STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No.: 2013-001157

Christopher Lee Pride... ..... Petitioner,

v.

State of South Carolina ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

I. Did the PCR court properly find Counsel was not ineffective for failing to communicate and/or accept a plea offer from the State when Petitioner provided no evidence that an offer from the State existed when Counsel Smith represented Petitioner and because the offer given to Counsel All was rescinded before Counsel All could communicate it to Petitioner because Petitioner refused to cooperate with Counsel All?

II. Is there any evidence of probative value that Counsel was not ineffective for not requesting a continuance and/or arguing against Petitioner being tried in his absence when Counsel was relieved, when Petitioner had ample notice that if he was not present for his trial, he would be tried in his absence and where Petitioner provided no evidence that had a continuance been granted, the outcome of his case would have been different?

III. Did the PCR court properly find Counsel was not ineffective for not making a motion for a new trial where Counsel was reappointed to Petitioner's case as standby counsel for the sole duty of filing Petitioner's direct appeal and where the sentencing judge had no power or reason to change the trial judge's sentence?

STATEMENT OF THE CASE

Christopher Lee Pride, ("Petitioner"), was indicted at the June 2003 term of the Union County Court of General Sessions for Possession of Crack Cocaine with Intent to Distribute (PWID) (2003-GS-44-0519) and PWID Crack Cocaine within proximity of a school (2003-GS-44-0523). He was originally represented by Fletcher Smith, Esq. On September 13, 2004, the Honorable J. Cordell Maddox, Jr. relieved Counsel Smith from representation. Petitioner subsequently applied to the 16th Circuit Public Defender's Office, and Bill All (Counsel All) was appointed to represent the Petitioner.

According to the trial transcript, Petitioner was scheduled to meet with Counsel All on two occasions, but failed to show up due to work obligations. On October 1, 2004, Counsel wrote Petitioner a letter, stressing the importance of meeting with him to discuss the case and prepare for trial, which was scheduled for the week of October 11, 2004. Petitioner rescheduled an appointment for October 7, 2004, but failed to show and/or call Counsel All's office. The day before the scheduled trial, Petitioner appeared for roll call, met with Counsel All and stated he needed to meet with Counsel Smith. Counsel All then attempted to contact Counsel Smith concerning representation. The solicitor informed Counsel All that Counsel Smith's office had contacted the solicitor and stated Counsel Smith did not represent Petitioner.

On October 13, 2004, the case proceeded to trial. During pre-trial discussions and motions, the solicitor introduced a bond form, signed by Petitioner that informed the Petitioner that, if he failed to show for trial, he would be tried in his absence. The State then moved to try Petitioner in his absence. Immediately following this motion, there was a discussion about Counsel's All representation of the Petitioner, and the Honorable John C. Hayes, III relieved Counsel All from representation. Petitioner, *pro se*, was tried by a jury *in absentia* and convicted

of PWID Crack Cocaine, 2nd offense and PWID Crack Cocaine with proximity of a school. The sentence was sealed until Petitioner was located.

On January 18, 2005, Petitioner appeared for a sentencing hearing before the Honorable G. Thomas Cooper, Jr. Counsel All was reappointed for sentencing and for the primary purpose of filing an appeal. Judge Cooper unsealed the sentenced by which Judge Hayes sentenced Petitioner to confinement for twenty-five (25) years for PWID Crack Cocaine, 2nd offense and fifteen (15) years, concurrent, for the proximity charge.

Thereafter, Petitioner appealed his conviction and sentence. After full briefing, the South Carolina Court of Appeals affirmed his conviction and sentence. State v. Pride, 2007-UP-544 (S.C. Ct. App. filed December 5, 2007). Petitioner then appealed to the South Carolina Supreme Court who granted certiorari. Subsequently, the S. C. Supreme Court dismissed the Petitioner's appeal as improvidently granted. State v. Pride, Op. No. 2009-MO-064 (S.C. filed December 14, 2009). The Remittitur was issued on December 30, 2009.

Petitioner then appealed to the United States Supreme Court. The United States Supreme Court denied his petition for writ of certiorari on June 21, 2010.

