

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

2011-CP-40-00741
Appellate Case No. 2013-001039

RECEIVED

APR 21 2014

S.C. Supreme Court

Eric Mance.....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

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ISSUE PRESENTED

Probative evidence supports the PCR Court's finding that Counsel was not ineffective for failing to pursue a verdict of guilty but mentally ill, where Counsel articulated a valid strategic reason for doing so and the outcome of the proceeding would not have been any different.

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. The Petitioner was indicted at the September 2006 term of the Richland County Grand Jury for Assault and Battery with Intent to Kill, Armed Robbery, and Possession of a Pistol by a Person Convicted of a Crime of Violence (2006-GS-40-4738; -4739; -4741). Petitioner was represented by David Tarr, Esquire, on the charges. On August 25, 2008, Petitioner proceeded to a jury trial before the Honorable Clifton Newman. After a three (3) day trial, Petitioner was found guilty of all three charges as indicted and sentenced to life imprisonment without parole for Armed Robbery and ABWIK, as well as five (5) years imprisonment for the Pistol charge. The sentences were to run concurrently.

A Notice of Appeal was submitted on Petitioner's behalf and an Anders brief was submitted by Robert Pachak of the South Carolina Office of Appellate Defense. By order filed February 11, 2010, the South Carolina Court of Appeals dismissed the appeal. The remittitur was issued May 28, 2010.

Petitioner filed an application for PCR on February 4, 2011 (20011-CP-40-00741). The State made its Return on or about September 15, 2011, and the matter was scheduled for an evidentiary hearing before the Honorable Alison Renee Lee on March 7, 2013. Petitioner was present and represented by Tara Dawn Shurling, Esquire. By Order dated April 25, 2013 and filed April 29, 2013, Judge Lee denied and dismissed Petitioner's application with prejudice. Petitioner appealed Judge Lee'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.

ARGUMENT

Probative evidence supports the PCR Court's finding that Counsel was not ineffective for failing to pursue a verdict of guilty but mentally ill, where Counsel articulated a valid strategic reason for doing so and the outcome of the proceeding would not have been any different.

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for failing to pursue a verdict of guilty but mentally ill. 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.

Courts in South Carolina 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).

The Petitioner here fails both prongs of the Strickland test. The PCR Court found that Counsel was not ineffective in failing to investigate, prepare, or pursue a GBMI verdict on Applicant's behalf. First, Counsel's actions were objectively reasonable because they were

based upon the information and requests supplied to him by the Petitioner. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or action” as “[c]ounsel’s actions are usually based, quite properly, on informed strategic decisions made by the defendant and on information supplied by defendant.” Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. “In particular, what investigation decisions are reasonable depends critically on such information.” Id. Petitioner during sentencing pleaded with the trial court, repeatedly asking the court to “not throw him away.” (App. p. 599 lines 23-24; p. 600 lines 3-4). During the evidentiary hearing, Counsel stated that it was Petitioner’s desire to be able to walk out of prison one day. (App. p. 651 lines 11-14). Counsel reasoned that pursuing a GBMI verdict would still require Petitioner to serve a life without parole sentence. (App. p. 651 lines 15-22). Therefore, they both made the decision not to pursue a GBMI verdict. (App. p. 651 lines 15-22). The PCR Court found Counsel’s testimony as to the Petitioner’s express desires for the outcome of the case—to walk out of prison one day—entirely credible and, as a result, Counsel’s actions in pursuing that outcome to be objectively reasonable. (App. p. 770-771).

