutional right to a unanimous jury verdict;
2. Failure to advise of the lesser included offense of strong armed robbery;
3. Failure to advise of video evidence; and
4. Failure to interview victims in anticipation of trial testimony.

An evidentiary hearing was convened on January 23, 2013, at the Aiken County Courthouse before the Honorable Doyet A. Early, III. Petitioner was present and represented by Christopher C. Johnson, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. Petitioner testified on his own behalf. Counsel was also present and testified at the hearing. By Order filed March 13, 2013, Judge Early denied and dismissed Petitioner's application for post-conviction relief.

Petitioner filed a Petition for Writ of Certiorari on January 2, 2014. 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) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his 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, Id.

The proper measure of performance is whether an 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; supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

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, supra. 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. Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pled 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, 49, 723 S.E.2d 375, 382 (2012).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. 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." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (internal citations omitted).

ARGUMENT

- I. There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective in regards to the video surveillance footage, where none of the attorneys involved were aware of the second angle of surveillance footage until the first day of trial, Counsel advised Petitioner that conviction was all but certain based on the overwhelming evidence of his guilt and that he should accept the State's extremely favorable plea offer and Petitioner elected to pursue a trial against Counsel's professional judgment, and there is overwhelming evidence of guilt absent the second surveillance video footage.**

Petitioner asserts that the post-conviction relief court "erred in denying Petitioner's claim of ineffective assistance of counsel where it was undisputed at the PCR hearing that when the State made its more favorable offer of fifteen (15) years to Petitioner, Petitioner lacked complete information of the State's evidence against him – the additional, more damaging video footage from the B.P. station." PWC p. 10. Specifically, Petitioner contends that Counsel was deficient "in not discovering and making Petitioner aware of the additional, more damaging video footage against him when the State made the initial plea offer of fifteen (15) years." PWC p. 11. Petitioner elaborates that he was prejudiced by this deficiency because when he pled guilty after his trial had begun he received a harsher sentence "and the difference in the sentence Petitioner received and the plea offer is proof of prejudice." PWC p. 11. However, this argument is without merit, as the record establishes that none of the attorneys involved – including both Counsel and the prosecuting assistant solicitors – had any knowledge of this second angle from the video surveillance, Counsel advised Petitioner numerous times that there was overwhelming evidence of his guilt absent this second video surveillance from a different angle and that he should accept the State's extremely favorable plea offer, and Petitioner elected not to heed Counsel's advice and instead turned down the State's plea offer to pursue a trial.

In its Order of Dismissal, the post-conviction relief court found that “Counsel’s credibility is unquestionable and that [Petitioner]’s credibility is lacking.” App. p. 297. The post-conviction relief court also found that Counsel’s performance was not deficient in regards to this allegation, stating that Counsel reviewed all available discovery with Petitioner, including numerous eyewitness identifications and statements, and advised Petitioner that the evidence against him was overwhelming. App. p. 299. The Court also noted that Counsel testified that he did not believe that the video was dispositive in Petitioner’s decision to turn down the State’s plea offer, as he explained to him numerous times that the State’s evidence would result in “all but certain conviction” but that Petitioner was insistent on proceeding to trial. Furthermore, the post-conviction relief court found that Petitioner could not establish the requisite prejudice required for relief, as there was overwhelming evidence of Petitioner’s guilt absent the second surveillance video. App. p. 300. These findings are supported by ample evidence in the record from both Petitioner’s guilty plea proceeding and the evidentiary hearing.

Counsel testified that all the lawyers involved in this case, including the prosecuting assistant solicitors, had not seen the second surveillance video showing the robbery from a different angle until immediately before trial. App. p. 281. Counsel testified that upon learning of this additional video angle, he showed the video footage to Petitioner and Petitioner still elected to proceed to trial. Counsel testified that this second video footage did not change his advice to Petitioner or have any impact on Petitioner’s decision to proceed to trial, stating that the case was “a slam-dunk without [the second video]. Without anybody seeing that video, it was just a slam-dunk that everybody saw evidently but him. So that wasn’t going to make any difference in his mind. He had his mind made up as to what he was going to do and he did it.”

