

ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-002130

RECEIVED

MAY 22 2014

S.C. Supreme Court

BRYAN L. MULLIGAN, 344736,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT.

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QUESTION PRESENTED

I. Did the lower court correctly find that Plea Counsel was ineffective during sentencing where Respondent demonstrated deficiencies in Plea Counsel's representation which resulted in prejudice to the Respondent?

STATEMENT OF THE CASE

The Respondent was indicted by the Dorchester County Grand Jury, along with his two co-defendants, for one (1) count of Assault and Battery of a High and Aggravated Nature (ABHAN) (2008-GS-18-1107), one (1) count of Possession of a Weapon During the Commission of a Violent Crime, two (2) counts of Armed Robbery(2008-GS-18-1121, 2008-GS-18-1112), and three (3) counts of Kidnapping (2008-GS-18-1108, 2008-GS-18-1120, 2008-GS-18-1113). He was additionally indicted by the Charleston County grand jury for three (3) counts of Kidnapping (2008-GS-10-8072, 2008-GS-10- 8127, 2008-GS-10-8137), two (2) counts of Armed Robbery (2008-GS-10-8126, 2008-GS-10-8141) one (1) count of Attempted Armed Robbery (2008-GS-10-8073) and one (1) count of First Degree Criminal Sexual Conduct (2008-GS-10-8135).

The Respondent was represented by Andrew J. Savage, Esquire on these charges. On February 3, 2010, Respondent appeared before the Honorable Roger Young and pleaded guilty to all the charges listed above with the exception of the charge of Possession of a Weapon During the Commission of a Violent Crime; that charge was dismissed as part of the Respondent's plea agreement with the State. The Respondent was sentenced as follows on each of his pleas:

- ABHAN: ten (10) years imprisonment;

- Six (6) counts of Kidnapping: thirty (30) years imprisonment on each charge;
- Four (4) counts of Armed Robbery; thirty (30) years imprisonment on each charge.
- Attempted Armed Robbery, twenty (20) years imprisonment.
- Criminal Sexual Conduct, First Degree, thirty (30) years imprisonment.

All sentences were ordered to run concurrently giving the Respondent an aggregate term of 30 years. The Respondent's co-defendant's received ten (10) years for ABHAN, Twenty (20) years for Attempted-Armed Robbery and twenty-five (25) years on each of their other judgments for an aggregate term of twenty-five (25) years. The Respondent did not appeal his pleas or sentences.

In his Application for Post-Conviction Relief filed July 20, 2011, the Respondent alleged that he was being held in custody unlawfully for the following reasons:

1. The Respondent received ineffective assistance of counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.
2. The Respondent's pleas of guilty were not voluntary and intelligently entered. The judgments and sentences against the Respondent were entered in violation of his rights to due process of law and effective assistance of counsel.

In support of those allegations, the Respondent specifically alleged that:

1. Trial Counsel failed to give the Respondent adequate legal advise prior to the Respondent's guilty plea proceeding. Trial counsel failed to advise the Respondent of the potential consequences of delaying the acceptance of a plea bargain until after the discovery process was completed.
2. Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Respondent's ability to optimize the benefits available to him through plea negotiations with the State were irreparably prejudiced by counsel's failure to sufficiently advise the Respondent of the likely consequences of delaying his acceptance of a plea bargain until after all the discovery process was completed.

3. Trial Counsel was ineffective for neglecting to adequately explain the law of accomplice liability to the Respondent as it applied to the charge of Criminal Sexual Conduct, 1st Degree.

