

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2013-000605

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APR 17 2014

S.C. Supreme Court

BRANDON JONES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective regarding the presentence report, where there is no credible evidence that there was a plea agreement to conceal relevant information from the plea court, the State did not present any information from Hunter, Petitioner acknowledged multiple times at both his plea and sentencing proceedings that he was guilty and wanted to plead guilty, and the plea court stated on the record its rationale for the particular sentence that was wholly unrelated to the information Petitioner asserts was improperly included in the presentence investigation report?

STATEMENT OF THE CASE

Petitioner was indicted during the December 2004 term of the Richland County Grand Jury for three counts of Criminal Sexual Conduct with a Minor in the First Degree (2004-GS-40-08462 through -0864). The indictments arose from allegations during September to December 2003, Petitioner repeatedly engaged in sex acts with three minor male children, all age ten, whom Petitioner had befriended. On June 27, 2005, Petitioner appeared before the Honorable John L. Breeden, and pled guilty as indicted to all three offenses without any negotiations or recommendations from the State. Petitioner was represented by Assistant Public Defender Deborah Ahrens and the State was represented by Assistant Solicitor Erin Gaddy. Following its colloquy with Petitioner, the plea court found Petitioner's pleas to be free and voluntary. The court heard from Petitioner, family members of the victims, and reviewed letters from Petitioner's family and friends. At Petitioner's request, the plea court deferred sentencing and ordered the Department of Probation, Parole, and Pardon Services to conduct a presentence investigation.

On September 15, 2005, Petitioner again appeared before Judge Breeden for sentencing. He was represented by Assistant Public Defender Lauren Mobley and the State was represented by Assistant Solicitor Vincent Smith. The court heard again from Petitioner and family members of the victims, as well as Petitioner's parents. A report of the presentence investigation was also provided to the court. After reviewing all information provided, Judge Breeden sentenced Petitioner to thirty years imprisonment for each charge, with all three 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 Chief Appellate Defender Robert M. Dudek and Petitioner's *pro se* brief, the South Carolina Court of Appeals dismissed the appeal. State v. Brandon Eugene Jones, 2008-UP-175 (Ct. App. filed March 13, 2008). The Remittitur was sent September 9, 2008.

Petitioner filed an application for post-conviction relief on August 31, 2009, alleging that he was being held in custody unlawfully based on the allegations of ineffective assistance of counsel and involuntary guilty plea. Respondent made its Return on March 19, 2010, requesting an evidentiary hearing be held. An evidentiary hearing was convened on February 28, 2011, at the Richland County Courthouse before the Honorable L. Casey Manning. Petitioner was present and represented by Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Brian T. Petrano of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and presented testimony from his father, Randall Jones. Sentencing counsel Lauren Mobley was also present and testified at the hearing. By Order filed February 24, 2012, Judge Manning denied and dismissed Petitioner's application for post-conviction relief. Petitioner filed a motion to alter or amend the judgment, to which Respondent replied on January 23, 2013. By written Order dated March 7, 2013, Judge Manning denied Petitioner's motion to alter or amend.

Petitioner filed a Petition for Writ of Certiorari on December 31, 2013. This Return follows.

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

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

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective regarding the presentence report, where there is no credible evidence that there was a plea agreement to conceal relevant information from the plea court, the State did not present any information from Hunter, Petitioner acknowledged multiple times at both his plea and sentencing proceedings that he was guilty and wanted to plead guilty, and the plea court stated on the record its rationale for the particular sentence that was wholly unrelated to the information Petitioner asserts was improperly included in the presentence investigation report.

Petitioner asserts that "counsel was deficient in assisting Petitioner in knowingly and voluntarily waiving his right to trial², and the conclusion to the contrary in the [post-conviction relief court]'s order was erroneous." PWC p. 9. Specifically, Petitioner contends that "counsel was ineffective because she plea-bargained for terms the Petitioner was not entitled to secure and because she failed to object to the contents of the presentence investigation report or to withdraw Petitioner's guilty plea after the court received the report." PWC p. 6. The portion of the presentencing investigation report that Petitioner takes issue with is:

"According to Elijah Hunter, Jones' cellmate at the Alvin S. Glenn Detention Center, Jones' showed no dealings of guilt, expressed no desire to change his behavior and wants nothing more than to flee the country again to be with another young boy in Ecuador who goes by the name of "Junior." Jones admitted to Hunter that he has molested upwards of 20 kids in the Charlotte-Mecklenburg area and that he has found nothing wrong with his actions by claiming he is guilty of nothing but, 'love in the first degree.'"

Second Supp. App. p. 74. In support of his allegation, Petitioner relies on his testimony that he would not have pled guilty but rather insisted on going to trial if he was aware that any information from Hunter would be conveyed to the plea court. He elaborated that his first attorney, Deborah Ahrens, told him that she had entered into an agreement with the prosecuting

² While Petitioner argued during his evidentiary hearing that his guilty plea was involuntarily, he appears to have either abandoned this issue on appeal or has conceded that his guilty plea was "knowingly and voluntarily" entered. PWC p. 9.