App. p. 283 lns. 9-14. Additionally, Counsel testified that he consistently informed Petitioner that the State's evidence was overwhelming, would amount to an all but certain conviction at trial, and that he should take advantage of the State's advantageous plea offer. App. p. 274-78; p. 281-84. Counsel wrote Petitioner a letter to the same effect, which was read into the record at the evidentiary hearing. App. p. 255-257. Counsel clearly conveyed to his client how strong the State's case was before the even more damaging videotape was discovered and advised him to take advantage of a generous plea offer from the State. Instead of following this advice, Petitioner elected to proceed to trial and went so far as to ask Counsel to fabricate a defense for him, which Counsel appropriately refused to do. App. p. 275-76. Counsel's performance was reasonable based on the circumstances of this case and Counsel was not deficient. The post-conviction relief court properly determined that Counsel cannot be deficient for failing to seek out and notify his client of video surveillance that no one knew or had reason to know existed.

Furthermore, the post-conviction relief court properly ascertained that Petitioner failed to establish the requisite prejudice needed for relief. The post-conviction court found that there was overwhelming evidence of guilt. This Court has long held that an applicant in a post-conviction relief proceeding cannot establish prejudice where there is overwhelming evidence of guilt. See Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013) (applicant failed to show prejudice resulting from trial counsel's failure to request an alibi jury instruction where there was overwhelming evidence of guilt); Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008) (applicant could not show prejudice because the evidence of guilt was overwhelming); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (applicant failed to show a reasonable probability that the result of his trial would have been different but for counsel's alleged deficiency where there is

overwhelming evidence of guilt); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (applicant failed to establish prejudice stemming from counsel's alleged deficiency in light of the overwhelming evidence of petitioner's guilt). In the present case, Petitioner was identified by both victims in a photo line-up and during their trial testimony, was arrested for shoplifting in Florida with the stolen car's keys in his pocket, and gave statements to law enforcement that the trial court deemed voluntary and admissible. There was overwhelming evidence of Petitioner's guilt absent the more incriminating second surveillance video footage. Therefore, Petitioner failed to establish the necessary prejudice from Counsel's alleged deficiency in regards to this allegation.

Additionally, Petitioner never affirmatively stated that he would have pled guilty if he had seen the second video footage earlier while the State's offer was still pending. When directly asked whether he would have accepted the State's plea offer if he had seen the second surveillance footage, Petitioner replied he *may* have taken the State's offer. App. p. 259 lns. 11-14. Petitioner failed to establish that he unequivocally would have accepted the State's offer absent Counsel's alleged deficiency, and therefore has failed to show that the results were different. Hill, 474 U.S. at 59; Hyman, 397 S.C. at 49, 723 S.E.2d at 382.

Moreover, Petitioner's reliance on Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376 (2012) and Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399 (2012) is unpersuasive in Petitioner's case. Petitioner asserts that he rejected a favorable plea offer from the State based on Counsel's deficient performance and thereby received a harsher sentence when he pled while his trial was underway in line with Lafler. However, Petitioner's reliance on Lafler and Frye is in error for several crucial reasons. First, in Lafler, the petitioner rejected a favorable plea offer from the

State based on erroneous advice from his attorney that the state would be unable to prove the requisite intent for murder because the victim was shot below the waist. In the present case, Counsel advised Petitioner several times, both during meetings and in writing, that there was overwhelming evidence of his guilt and urged him to accept the State's advantageous plea offer. Second, the Lafler and Frye opinions both make it clear that a petitioner must establish that the plea offer would have been accepted by the court with the prosecution cancelling or withdrawing the offer in light of intervening circumstances. In the present case, the favorable fifteen year plea offer was extended before any parties knew of the more incriminating second video surveillance footage clearly showing Petitioner as the perpetrator of the crime. While there was overwhelming evidence of Petitioner's guilt absent this more incriminating video, Petitioner has failed to establish that the State would not have revoked its plea offer based on this new footage.

The record contains evidence of probative value to support the post-conviction relief court's findings that Counsel was not ineffective in regards to this allegation. This Petition should be denied.