During the Respondent's PCR hearing on November 1, 2012, the Respondent elected to waive all his allegations with the exception of his claim that he received ineffective assistance of counsel during his sentencing. He waived his previous request for a new trial and asked only for a new sentencing proceeding. The Respondent was thoroughly questioned by the Court concerning this decision. The lower court found that the Respondent was making a knowing and voluntary decision to narrow the focus of his PCR action and therefore, granted his request to amend. In addition, the Respondent was advised that if he won a new sentencing proceeding, it was possible for the presiding judge to give him a more severe sentence than which he originally received. Notwithstanding this advice, the Respondent indicated that he wished to go forward with his claims related to his Defense Attorney's failure to provide him effective assistance of counsel during the sentencing phase of his plea proceeding. App. p.156, l.21 – p. 157, l. 15. On August 1, 2013 the Honorable Carmen Mullen signed an Order granting the Respondent a new sentencing hearing. This Order was filed with the Court on August 6, 2013. On August 20, 2013 the Petitioner filed a Motion to Reconsider, Alter or Amend pursuant to Rule 59(e), SCRPC. A Form 4 Order Denying the Petitioner's Motion to Reconsider, Alter or Amend pursuant to Rule 59(e) was signed by Judge Carmen Mullen on August 27, 2013 and filed with the Court on September 19, 2013. The Petitioner filed a Notice of Appeal to the Supreme Court of South Carolina on September 27, 2013. The State filed its Petition for Writ of Certiorari on January 2, 2014.

EVIDENCE BEFORE THE LOWER COURT

In addition to the testimony presented during the evidentiary hearing held in this case and the exhibits introduced during that proceeding, in deciding this collateral action, the lower court

also has before it a copy of the plea record, a copy of the deposition of Andrew Savage, III, dated January 25, 2013, the Respondent's records from the South Carolina Department of Corrections and the records of the Dorchester and Charleston County Clerks of Court regarding the subject judgments and sentences.

STANDARD OF REVIEW

On appeal the proper standard of review of a post conviction relief ruling is whether "*any evidence of probative value*" exists to sustain the post-conviction relief judge's findings. *Cherry v. State*, 200 S. C. 115, 386 S.E.2d 624 (1989) (Emphasis added). The reviewing court will reverse the lower court's findings only if no probative evidence is found to support those rulings. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000).

Where ineffective assistance of counsel is alleged as a ground for relief, it is the applicant's burden to 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 (1984); *Butler v. State*, 286 S.C. 441, 224 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. This Application for Post-Conviction Relief raises numerous specific allegations of ineffective assistance of counsel. At his evidentiary hearing, the Respondent narrowed the focus of his application to raise only a claim of ineffective assistance of counsel during his sentencing proceeding. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *U. S. Const. Amend. VI; Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164(2008). That right extends to representation during sentencing.

The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Suber v. State*, 371 S.C. 554, 558, 640 S.E. 2d 884, 886 (2007); *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Rule 71.1(e), SCRPC*. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Trial Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Speaks v. State*, 377 S.C. 396, 399, 600 S.E.2d 512, 514 (2008). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011); *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007); *Rhodes v. State*, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002). Having narrowed his allegations to address only his representation during sentencing, the Respondent submits that the operative question becomes whether, but for counsel's errors and omissions, there is a reasonable probability that the result during the sentencing proceeding would have been different.

On the one hand, where Trial Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). In order to satisfy the first prong of the Strickland standard, a PCR applicant must show that counsel's performance fell below an objective standard of

reasonableness. *Franklin v. Catoe*, 346, S.C. 563, 570-571, 582 S.E.2d 718, 722 (2001). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that,

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

ARGUMENT

The Post-Conviction Relief Judge correctly found that Plea Counsel's representation during sentencing was deficient and that Respondent was prejudiced by the errors and omissions of Plea Counsel during the sentencing portion of his plea proceeding.

Petitioner correctly cites to *Hill v. Lockhart*, 474 U.S. 52 (1985), for the proposition that a PCR applicant in a guilty plea case ordinarily must demonstrate that there is a reasonable probability that, but for counsel's errors and omissions, he would not have waived his right to trial by jury. Where the PCR applicant seeks to have his guilty pleas set aside, and a new trial granted, that standard clearly applies. Such was not the case in the Respondent's PCR action. In Respondent's case he expressly narrowed his claims to assertions that Plea Counsel was ineffective in his representation of the Respondent during his sentencing. Under those circumstances, the Respondent would submit that the PCR Court correctly determined that the operative question was whether there existed a reasonable probability that the outcome of the Respondent's sentencing proceeding would have been different, but for the errors and omissions of Plea Counsel.