Assistant Solicitor Erin Gaddy that Hunter's statement would not be presented to the plea court. However, the post-conviction relief properly denied Petitioner's allegations, as there is no credible evidence that there was a plea agreement between Petitioner and the State to conceal relevant information from the plea court, the State presented no information from Hunter during Petitioner's guilty plea or sentencing hearing, Petitioner acknowledged multiple times that he was guilty and wanted to plead guilty, and the court's rationale for its particular sentence was wholly unrelated to the information which Petitioner complains was improperly included in his presentencing investigation report.

In its Order of Dismissal, the post-conviction relief court made the specific finding that Petitioner's testimony was not credible after observing him throughout the evidentiary hearing. App. p. 107. Therefore, the only credible evidence or testimony related to this alleged agreement comes from sentencing counsel Lauren Mobley, who testified that she saw a note in her file from former counsel Ahrens "recounting a discussion between her and the Solicitor Erin Gaddy noting that there would be a serious problem and the plea wouldn't go through if Elijah Hunter's testimony was allowed during the plea agreement." App. p. 80 lns. 16-20. However, this testimony only references an agreement that the State would not present *testimony* from Hunter. There is no evidence that the State entered into an agreement to conceal any information from Hunter from the plea court, merely that it would not present Hunter as a witness or offer his statements to the plea court. Additionally, the State did not offer any testimony from Hunter during Petitioner's guilty plea or sentencing proceedings. The record is completely devoid of any utterance of Hunter's name or information he provided by the State. See App. p. 1-22; Supp. App. p. 1-21. The only reference to Hunter or any information he provided is contained in the

presentence investigation report by way of a brief comment made by Chief Brian Buck of the Irmo Police Department. Second Supp. App. p. 74. This presentence investigation report was prepared at Petitioner's request by the Department of Probation, Parole and Pardon Services – a separate entity than the Fifth Circuit Solicitor's office. Therefore, even if the State had entered into an agreement not to present testimony from Hunter, this agreement was not breached, as the State did not present any testimony or statements from Hunter and the only brief information provided was from a report prepared by a separate entity. As there was no breach, counsel cannot be deficient for failing to object or in the alternative, withdraw Petitioner's guilty plea. The post-conviction relief court's ruling should be affirmed as there is no evidence of any deficiency of counsel.

Furthermore, Petitioner cannot establish any resulting prejudice from counsel's alleged deficiency. First, Petitioner's own statements during his plea and sentencing strongly refute his claims³ that he wanted to proceed to trial rather than enter a guilty plea. Petitioner spoke at great length during both his guilty plea and sentencing proceedings regarding his known pedophilia and his inability to control his sexual urges towards young boys. App. p. 17-20; Supp. App. 10-14. He also freely admitted that he had committed these crimes and apologized profusely to the victims and their families. App. p. 17-20; Supp. App. 10-14. Additionally, during his guilty plea proceeding, counsel Ahrens told the court that Petitioner "basically would never entertain the notion of taking this case to trial . . . he has always taken responsibility for what he did[,] he has always acknowledged the wrongfulness of his actions." App. p. 14 ln. 24- p. 15 ln. 3. Petitioner has failed to establish that he would have insisted on proceeding to trial but for counsel's alleged deficiency – which occurred *after* he tender his guilty plea.

³ As discussed supra, the post-conviction relief court found Petitioner's testimony was "not credible." App. p. 107.

Second, Petitioner is unable to show that the outcome would have been different but for the allegedly improper information from Hunter in the presentencing investigation report. The plea court gave its rationale for its sentence, stating:

“Let me tell you one of the things that concerns me most about this other than the obvious. Is leaving and going to Ecuador at a crucial moment. His explanation was that I was going there to seek Depo-Provera and I was going to come back when I got it. But while there, his visa expired, there was no money to buy a ticket to return home. That was his explanation. The concern that the parents have and the concern that the Court has that he had no intention to come back to this country. He recognized that – and what he said he told the young boy that if they told, that he would be in deep trouble. And he recognize[d] that fact. He knew that fact.”

Supp. App. p. 19 ln. 17 – p. 18 ln. 5. Again, Petitioner cannot establish that the result of his proceeding would have been different absent the information from Hunter in the presentence report where the plea court lays out its reasoning for its particular sentence, that is wholly unrelated to any information provided by Hunter. Furthermore, Petitioner himself confirmed the plea court’s rationale, freely admitting during the evidentiary hearing that evaded justice for a period of time. App. p. 70 ln. 24 – p. 71 ln. 3. Petitioner failed to establish any prejudice from the alleged deficiency and the post-conviction relief court’s ruling should be affirmed.

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.

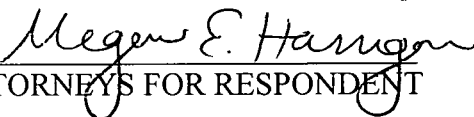
CONCLUSION

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

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April 17, 2014

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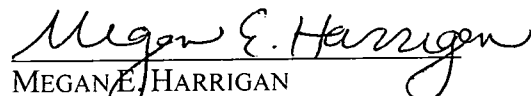
PROOF OF SERVICE

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:

Benjamin J. Tripp, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 17th day of April, 2014.


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APR 17 2014

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

April 17, 2014

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

Re: Brandon Jones v. State of South Carolina
Appellate Case No. 2013-000605

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

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

MEH
Enclosures

cc: Benjamin J. Tripp, Esquire
Trisha Allen, Victim Services