Petitioner subsequently filed an application for post-conviction relief (PCR) on August 23, 2011. Respondent made its Return and Motion to Dismiss on December 19, 2011. The Honorable Lee S. Alford signed a Conditional Order of Dismissal on January 4, 2012. Petitioner responded timely to the Conditional Order of Dismissal. On November 5, 2012, the Honorable Lee S. Alford signed an Order substituting Tricia A. Blanchette, Esquire as Petitioner's counsel. On November 29, 2012, Petitioner, through counsel, submitted amendments to his PCR application. On February 8, 2013, an evidentiary hearing was held at the Moss Justice Center in

York, SC. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On March 25, 2013, the Honorable Lee S. Alford denied and dismissed the Petitioner's application with prejudice by written Order. The Order was filed on April 2, 2013. Petitioner's counsel filed a SCRCP 59(a) or (e) Motion to Alter or Amend on April 11, 2013. On April 22, 2013, the Honorable Lee S. Alford issued an Amended Order of Dismissal and an Order on Petitioner Motion to Alter or Amend. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR 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 PCR proceeding, 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).

ARGUMENTS

I. The PCR court properly found Counsel was not ineffective for failing to communicate and/or accept a plea offer from the State when Petitioner provided no evidence that an offer from the State existed when Counsel Smith represented Petitioner and because the offer given to Counsel All was rescinded before Counsel All could communicate it to Petitioner because Petitioner refused to cooperate with Counsel All.

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for failing to communicate and/or act on a plea offer of ten years and that Petitioner was not prejudiced as a result. This argument is without merit.

In a PCR action, 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 the 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, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Petitioner must prove 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.

Defense counsel has duty to communicate formal plea offers from the State to Petitioner. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.). However, "[d]efendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it..." Id. at 1409, 182 at 379. Further, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Strickland at 691, 104 at 2066.

Additionally, great deference is given to the PCR court's findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 cert. denied, 510 U.S. 1014, 114 S.Ct. 607 (1993).

At the PCR hearing, Counsel Smith testified he did not recall a plea offer communicated by the State and had no record of a plea offer in his file. (App. p. 225). Counsel Smith also testified he did not recall the solicitor ever offering Petitioner a plea deal in this case and that Judge Maddox relieved him as counsel before Petitioner's trial. (App. p. 231). Counsel All testified when he was originally appointed to the Petitioner's case, a ten-year offer was communicated by one solicitor. However, shortly after Counsel All's appointment, a different solicitor took over Petitioner's case and the ten-year offer was no longer available. (App. p. 260).

At this point, Counsel All attempted to contact Petitioner, but Petitioner failed to contact Counsel All. (App. pp. 260-261). Petitioner, while claiming the State offered him a ten-year plea agreement while Counsel Smith was his attorney, admitted that he refused to cooperate with Counsel All, even though he knew, based on the hearing before Judge Maddox, that he had Counsel Smith relieved one month prior to his trial. (App. p. 253 line 25- p. 254 line 22). Petitioner also admitted that he had no proof of the ten-year offer at the PCR hearing. (App. p. 252 lines 16-20).

Based on this testimony, the PCR court correctly held the allegation that Counsel Smith was ineffective for failing to act on a plea offer from the State was meritless. The PCR court reasoned that while Counsel Smith was representing Petitioner, Counsel Smith had no recollection of a plea offer from the State and Petitioner failed to provide any proof of such offer or how he learned of such offer. The PCR court also articulated that the offer Petitioner referred to was one probably made to Counsel All, but because of Petitioner's own actions in refusing to communicate with Counsel All, the new solicitor on the case withdrew the offer before Counsel All could relay it to Petitioner. The PCR court further found there was no credible evidence that Counsel Smith ever received a plea offer from the State and found Petitioner's testimony not credible on the subject.

In this case, the PCR court correctly found Counsel Smith was not ineffective for failing to advise Petitioner of a ten-year plea offer because there was no credible evidence that a ten-year plea offer was ever communicated to Counsel Smith. While Counsel Smith would have had a duty to relay an offer to Petitioner had one existed, Petitioner failed to prove the existence of such an offer. In addition, Petitioner failed to show a reasonable probability that the plea would have been entered without the State cancelling it under Frye. While Counsel All initially

received a ten-year plea offer for Petitioner, Petitioner admittedly refused to communicate with Counsel All and because of Petitioner's own actions, the State withdrew the offer. Moreover, Petitioner's self-serving testimony that he would have accepted the offer was found not credible. Thus, the PCR court correctly found Petitioner failed to prove that Counsel Smith was ineffective for not relaying the alleged plea offer from the State.

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

II. Counsel was not ineffective for not requesting a continuance and/or arguing against Petitioner being tried in his absence when Counsel was relieved, when Petitioner had ample notice that if he was not present for his trial, he would be tried in his absence and where Petitioner provided no evidence that had a continuance been granted, the outcome of his case would have been different.