In the landmark case of *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980), this Honorable

Court found that the sentencing court had the authority to impose, as condition of probation, that defendant make reparation in the form of payment of damages to the victim, but additionally found that an evidentiary basis was required to be shown for the amount of the payments ordered. In so ruling, this Court found the appropriate remedy to require that so much of the judgment and sentence *as fixed the amount of reparations be reversed* and the matter remanded for redetermination of the amount of reparations in the light of the evidence produced at the rehearing. In all other respects the judgment and sentence in *Wilson* was affirmed. *Wilson* is a classic illustration of this Court's consistent view that the remedy should be tailored to the harm alleged. There is South Carolina authority for the position that a judge in a PCR proceeding has the authority, on appropriate facts, to remand for a new sentencing hearing only. *See, Davie v. State, 381 S.C.601, 675 S.E.2d 416 (2009)*. Where the Applicant in *Davie* had not expressed a desire to proceed to trial, this Honorable Court found that a remand for a new trial was not the appropriate remedy.

Where, as in this case, the PCR applicant alleges that his Sixth Amendment right to effective assistance of counsel during his sentencing was violated, the proper remedy, as found by the PCR judge, is a new sentencing proceeding. Where the proper remedy is a new sentencing proceeding, it is illogical to claim, as Petitioner does, that Respondent has the burden of establishing that, but for Plea Counsel's ineffective representation concerning sentencing, he would have exercised his right to trial by jury. As the PCR Judge correctly found in her Order, *"there is a reasonable probability that the outcome of the Applicant's sentencing would have been different but for the errors and omissions of Defense Counsel addressed herein."* App. p. 296, Conclusion.

A.

The PCR Court correctly found that Plea Counsel was deficient in his representation of the Respondent during sentencing.

The very detailed order of the PCR Court granting relief in this PCR action sets forth with specificity the ways in which Plea Counsel failed to provide the Respondent reasonable professional assistance of counsel during the sentencing portion of the Respondent's plea hearing. The Order of the PCR Court very clearly points to the errors and omissions found by the PCR Court to constitute deficient representation during sentencing. In addition, the Order outlines the portions of the PCR hearing record, and the Plea hearing record, which supported a finding on each of the errors and omission alleged by the Respondent. Thus, the record below, and the rulings of the PCR Court, demonstrate that there was "*evidence of probative value*" to support the findings of the PCR judge in granting relief in this PCR action and, further, that the relief ordered was appropriate in light of the narrow allegations raised by the Respondent. The Petitioner's analysis to the contrary is faulty.

The PCR Court found that Plea Counsel was ineffective for failing to object to the Plea Court holding against the Respondent the exercise of his right to see all the discovery materials in this case before accepting a plea agreement. Petitioner argues that, because the record below demonstrates that the Plea Judge obviously knew that Respondent was waiting on DNA results, Respondent was not prejudiced by Counsel's failure to make an objection on this point. Petition, pg. 10 – 11. This assertion, however, overlooks the fact that although the Plea Judge indicated that he knew Respondent was waiting on the DNA results, he nevertheless clearly indicates that the co-defendants "*were first on board with cooperating*" and asserts that the prosecution was able to use their cooperation to obtain the Respondent's pleas. App.p. 50, l.14 – p. 51, l. 15. The Petitioner also claims that Plea Counsel was correct in concluding that the presiding judge obviously knew the results of the DNA testing conducted in this matter. The record does not support that conclusion. In his PCR testimony Plea Counsel expressed the opinion that the Plea Court's misunderstanding of the evidence on that count came from "*a*

conversation with the Solicitor or somebody from the State.” App. p. 102, ll. 2-6. Ultimately however, Defense Counsel acknowledged that at the time of the Applicant’s pleas, he had “*no idea*” whether the presiding judge had been made aware of the results of the DNA testing in this case. App. p. 104, l. 24-p. 105, l. 6. He speculated that the judge may have received erroneous information about the DNA testing when he presided over the guilty plea proceeding of one of the two co-defendants months before the Applicant’s pleas were entered. App.p. 105, l. 12- p. 106, l. 6. Respondent respectfully asserts that the PCR Court correctly concluded that while the source of the Plea Court’s misunderstanding of the evidence in this case is not clear, the fact that Plea Counsel did not take appropriate measures to correct that misunderstanding is clear. It is apparent that Plea Counsel did not point out the Court’s error before the Applicant sentence was handed down.

