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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-001861

Robert Lee Heydman, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel not ineffective based upon an alleged conflict of interest and Petitioner failed to prove any prejudice, but that there also was no conflict of interest?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted at the August 2007 term of the Spartanburg County Grand Jury for murder (07-GS-42-4087). Petitioner was represented by William H. McPherson, Esquire. On September 28, 2008, Petitioner proceeded to trial where he was found guilty of the charge of a jury. Petitioner was sentenced by the Honorable Paul M. Burch to confinement for life.

A timely notice of appeal was submitted and an Anders brief was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Heydman, Op. No. 2011-UP-269 (filed June 8, 2011). The Remittitur was returned on June 24, 2011.

The Petitioner subsequently filed a PCR application on July 8, 2011. The Respondent made its Return on or about May 6, 2012. An evidentiary hearing into the matter was convened on April 4, 2013, at the Spartanburg County Courthouse. The transcript of trial counsel's deposition was submitted as part of the record. The Petitioner was present at the hearing and was represented by Franklin M. Mann, Jr., Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing, The Honorable J. Mark Hayes II denied the PCR application by written Order dated July 24, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. 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 not ineffective based upon an alleged conflict of interest and Petitioner failed to prove any prejudice, but that there also was no conflict of interest.

Petitioner was arrested and charged with murder following the death of victim, Richard Fowler. Petitioner proceeded to trial, and was represented by William H. McPherson, Esquire, of the Spartanburg Public Defender’s Office. At trial, the State called witness John Fowler. Fowler, an inmate at the Spartanburg County Detention, met Petitioner in jail after his arrest and had various conversations with him. (App. p. 265). Fowler was represented by Timothy Ray, who also worked for the Spartanburg Public Defender’s Office. (App. p.) Fowler testified against Petitioner at his trial for murder. (App. p. 266). Petitioner asserts that the representation of both himself and Fowler by attorneys in the Spartanburg Public Defender’s Office created an actual conflict of interest, and that his attorney’s performance was adversely affected as a result.

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.

Petitioner argues that Counsel was ineffective because of an actual conflict of interest, in that the Seventh Circuit Public Defender’s office represented both Petitioner and a witness, John Fowler, who testified for the State. Counsel was asked during his deposition if he represented any of the other witnesses who testified at trial, specifically Mr. Fowler, to which he answered negatively. (App. p. 439). Counsel testified that someone else in the public defender’s office represented Fowler at the time of Petitioner’s trial; however, Counsel testified that he was unaware of anything related to Fowler and his case. (App. p. 441). Counsel testified that he had no knowledge of any negotiations between the State and Fowler. (App. p. 442). Further,

Counsel testified that he had never reviewed Fowler's file and was not positive that he could have accessed the file even while employed at the office. (App. p. 447).

Petitioner mischaracterizes Counsel's testimony as conceding that there was a "direct conflict." (PWC p. 9). Notwithstanding the fact that Counsel's opinion on the legal distinction between an actual and potential conflict is not binding authority on this court, it is clear that Petitioner has taken Counsel's "concession" out of context. The "direct conflict" testimony was in response to a question regarding the Rules of Professional Conduct. (App. p. 444). The Rules of Professional Conduct, whose "purpose is to regulate and guide the legal profession by defining proper ethical conduct," have no bearing on the constitutionality of a criminal conviction. Langford v. State, 310 S.C. 357, 361, 426 S.E.2d 793, 795 (1993). The remainder of Counsel's testimony supports the notion that the potential conflict never turned into an actual one. Counsel stated that he was not aware of the potential conflict until the end of his representation of the Petitioner, and that if it had been an issue that he thought was potentially damaging or could have been mistrial worthy, he would have raised it to the court. (App. p. 456).

Alone, the fact that Counsel worked in the same office as the attorney who represented Fowler does not create an actual conflict of interest, but merely *potential* conflict of interest. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Similar to Jackson, Petitioner can point to nothing further in the record that "suggests the potential conflict caused Counsel to treat [Petitioner's] case in such a manner as to obtain more favorable consideration" for Fowler. Similarly, in its Order of Dismissal, the PCR Court found that the particular situation as presented did "not create an automatic disqualifying event for Counsel." (App. p. 494). The PCR Court found that Petitioner's and Fowler's respective representations did not arise out of the

same facts or circumstances, that there was nothing in the record to suggest that Fowler's attorney had any access to the Petitioner's file, and that Counsel was not denied any information about Fowler. (App. p. 494).