Petitioner asserts the PCR court erred in not finding Counsel ineffective for not requesting a continuance and/or not arguing against Petitioner being tried in his absence. This argument is without merit.

At the beginning of trial, Counsel All explained to the court that he attempted to contact Petitioner by telephone and received no response. (App. pp. 4-5). Counsel All also stated that after Counsel Smith was relieved on September 13, 2004 by Judge Cordell Maddox, he was appointed to Petitioner's case. (App. p. 5). Counsel All then explained Petitioner made two appointments to meet with Counsel All, but failed to show at these appointments. (App. pp. 5-6). Counsel All then stated he wrote Petitioner a letter advising him that his case would be called to trial on October 11, 2004. (App. p. 6). Petitioner then scheduled another meeting with Counsel All on October 7, 2004, but failed to show at this one too. (App. p. 6).

After Counsel All finished explaining the procedural history, the trial court engaged him in a colloquy concerning whether he wished to be relieved as counsel based upon Petitioner's conduct. (App. pp. 9-11). The solicitor also moved to try Petitioner in his absence and introduced bond paperwork, proving Petitioner acknowledged that if he failed to appear for trial that he would be tried in his absence. After the colloquy between the trial court and Counsel All, Counsel All made a motion to be relieved and the trial court granted it. (App. p. 11). Counsel All also agreed to act as standby counsel if Petitioner appeared during his trial. (App. p. 11). The trial court held Petitioner was to be tried in his absence based on his own conduct. Petitioner was convicted of both crimes and later sentenced to twenty-five years' incarceration.

Petitioner appealed his conviction and sentence to the South Carolina Court of Appeals. The Court of Appeals, in a thorough opinion, held Petitioner waived his right to counsel via his own conduct and distinguished this case from State v. Roberson, 371 S.C. 334, 638 S.E.2d 93 (Ct. App. 2006, (cert. granted Oct. 19, 2007) and State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003). The Court of Appeals specifically held Petitioner failed to cooperate with Counsel All and "knowingly attempted to manipulate the court system." (App. p. 164). The Court of Appeals also opined that Petitioner essentially fired Counsel All by assuring him that Petitioner was represented by Counsel Smith, even though Petitioner knew Counsel Smith did not represent him. (App. p. 164). The Court of Appeals further held Petitioner's "deliberate, dilatory, and manipulative conduct was sufficient to waive his right to counsel." (App. p. 164).

Once the trial court relieved Counsel All from his representation, Counsel All was not required to make any motions or argument on behalf of Petitioner. See State v. Oliphant, 47 Conn. App. 271, 281, 702 A.2d 1206, 1212 (1997) ("defendant's claim that he was denied the effective assistance of counsel is without merit because, after deciding to proceed pro se, he had

no constitutional right to the effective assistance of counsel in any capacity."); Com. v. Jackson, 419 Mass. 716, 720, 647 N.E.2d 401, 404 (1995) ("defendant waived his right to effective assistance of counsel when he refused appointed counsel."); see also State v. Sheppard, 172 W. Va. 656, 670, 310 S.E.2d 173, 187-88 (1983) ("a defendant who validly elects to represent himself in a criminal proceeding cannot thereafter complain of ineffective assistance of counsel.").

First, the Court of Appeals has already ruled that Counsel All was properly relieved as Petitioner's counsel. See Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973) (A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal.). Second, as soon as the case was called for trial by the solicitor, the recitation of the procedural history by Counsel All and the colloquy between the trial court and him occurred. Immediately after the colloquy, the trial court relieved Counsel All. Petitioner, by his own conduct, decided to proceed *pro se* in his trial. As such, Counsel All had no further obligations or duties in his representation of Petitioner in any capacity. Thus, Petitioner cannot claim ineffective assistance of counsel for Counsel All not arguing against Petitioner being tried in his absence or for not making a motion for continuance on Petitioner's behalf.