During the PCR hearing, when Plea Counsel was asked to explain why he didn’t clarify what the actual evidence was on the criminal sexual conduct charge, Plea Counsel stated simply, “*I don’t have an answer to that.*” App.p. 141, l. 15- p.143, l. 11. As Plea Counsel acknowledged in his PCR testimony, when the DNA test results finally came back, they were inconclusive. App. p. 98, l. 1-7. In addition, the victim was not able to identify which of the defendants sexually assaulted her. App. p. 98, ll. 19-24.

In addition, the record below supports the PCR Judge’s conclusion that Plea Counsel was deficient for failing to point out that his client never intended to go to trial and that the cooperation of the co-defendants had not, therefore, aided the State in getting Respondent to plead. Emails between Defense Counsel and the Solicitor’s Office confirmed that the Applicant always intended to plead on his charges rather than go to trial. App. p. 139, ll. 1-20, and an email to Solicitor Scarlett Wilson dated November 29, 2010. App.p. 247. Despite this position, Plea Counsel acknowledged in his PCR testimony that he never considered informing the Court

of this fact when the sentencing judge noted that the Applicant's co-defendants had cooperated early on and the State had been able to use their cooperation to threaten the Applicant and get him to plead guilty rather than go to trial by jury. App. p. 139, ll. 6-14.

Petitioner further argues that a video referenced during the plea proceeding established that Respondent's codefendants were not the perpetrators of the sexual assault in this case. That argument was not advanced by Petitioner in the PCR Court and it is not supported by the evidence in this case. Plea Counsel is a very experienced trial attorney with many years experience in the field of criminal defense. It is absurd to suggest, as does the Petitioner, that Plea Counsel would have been waiting on the DNA results in this case to establish that Respondent was not responsible for a sexual assault if there was a video tape already in existence which proved to the contrary. The assertions about the supposed value of the video tape were made by Milton Stratos, Esquire, counsel to co-defendant Joshua Monroe. App. p. 38, ll. 12 – 15. The video was not played during the plea proceeding and it was not introduced into evidence at that proceeding. The statements of the prosecutor on the record during the plea establish that, *"[I]t's difficult to tell which of the masked individuals was the one that initiated the CSC. According to co-defendants Larkin and Monroe, it was Mulligan..."* App. p. 21, l. 25 – p. 22, l. 2. Thus, the State acknowledged that the only evidence they had pointing to Respondent as the party responsible for initiating the CSC was the claims of the co-defendants.

Respondent now respectfully asserts that the record below fully supports the findings of the PCR judge in this case and her Order should be affirmed.

B.

Respondent has demonstrated prejudice

The Petitioner argues that Petitioner has failed to establish prejudice because he

did not take advantage of Plea Counsel's offer to file a direct appeal on his behalf or, alternatively, to file a Motion to Reconsider Sentence. Respondent strongly disagrees. The record below establishes that Plea Counsel's associate visited Respondent at the jail following his sentencing. There is no testimony from that associate in this record. Plea Counsel in this case is a veteran defense attorney with a positive reputation for the manner in which he represents clients in his practice. Nevertheless, the record of the PCR hearing in this case does not reflect an acknowledgement by Plea Counsel that there were aspects of this plea proceeding that should have been handled differently. That being said, it is ridiculous to suggest that his associate would have given Respondent reason to believe a Motion to Reconsider had any hope of being fruitful.