II. There is evidence of probative value to support the post-conviction relief court's finding that Counsel was not ineffective for failing to advise Petitioner that he could have requested a charge on the lesser included offense of strong arm robbery, where there is no evidence to support a conviction of the lesser included offense of strong arm robbery.

Petitioner asserts that the post-conviction relief court erred by refusing to deem Counsel ineffective for failing "to advise him that if he continued with the trial instead of pleading guilty, he could have requested a charge of the lesser included offense of strong arm robbery and therefore, could have been convicted on the lesser included offense instead of armed robbery." PWC p. 13. In support of this proposition, Petitioner states that "[t]he evidence at the PCR

hearing was uncontroverted that Petitioner was not advised of the lesser included offense of strong-arm robbery.” PWC p. 14. However, this is not an accurate reflection of the record, as Petitioner stated that “[he] wasn’t advised by the Court or Mr. Lyons that [he] could have *pleaded* to a lesser included offense of strong arm robbery.” There was no evidence presented that the State had ever made an offer to the lesser included offense of strong arm robbery. The only evidence presented at the hearing was the uncontroverted testimony that the State made an offer of fifteen years imprisonment if Petitioner *pled as indicted*.

The record is absolutely devoid of any credible evidence to support a conviction of the lesser included offense of strong arm robbery rather than the greater offense of armed robbery. Pursuant to South Carolina law, “[a] person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, *or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty*” of armed robbery. S.C. Code Ann. § 16-11-330(A) (emphasis added). The plea court properly explained this to Petitioner during his guilty plea and Petitioner acknowledged that the victim believed he had a weapon because he demonstrated that he had a firearm. App. p. 221 ln. 7 – p. 223 ln. 9. Petitioner elaborated that he was not entirely certain of what transpired because he was under the influence. App. p. 222 ln. 22 – p. 223 ln. 9. There is no evidence that could have been presented to the jury to support a charge on the lesser included offense of strong arm robbery, where the victim testified Petitioner demonstrated he had a firearm, she believed him to be armed with a deadly weapon, and Petitioner acknowledged under oath that he did demonstrate that he had a firearm but was so intoxicated that he could not be

certain whether he had a deadly weapon or not. “The trial court should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense. Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007) (citing State v. Smith, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994)). As Petitioner failed to establish that he was entitled to a charge on the lesser included offense of strong arm robbery, Counsel cannot be deficient for failing to advise Petitioner of the lesser included offense of strong arm robbery. See Suber, 371 S.C. at 560, 640 S.E.2d at 887 (plea counsel was not deficient for failing to advise applicant of the lesser included offense of assault with intent to kill because applicant failed to present any evidence that would have entitled him to a charge of the lesser included offense under these facts); Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005) (reversing grant of relief where PCR judge found ineffective assistance of counsel for failure to request jury charges on lesser-included offenses because there was no evidence in the record to support jury charges for lesser-included offenses); Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004) (reversing PCR judge's grant of relief where the record was devoid of any evidence warranting a jury charge on the lesser offense). Based on the foregoing, there is ample evidence in the record to support the post-conviction relief court’s finding that Counsel was not ineffective in regards to this allegation. This Petition should be denied


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

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

April 16, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge
Case No. 2012-CP-02-0852
Appellate Case No. 2013-000739

MICHAEL ANTHONY ALLEN,

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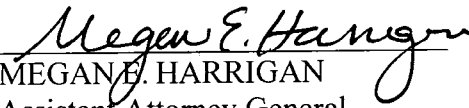
PROOF OF SERVICE

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:

Carmen V. Ganjehsani, 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 16th day of April, 2014.


MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

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



ALAN WILSON
ATTORNEY GENERAL

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APR 16 2014

S.C. Supreme Court

April 16, 2014

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

Re: Michael Anthony Allen v. The State of South Carolina
Appellate Case No. 2013-000739

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH/ko
Enclosures

cc: Carmen V. Ganjehsani, Esquire, Appellate Defense
Trisha Allen, Victim's Services