The PCR Court found probative evidence that Counsel was not ineffective in pursuing that outcome. “Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.” Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992). Counsel stated that pursuing a GBMI verdict would still require Petitioner to serve a life without parole sentence. (App. p. 651 lines 15-22). Therefore, they both made the strategic decision not to pursue a GBMI verdict. (App. p. 651 lines 15-22). Counsel reasoning is supported by the fact that there is, by law, *no distinction* between a guilty verdict and a GBMI verdict. S.C. Code Ann. § 17-24-70. Counsel was fully aware of this when he determined not to

pursue a GBMI verdict, stating that he “was trying to get it where he was able to get out one day. That was my goal, and that’s what [Petitioner] wanted, and that’s what I tried to do.” App. p. 643-45. Instead, Counsel essentially argued that the Petitioner’s lack of intent, evidenced by his low IQ, mitigated his conduct down to the lesser included offense of Assault and Battery of a High and Aggravated Nature, as such a crime would not invoke a mandatory LWOP sentence under S.C. Code Ann. § 17-25-45.

In response, the Petitioner notes that “[t]he conviction for armed robbery exposed Petitioner to LWOP as well.” {PWC p. 15}. This argument is without merit. Just as with the ABWIK charge, Counsel’s strategy was to use Petitioner’s low IQ and mental state to attack the element of intent. In his closing argument at trial, Counsel stated:

[t]hat’s why I brought in Dr. Brawley to tell you about [Petitioner’s] mental state, about how somebody could think in their right mind that this was the right way to do this, to take a gun and take a car. We’re not arguing that he took the car. What we’re saying is he never intended to steal the car and deprive [the victim] permanently of the car. He didn’t even think about that.”

(App. p. 551 lines 12-18). Again, Counsel’s trial strategy was to argue that Petitioner did not meet the required level of intent to be found guilty of ABWIK and Armed Robbery. Counsel reasoned that arguing a lack of intent was the only way to achieve Petitioner’s goal of walking out of prison one day.

As such, probative evidence supports the PCR court’s finding that Counsel articulated a valid reason for employing his strategy in choosing to not pursue a GBMI verdict. Counsel repeatedly testified that it was Petitioner’s goal to walk out of prison and pursuing a GBMI verdict would still require Petitioner to serve a life without parole sentence. Therefore, Counsel did not feel it was in his client’s best interest to present the jury with a GBMI verdict.

In any event, Petitioner has also failed to meet the prejudice prong of the Strickland test. “When a defendant challenges a conviction, the question” to be considered by the court in measuring prejudice “is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” Strickland, 466 U.S. at 695, 104 S.Ct. at 2068-2069. The South Carolina Supreme Court has interpreted this standard for proving resulting prejudice as set forth in Strickland, stating “[t]he second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry, 300 S.C. at 118, 386 S.E.2d at 625. “To return a verdict of ‘guilty but mentally ill’” ... “the burden of proof is upon the defendant to prove by a preponderance of the evidence that when he committed the crime he was mentally ill,” meaning “he had the capacity to distinguish right from wrong or to recognize his act as being wrong ... but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.” S.C. Code Ann. § 14-24-10 (A) & (B).

Petitioner asserts that “[h]ad the jury been made aware of Petitioner’s significant mental health history, there is a reasonable probability that the jury would have found Petitioner lacked sufficient capacity to conform his conduct to the requirements of the law despite his ability to distinguish right from wrong or to recognize his act as being wrong.” (PWC p. 16). However, even assuming *arguendo* that the jury returned a verdict of GBMI, Petitioner would still be serving a life without parole sentence. As a result, Petitioner can show no prejudice.

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

April 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable Alison R. Lee, Circuit Court Judge
Case No. 2011-CP-40-00741
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ERIC MANCE,

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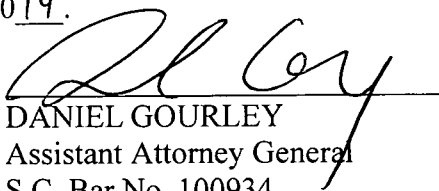
PROOF OF SERVICE

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:

Susan B. Hackett, 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 21 day of April, 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



ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

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

Re: Eric Mance v. The State of South Carolina
Appellate Case No. 2013-001039

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: Susan B. Hackett, Esquire, Appellate Defense
Trisha Allen, Victim's Services