Nevertheless, Petitioner has failed to prove any resulting prejudice from Counsel All's not making a motion for continuance on his behalf as Petitioner failed to provide any credible evidence that had a motion for continuance been granted, the outcome of his case would have been different. See Ruffin v. State, 283 Ga. 87, 90, 656 S.E.2d 140, 143 (2008) ("Even assuming, arguendo, that the trial court would have granted a continuance, appellant has failed to show what additional matters counsel could have accomplished had he obtained a continuance. Accordingly, even assuming counsel's deficiency in failing to request a continuance, there was

no showing of any resulting prejudice."). Petitioner claims the prejudice he suffered by Counsel All's not moving for a continuance was that no one was present to challenge two jurors, the State's evidence concerning the statements Petitioner made to police, and the SLED chemist. However, Petitioner failed to provide any evidence whatsoever at the PCR hearing that challenging the two jurors, challenging the statements by Petitioner to law enforcement, and challenging the admission of the SLED chemist report would have changed the outcome of Petitioner's trial. Therefore, Petitioner has failed to meet his burden of proof as to this argument.

III. The PCR court properly found Counsel was not ineffective for not making a motion for a new trial where Counsel was reappointed to Petitioner's case as standby counsel for the sole duty of filing Petitioner's direct appeal and where the sentencing judge had no power or reason to change the trial judge's sentence.

Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for not making a motion for a new trial after his reappointment as standby counsel during Petitioner's sentencing hearing. The PCR court properly dismissed this allegation.

At Petitioner's sentencing hearing on January 18, 2005, the solicitor and Counsel All explained the procedural history of the case to Judge G. Thomas Cooper, Jr. (App. p. 97-100). Judge Cooper explained to Petitioner that all he could do for Petitioner was appoint a public defender to act as standby counsel for Petitioner while the sentence was read. (App. p. 103). Counsel All then expressed that there was nothing much he could say unless Judge Cooper was inclined to change the sentence Judge Hayes had decided for Petitioner at the end of Petitioner's trial. (App. p. 104). Judge Cooper stated that unless there was some obvious error, it was highly unlikely he would change another judge's sentence. (App. p. 104). Judge Cooper then read Petitioner's sentence of twenty-five years. (App. p. 105-106).

The PCR court held Counsel All was reappointed to Petitioner's case during the sentencing hearing for the primary purpose of filing a Notice of Appeal. (App. p. 286). The PCR court also found a motion for a new trial would not have been granted or would not have preserved any issues which were not addressed in the direct appeal. (App. p. 286). Moreover, the PCR court found that Judge Cooper was not going to overturn another circuit court judge's sentence. (App. p. 287). Further, the PCR court found there was overwhelming evidence of Petitioner's guilt in this case. (App. pp. 286-287).

First, there exists no Sixth Amendment constitutional right to effective assistance of standby counsel. See State v. Gunther, 278 Neb. 173, 178, 768 N.W.2d 453, 457 (2009) (Citing Simpson v. Battaglia, 458 F.3d 585, 597 (7th Cir.2006) ("inadequacy of standby counsel's performance, without the defendant's relinquishment of his [right to self-representation], cannot give rise to an ineffective assistance of counsel claim under the Sixth Amendment"); U.S. v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) ("[a]bsent a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective"); Johnson v. Quarterman, 595 F.Supp.2d 735, 750 (S.D.Tex.2009) ("[a]lthough the court may appoint standby counsel to assist a *pro se* defendant, there is no constitutional right to the effective assistance of such counsel")). Second, "One Circuit Court Judge does not have the authority to set aside the order of another." Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986). Third, where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See 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); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991).

In this case, Counsel All was reappointed to Petitioner's case as standby counsel for the main purpose of filing the Notice of Appeal so that the Office of Appellate Defense could perfect

an appeal on Petitioner's behalf. As there is no constitutional right to effective assistance of standby counsel, Counsel All cannot be deemed ineffective. Additionally, Petitioner provided no probative evidence at the PCR hearing showing that if Counsel All had made a motion for a new trial, the outcome of his case would have been different. Even if Counsel had made a motion for a new trial, Judge Cooper did not have the authority to change Judge Hayes' sentence under Flecther, *supra*. Judge Hayes' sentence was proper for the charges and lacked any error. Moreover, Petitioner cannot prove resulting prejudice from Counsel All's alleged deficiency because there was overwhelming evidence of his guilt from the testimony provided at trial.

Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry, *supra*. Therefore, the 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,

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By: _____
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May 8, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Lee S. Alford, Circuit Court Judge

CHRISTOPHER PRIDE, 281240

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette
Post Office Box 12725
Columbia, South Carolina 29211

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

This 8th day of May 2014.

CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

May 8, 2014

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

***RE:* Christopher Pride, 281240 v. State of South Carolina**
2013-001157

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,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Tricia A. Blanchette, Esquire
Trisha Allen, Victim Services

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