

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Colleton County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2011-203246

JIMMY LEE DUNCAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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AUG 25 2014

S.C. Supreme Court

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QUESTION PRESENTED

I. Whether there is probative evidence to support the post-conviction relief court's finding that the Petitioner failed to carry his burden of proving he was entitled to appeal pursuant to White v. State of his conviction for furnishing and possessing contraband in a county or municipal prison when the Petitioner failed to convey to counsel his desire to appeal his conviction?

STATEMENT OF THE CASE

The Applicant was indicted at the December 2009 term of the Colleton County Grand Jury for furnishing or possessing contraband in county or municipal prison (2009-GS-15-0640). The Applicant was represented by Everett Bennett Jr., Esquire. The State was represented by Robert McNair, Esquire, and Dale Scott, Esquire, both of the South Carolina Office of the Attorney General. The Petitioner proceeded to trial on January 13-14, 2010. The Petitioner was found guilty by a jury. The Honorable Perry M. Buckner, III, sentenced the Petitioner to three (3) years for furnishing or possessing contraband.

After being convicted at trial for furnishing or possessing contraband, the Petitioner pled guilty to possession of 1gram of crack cocaine- first offense (2009-GS-15-0031). The Petitioner was sentenced to time served for that conviction. The Court also revoked the Petitioner's probation on a prior conviction for eighteen (18) months. The Petitioner's sentences were run concurrent. The Petitioner did not appeal his convictions or sentences.

The Petitioner filed an application for post-conviction relief on June 7, 2010. The Respondent filed its Return on October 14, 2010. An evidentiary hearing was convened on September 1, 2011 at the Beaufort County Courthouse. The Petitioner was present and represented by J.D. Bryan, Esquire. Matthew Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. The Petitioner and trial counsel both testified at the hearing. By Order filed October 20, 2011, the Honorable D. Craig Brown denied and dismissed the Petitioner's application with prejudice.

The Petitioner appealed the lower court's denial of his application for post-conviction relief. Counsel for the Petitioner submitted a Johnson¹ petition and a motion to be relieved as

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

counsel. By Order dated April 4, 2014, this Court denied the motion and directed the parties to address the issue raised in this return. This Return follows.

ARGUMENT

The Petitioner asserts that the post-conviction relief court erred by finding he was not entitled to an appeal of his conviction pursuant to White v. State². The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant 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 Applicant 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, 80 L.Ed.2d 674 (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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

² White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. There is probative evidence to support the lower court's claim that the Petitioner failed to carry his burden of proving he was entitled to an appeal pursuant to White v. State when the Petitioner was aware of his right to appeal and failed to indicate to counsel his desire to appeal his conviction.

The Petitioner asserts the post-conviction relief court erred by finding the Petitioner failed to carry burden of proving he was not entitled to an appeal pursuant to White v. State of his conviction for furnishing or possessing contraband in a county or municipal prison. The Respondent submits there is probative evidence to support the lower court's ruling since the Petitioner was aware of his right to appeal and failed to express to counsel his desire to appeal his conviction.

The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). They instead held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id.

The Respondent submits counsel was not ineffective for failing to file an appeal of the Petitioner's conviction for furnishing or possessing contraband in a county or municipal prison. The Petitioner has failed to show that he demonstrated to counsel his interest in appeal his

conviction. The record is clear that the Petitioner was aware of his right to appeal and had been involved in the appellate process before. The Petitioner was advised of his right to appeal by the Court following the jury's guilty verdict during his guilty plea for possession of 1 gram of crack cocaine. (App. 36:18-22). At the time of trial, the Petitioner also had a pending appeal from a prior probation revocation. (App. 8-10). The Petitioner's testimony at the evidentiary hearing further indicates he was aware of his right to appeal his conviction after trial. (App. 292:24-295:9.)

The Respondent submits the Petitioner has failed to show that he demonstrated to counsel his desire to appeal after his trial, guilty plea, and sentencing by the Court. The Petitioner's own testimony indicates he never had a chance to speak with counsel about an appeal and that he tried to send word through an officer and was unsure if his request even reached his attorney. (App. 292:24-295:9). The lower court also found counsel provided credible testimony that it was his general practice to file an appeal when his clients asked to appeal and that the Petitioner never contacted him to request an appeal or discuss possible grounds for an appeal. (App. 301:25-304:2). The Respondent submits the Petitioner was aware of his right to appeal and had the obligation to express to counsel his desire to appeal his conviction. The post-conviction relief court properly found that the Petitioner was not entitled to an appeal pursuant to White v. State.

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

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BY: 

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ATTORNEYS FOR RESPONDENT

August 29, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Colleton County
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2011-203246
Lower Court Case No. 2010-CP-15-0622

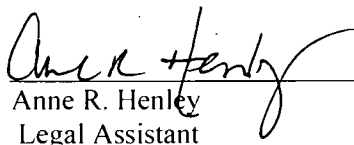
JIMMY LEE DUNCAN, Petitioner,

v.

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 to The SC Supreme Court has been mailed to the opposing counsel Robert Pachak, this 25th day of August 2014.


Anne R. Henley
Legal Assistant

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


Notary Public for South Carolina.
My Commission Expires: 10/28/2014 (L.S.)



ALAN WILSON
ATTORNEY GENERAL

August 25, 2014

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AUG 25 2014
S.C. Supreme Court

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

RE: Jimmy Lee Duncan, #304569 v. State of South Carolina
Appellate Case No. 2011-203246
Lower Court Case No. 20108-CP-15-0622

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving the petitioner with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Robert Pachak, Esquire