

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2013-000455

Jeffery T. Lucas,..... Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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TABLE OF CONTENTS

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW3

ARGUMENT

The PCR judge fatally erred as a matter of law in improperly shifting the burden to Respondent in finding Petitioner was entitled to a review of direct appeals issues.
.....4

Certiorari is not warranted where the PCR Judge correctly found Petitioner failed to meet his burden to prove that counsel’s performance was rendered either deficient or ineffective for failing to lodge a meritless objection to the State’s closing argument.
.....7

CONCLUSION8

QUESTION PRESENTED

1. Is Certiorari appropriate to determine whether the PCR Judge committed reversible error in finding Petitioner met his burden to prove he was entitled to White v. State review of direct appeal issues?
2. Is Certiorari appropriate to review whether probative evidence PCR Judge's finding that Petitioner failed to meet his burden to prove that counsel was either deficient or ineffective for not objecting to the solicitor's use of syntax in the State's closing argument?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. He was indicted at the March 2009 term of the Lexington County Grand Jury for infliction of great bodily injury upon a child (2009-GS-32-0536). He was represented by Wayne Floyd, Esq. The State was represented by Larry Wedekind, Esq., Sara McMahon, Esq. and Michael Ross, Esq. On March 16, 2009, the State called its case to trial before the Honorable William P. Keesley. Petitioner was found guilty as indicted. Judge Keesley sentenced him to a term of twenty (20) years imprisonment. Petitioner did not appeal his sentence or conviction.

Petitioner however filed a timely Application for post-conviction relief (PCR) on February 19, 2010 (2010-CP-32-0803). The State filed its responsive pleadings on June 8, 2010. A hearing was held at the Lexington County Courthouse on concerning Petitioner's civil case on April 25, 2012 before the Honorable Clifton Newman. Petitioner was represented by Tommy Thomas, Esq. The State was represented by Kaelon May, Esq., of the Office of the Attorney General. Judge Newman denied and dismissed Petitioner's pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), providing the discretionary grant for appellate review of direct appeals issues. This appeal follows.

STANDARD OF REVIEW

The proper standard for review of 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction

relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

The PCR judge fatally erred as a matter of law in improperly shifting the burden to Respondent in finding Petitioner was entitled to a review of direct appeals issues.

At the PCR hearing, Petitioner asserted that he told counsel to file a notice of appeal immediately after the Judge Keesley sentenced him. (App.p.482). He testified that he trusted counsel would take care of the notice for him. (App.p.477). He testified that upon his admission to the Department of Corrections, he was unable to communicate with counsel. He recalled the Judge's Keesley's instruction to him concerning the time limits to seek appellate review. He testified that he was alarmed to learn that counsel met with his family and advised them that Petitioner that there was no meritorious issue to appeal in cautioning the family not to waste money in retaining appellate counsel.

Counsel testified to his course of conduct during the representation. He testified that he apprised Petitioner of appellate rights during the early stages of the case. He further testified that he discussed the merits of an appeal with Petitioner's family soon after he was sent to Corrections and gave them in his candid opinion on the matter. He testified that he instructed Petitioner's family contact him if Petitioner decided he wanted proceed with an appeal.

In denying and dismissing Petitioner's PCR Application pursuant to White v. State, the PCR Judge he found that Petitioner did not knowingly and intelligently waive

his right to appeal.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Failure to file a notice of appeal upon request was per se ineffective in Deitz v. Money, 391 F.3d 804, 810 (6th Cir. 2004). Counsel may be accused of ineffectiveness for failure to file a notice of appeal. If such a notice is requested by the defendant, disregarding the specific request is professionally unreasonable. Peguero v. U.S., 526 U.S. 23 (1998).

The PCR judge erred as a matter of law in finding Petitioner met his burden to prove counsel's performance in advising Petitioner of his right to appeal. Notably, Petitioner concedes that Judge Keesley and counsel made fully advised him of his appellate rights. Here, the controversy concerns whether Petitioner proved that counsel willfully neglected to file a notice of appeal after Petitioner purportedly told counsel he

wanted an appeal at the sentencing hearing See Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). (“In determining [PCR] issues, it is proper to consider [the transcript from the General Sessions Court] as well as evidence at the PCR hearing.”). First, the PCR Judge does not assign any evidentiary value to Petitioner’s testimony, nor does he make credibility findings. Thus, Petitioner’s entire allegation rests upon mere speculation. He notably did not present any witnesses present at the time he communicated his desire to appeal or relevant correspondence to counsel that corroborated his testimony. Therefore, Petitioner failed to produce credible evidence to refute the presumption of effective assistance of counsel. “An ambiguous or silent record cannot disprove the strong and continuous presumption of competence.” Chandler v. U.S., 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc). Petitioner could have developed testimony from counsel on whether Petitioner told him to file a notice of appeal right he was sentenced; however, Petitioner’s decision to not explore this critical inquiry does not negate presumption of effective assistance of counsel.

Third, counsel’s diligence during the representation further buttresses Strickland’s presumption of competence. Counsel testified that he had known Petitioner for some time and had a great relationship with him and his family. Even Petitioner testified that counsel made exceptional efforts to communicate with him during the case. (App.p.476). Notably the PCR Judge commented upon counsel’s conduct that this Court frowned upon in Edwards v. State. See Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) To achieve our goal of “eliminat[ing] the distorting effects of hindsight,” we must

disregard the attorney's statements.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

II.

Certiorari is not warranted where the PCR Judge correctly found Petitioner failed to meet his burden to prove that counsel's performance was rendered either deficient or ineffective for failing to lodge a meritless objection to the State's closing argument.

The PCR Judge correctly ruled that the solicitor's choice of syntax alone improper closing argument to warrant an objection. See State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence),

The allegation itself is conclusory and insufficient. "Counsel may be accused of failure to properly object or preserve error but the claim will fail where there is no identification of any specific circumstances to support the claim. Cummings v. Sirmons, 506 F.3d 1211, 1228 (10th Cir. 2007); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (vague and speculative assertions are insufficient). Therefore, Petitioner failed to show how counsel's performance was rendered deficient. See U.S. v. Bosch, 914 F.2d 1239, 1247 (9th Cir. 1990) (Generally, however, claims arise in the context of failure to object

and this claim will fail unless the complainant can show that the evidence was inadmissible.).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: J. Walker
ATTORNEYS FOR RESPONDENT

Feb 18th, 2014

STATE OF SOUTH CAROLINA
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Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

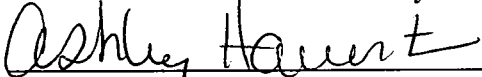
**Tommy A. Thomas, Esquire
7588 Woodrow St
Irmo, South Carolina 29063**

This 8th day of October, 2014.



J. Walt Whitmire, SC Bar #100793
ATTORNEY FOR RESPONDENT

SWORN to before me this 8th day of October, 2014.



Notary Public for South Carolina.

My Commission Expires: 3-18-23