



RECEIVED

JUN 23 2014

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

June 23, 2014

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


Re: Travis McKie v. State of South Carolina
Appellate Case No. 2013-001490
Lower Court Case No. 2010-CP-02-01256

Dear Mr. Shearouse:

I am in receipt of the Petition for Writ of Certiorari pursuant to Austin v. State in the above matter. Please accept this letter in lieu of a formal Return in this case. The Respondent takes no position on whether or not the Circuit Court's grant of a belated review pursuant to Austin v. State was proper, but rather submits that this is a matter for the sound discretion of this Court.

If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,



Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/ck

cc: Carmen V. Ganjehsani, Esquire



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUN 23 2014

June 23, 2014

S.C. Supreme Court

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

Re: Travis McKie v. State of South Carolina
Appellate Case No. 2013-001490
Lower Court Case No. 2010-CP-02-01256

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/ck
Enclosures

cc: Appellate Defender Carmen V. Ganjehsani (2 copies)
Trisha Allen. Victim Services (1 copy)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

2010-CP-02-01256
Appellate Case No. 2013-001490

TRAVIS MCKIE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

ALAN WILSON
Attorney General

DANIEL GOURLEY
Assistant Attorney General
Bar No. 100934

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

ATTORNEYS FOR RESPONDENT

RECEIVED

JUN 23 2014

S.C. Supreme Court

INDEX

ISSUE PRESENTED.....3
STATEMENT OF THE CASE.....4
STANDARD OF REVIEW5
ARGUMENT7
CONCLUSION.....10

ISSUE PRESENTED

Probative evidence supports the PCR court's finding that Counsel was not ineffective for declining to interview one of the victims of the shooting where the Victim could not conclusively state that Petitioner did not shoot him, the Petitioner admitted his guilt to Counsel during his representation, and there is evidence of overwhelming guilt.

STATEMENT OF THE CASE

Petitioner was indicted for two counts of Assault and Battery with Intent to Kill (2007-GS-02-1253 & 1254). Petitioner was represented by Michael Routzong, Esquire. On June 15, 2009, Petitioner pled guilty before the Honorable Doyet A. Early, III. Judge Early sentenced Petitioner to one term of twenty years suspended upon to five years' probation and a consecutive term of fifteen years. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed an application for post-conviction relief (PCR) on May 27, 2010, alleging that he was being held in custody unlawfully due to ineffective assistance of counsel. Respondent made its Return on November 17, 2010. Petitioner was present and represented by Joan E. Smith, Esquire. An evidentiary hearing was convened on July 14, 2011, at the Aiken County Courthouse before the Honorable James R. Barber, III. By order dated August 17, 2011, Judge Barber denied and dismissed the application with prejudice.

On July 30, 2012, petitioner filed a second PCR application requesting an appeal of his first PCR case pursuant to Austin v. State, 305 S.C. 453, 409 S.E2d 395 (1995). The Respondent filed its Return on October 8, 2012. Petitioner's PCR Counsel submitted an affidavit. On June 11, 2013, the Honorable R. Ferrell Cothran, Jr., signed a Consent Order Filing Belated Notice of Appeal. The Petitioner subsequently filed a Petition for Writ of Certiorari pursuant to Austin v. State on March 7, 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).

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.

Where there has been a guilty plea, the Petitioner 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, 106 S.Ct. 366, 370 (1985); Hyman v. State, 397 S.C. 35, 49, 723 S.E.2d 375, 382 (2012); Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011); Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

ARGUMENT

Probative evidence supports the PCR court's finding that Counsel was not ineffective for declining to interview one of the victims of the shooting where the Victim could not conclusively state that Petitioner did not shoot him, the Petitioner admitted his guilt to Counsel during his representation, and there is evidence of overwhelming guilt.

Petitioner argues the post-conviction relief (PCR) court erred in finding Counsel was not ineffective for failing to interview one of the victims of the shooting. However, this allegation is meritless as ample evidence supports the PCR court's finding.

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. "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

In the instant case, Petitioner admitted his guilt to Counsel during the course of his representation. Specifically, Counsel testified Petitioner informed him that he was guilty and

shot the Victim. (App. p. 68 line 24—p. 69 line 9). Counsel testified that there was no motive for the shooting of Victim. (App. p. 69 lines 15-21). Counsel explained Petitioner chose to accept the negotiated fifteen year cap plea offer and cooperated with police by helping search for the gun used to shoot Victim. (App. p. 69 line 20—p. 70 line 15). Counsel stated it was his hope that Petitioner's cooperation with Police would help during sentencing mitigation. (App. p. 70 lines 12-15). As evidence above, Petitioner's admission of guilt during the course of Counsel's representation greatly altered Counsel's actions as far as investigation and preparation. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

However, Petitioner now argues, despite his admission of guilt, that Counsel was ineffective for failing to interview Victim. Counsel stated he was aware that Victim was subpoenaed to testify had Petitioner proceeded to trial. (App. p. 69 lines 10-16). During the PCR hearing, Victim was unable to conclusively state that Petitioner was not the shooter. (App. p. 60 lines 9-13; p. 65 lines 15-17). Instead, Victim speculated that Petitioner was not the shooter because Petitioner would have talked to him about the shooting. (App. p. 61 lines 5-12). The PCR court found:

the testimony offered by the victim was vague and not sufficient to begin to prove that Applicant was not the shooter in this case. Further, counsel's failure to interview [Victim] in no way affected his representation of [Petitioner], as [Victim] offered no testimony at the PCR hearing to show [Petitioner] was not the shooter and [Petitioner] admitted his guilt to counsel early on in his representation.

(App. p. 84). Therefore, probative evidence supports the PCR court's finding that Counsel was not ineffective for failing to interview Victim prior to Petitioner's guilty plea.

Regardless, Petitioner can show no prejudice as there is overwhelming evidence of guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State,

345 S.C. 332, 548 S.E.2d 862 (2001), Jeter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C.,1991). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the applicant's guilt in Ford was overwhelming and this Court held that the applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation. In the instant case, Petitioner stated during the guilty plea, "I know what I did was wrong...I made a bad decision, sir, which I'm willing to accept the consequences for, sir." (App. p. 18 lines 2-5). Petitioner further apologized "to the families, to the victim, and [his] family for all the pain and grief." (App. p. 18 lines 6-8). Additionally, Counsel stated Petitioner admitted his guilt during the course of his representation and there was no doubt that he was the shooter. (App. p. 68 line 24—p. 69 line 9). Therefore, Petitioner can show no prejudice as a result of counsel's alleged deficiency as there is evidence of overwhelming guilt.

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 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

June 23, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

TRAVIS MCKIE,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari pursuant to Austin v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Carmen Vaughn Ganjehsani
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 23rd day of June, 2014


CAROLINE KAISER
LEGAL ASSISTANT