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. Cuyler v. Sullivan, 446 U.S. 335 (1980); Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 691 (2007); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001); Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Staggs, 372 S.C. at 551, 643 S.E.2d at 692; Fuller, 347 S.C. at 633-634, 557 S.E.2d at 665; Thomas, 346 S.C. at 143-144, 551 S.E.2d at 256. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. Cuyler, 446 U.S. at 350.

During Petitioner's trial, Fowler admitted that he had several pending charges, and that it "would be nice" if the solicitor reduced his charges in exchange for his testimony. (App. p. 271-275). However, he testified that he had not been offered anything for his testimony. (App. p. 268). Counsel used Fowler's prior record, including charges of grand larceny, two counts of distribution of crack cocaine, and financial transaction card fraud to impeach Fowler's credibility. (App. p. 270-1). Counsel noted that Fowler had two pending armed robbery charges and a possible probation revocation at the time of the trial. (App. p. 272). Fowler also indicated that he had a pending charge for inciting a riot or prisoners, but Counsel presented a document showing that Fowler's charge of inciting prisoners to riot was dismissed on June 9, 2008, several months prior to the trial due to "prosecutorial discretion." (App. p. 272-3). Counsel used that

dismissal to suggest to the jury that the solicitor had dismissed that charge in order to entice Fowler to testify against Petitioner. (App. p. 272-74). Additionally, Counsel ended his closing arguments by questioning Fowler's motivation in testifying against Petitioner. (App. p. 372-3).

Respondent submits that Petitioner failed to present any evidence or testimony at the hearing to support his claims that the alleged conflict of interest affected Counsel's performance in representing Petitioner at trial.

The Fourth Circuit has addressed many issues related to conflict of interest and these cases are persuasive in this case. Although an attorney's overlapping representation of two clients can affect representation when an actual conflict of interest is created, the mere fact that overlapping representation exists is insufficient to create a Sixth Amendment violation. United States v. Taft, 221 F. App'x 277, 279 (4th Cir. 2007) (holding that defendant's right to effective counsel was not violated when former trial counsel also represented a government witness for a short overlapping period).

"[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). Respondent notes that the majority of cases regarding conflict of interest deal with an attorney's simultaneous representation of co-defendants in the same case.

Respondent submits that the PCR court was correct in finding that Counsel was not ineffective because there was no actual conflict of interest. Respondent submits that there was clear evidence of probative value in the record to support the PCR judge's findings. Respondent submits that 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,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General
SC Bar #78225

By: 
ATTORNEYS FOR THE RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

Apr 25, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Circuit Case No.: 2011-CP-42-2966
Appellate Case No.: 2013-001861

ROBERT LEE HEYDMAN,

Petitioner,

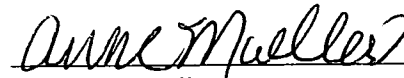
v.

STATE OF SOUTH CAROLINA,

Respondent.

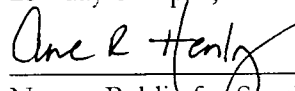
CERTIFICATE OF SERVICE

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, Lara M. Caudy, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 25th day of April, 2014.



Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
25th day of April, 2014.



(L.S.)
Notary Public for South Carolina.
My Commission Expires: 7/18/2017



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

April 25, 2014

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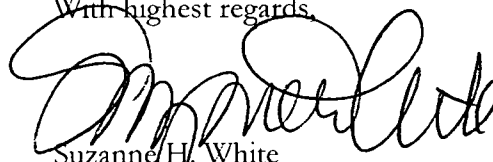
Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Robert Lee Heydman v. State of South Carolina
Circuit Court Case No: 2011-CP-42-2966
Appellate Case No.: 2013-001861**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,



Suzanne H. White
Assistant Deputy Attorney General

SHW/aam
Enclosures

cc: Lara M. Caudy, Esquire (w/enclosure)