Petitioner also asserts that a direct appeal would have been a more appropriate venue to address the issues raised in this PCR action and that Respondent can not demonstrate prejudice since he voluntarily waived his right to file a direct appeal when Plea Counsel's associate offered to file such an appeal on his behalf. That argument likewise should fail. There were no issues raised during the guilty plea proceeding, including the sentencing portion thereof, which were properly preserved for appellate review. A direct appeal from a guilty plea is rarely worth the paper it is written on. Despite Plea Counsel's assertion that he stood ready to back up a notice of appeal with appropriate affidavits, the record below simply does not reflect that any issues for a direct appeal which were raised, argued and ruled upon by the Plea Judge. Accordingly, Respondent's decision not to go forward with a direct appeal in no way waived the Sixth Amendment claims addressed in his PCR action.

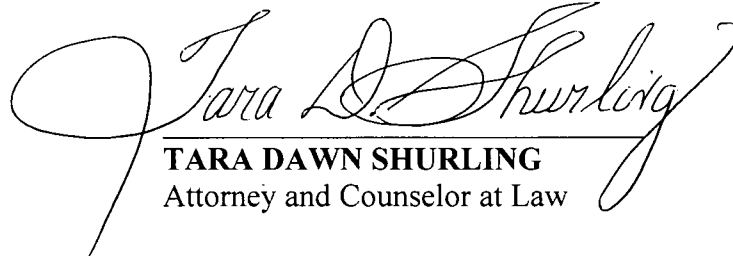
The PCR Judge correctly found that the errors and omissions of Plea Counsel during the sentencing portion of this guilty plea proceeding were such that there is a *"there is a reasonable probability that the outcome of the [Respondent's] sentencing would have been different"* but

for the deficiencies in Plea Counsel's representation. The points raised by Respondent would have negated the distinctions drawn by the Plea Court between Respondent and his two co-defendants. Therefore, it is reasonable to conclude that, but for these errors, Respondent would have been likely to receive the same sentence as his co-defendants who received five (5) years less time than Respondent.

CONCLUSION

For all the reasons set forth herein, as well as those advanced below, Respondent submits that there exists evidence of probative value which supports the finds of the PCR Court. Respondent now asks that the Petition for Writ of Certiorari be denied and that this matter be remanded to the lower court for a new sentencing proceeding as ordered by the PCR Court.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

This 19th day of May, 2014.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-002130

BRYAN L. MULLIGAN, 344736,

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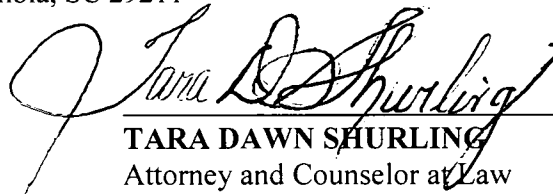
STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

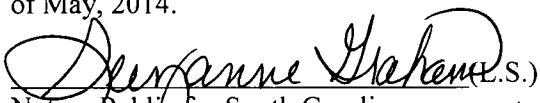
The undersigned attorney hereby certifies that a copy of the Return to Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Megan E. Harrigan, Assistant Attorney General, this 19th day of May, 2014, by mailing one (1) copy in a stamped envelope properly addressed to:

Megan E. Harrigan, Assistant Attorney General
Office of the Attorney General
P O Box 11549
Columbia, SC 29211


TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE me this 19th day
of May, 2014.


Notary Public for South Carolina
My Commission Expires: 2/28/2024

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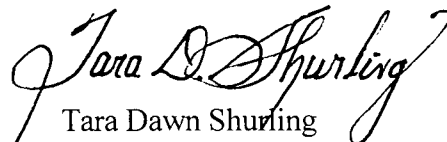
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Bryan Mulligan, 344736 v. State of South Carolina; 2013-002130.

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Return to Petition for Writ of Certiorari and the Certificate of Service in the above-captioned case. I would appreciate you returning one (1) clocked copy of the Return to Petition for Writ of Certiorari to me in the envelope provided. Thank you for your assistance in this matter. I remain,

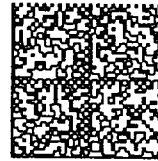
Sincerely yours,



Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures

cc: Megan Harrigan, Assistant Attorney General (w/enclosures)
Bryan Mulligan, 344736 (w/enclosures)
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TO:

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
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RE: Bryan Mulligan