

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2014-00100

Renaldo Gonzalez, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Certiorari is unwarranted where the PCR Judge correctly found that Petitioner’s allegation that substituted Attorney White’s was ineffective in advising him to not accept the State’s September 2008 guilty plea offer prior to obtaining certain evidence was without merit because his original counsel had visited law enforcing, reviewed the evidence at issue, and apprised Petitioner of his assessment the State’s case against him; Regardless, ample probative evidence supports the PCR Judge’s finding that Petitioner failed to meet his most basic burden, that his *post hoc* assertion that he would have accepted the State’s offer here but for counsel’s purported failings held credibility.

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QUESTION PRESENTED

1. Is Certiorari necessary to review whether the PCR Judge made a sound finding that Petitioner failed to meet his burden to prove that Attorney White was purportedly ineffective for failing to adequately advise him on the terms and conditions of the State's September 2008 plea offer?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at the January 2007 term of General Sessions for conspiracy to traffic methamphetamine (2007-GS-04-168) possession of cocaine (2007-GS-04-2208) and trafficking methamphetamine, more than 400 grams (2007-GS-04-169). Kurt Tavernier, Esq. represented between 2006 and 2008. Petitioner retained Attorney White, Esq. for the remainder of the representation.

On January 14, 2009, Petitioner entered a plea agreement to lesser included offense of trafficking methamphetamine, 28 to 100 grams, and as indicted on the conspiracy and possession charges. The Honorable J.C. Nicholson, Jr. sentenced Petitioner to a term of (198) one hundred and ninety-eight months imprisonment for trafficking, a term of ten (10) years for conspiracy, and a term of three (3) years imprisonment for the possession charge. The sentences were to be served concurrently.

A notice of appeal was filed at the South Carolina Court of Appeals and perfected by. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Reynaldo Gonzalez, Op. No. 2010-UP-405 (S.C. Ct. App. filed September 16, 2010).

Petitioner filed an application for post-conviction relief (PCR) on February 2, 2011. A hearing was convened at the Anderson County Courthouse on May 8, 2013. (App.pp.x). Petitioner was present and represented by Druanne White, Esq. What Whitmire, Esq., of the Office of the Attorney General represented Respondent. Petitioner, Attorney Tavernier, Attorney White, Officer Scroggins and Solicitor Campbell testified at the hearing. The PCR Judge partially denied and dismissed the PCR Application at the conclusion of the hearing. He further held the record open and directed Respondent to

obtain a pre-plea motion hearing transcript. The PCR Judge ordered a limited hearing be reconvened limited to issues concerning the motion hearing.

On September 18, 2013, a subsequent hearing was reconvened. The PCR Judge declined to take additional testimony or evidence and denied and dismissed Petitioner's Application in full. The PCR Judge's order of dismissal with prejudice was filed on December 3, 2013. This Petition for discretionary review 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

Certiorari is unwarranted where the PCR Judge correctly found that Petitioner's allegation that substituted Attorney White's was ineffective in advising him to not accept the State's September 2008 guilty plea offer prior to obtaining certain evidence was without merit because his original counsel had visited law enforcing, reviewed the evidence at issue, and apprised Petitioner of his assessment the State's case against him; Regardless, ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his most basic burden, that his *post hoc* assertion that he would have accepted the State's offer here but for counsel's purported failings held credibility.

At the PCR hearing, Petitioner testified that he was promised to get probation if he worked as an informant. App.p.106. He testified to his version of his unsuccessful informant relationship with law enforcement. App.pp.109-12. Petitioner testified that he had "told [Attorney White] everything I had talked to Kurt Tavernier about" when he retained her as substituted counsel. App.p.112, ln.14-15. Petitioner testified that he did not ask Attorney White to consult to with his original attorney. App.p.112. Petitioner testified that Attorney White advised him to reject the State's September 2008 plea offer because she did not have discovery from the State. In particular, he stated that Attorney White advised him "we needed to hear the tapes and get all the information we needed to get, that we could not make a valid decision without listening to these tapes." App.p.116. ln.20-23. Subsequently in October of 2008, Attorney White advised him that the evidence of his guilt was certain. App.p.116.

At the PCR hearing, Solicitor Campbell testified to his conduct in prosecuting the case. App.pp.170-89. He explained that Petitioner's original counsel, 'Attorney Tavernier' handled all of the Public Defender's narcotics cases pursuant to contract.

App.p.170. After receiving a discovery request from Attorney Tavernier, Solicitor Campbell and Attorney Tavernier met with law enforcement and reviewed their case file on or around November of 2006. App.pp.170-71. Solicitor Campbell explained that Petitioner was facing a mandatory minimum twenty-five (25) prison sentence and had wanted to work as an informant in hopes of the State would offer a favorable plea deal. App.p.171.

Counsel further detailed his prior practices with Attorney Tavernier in similar cases. Petitioner offered work as informant. The State's evidence of his guilt was substantial; furthermore, he already apprised the police of his narcotics operation in the statement he gave upon arrest. Solicitor Campbell stated that had Petitioner succeeded as an informant in providing substantial assistance, the State would have dropped the charge to a lesser-included and made a recommendation of ten to fifteen (10-15) year term of imprisonment at sentencing. Solicitor described the substantial assistance as:

If [Petitioner] works and tries to go up the chain -- meaning, we can get his supplier because he's bringing the dope in through Anderson County and getting it distributed here in our county... I'll go with it.

App.p.171, ln.14-22. Counsel was adamant that Petitioner's success as an informant would not have triggered the State offering a lesser-included to PWID or lower. App.pp.171-72. Solicitor Campbell testified that in the two years Petitioner worked as an informant, he failed to deliver substantial assistance. App.pp.172-73. After several years of Petitioner's pattern of obstinance and after numerous discussions with Attorney Tavernier, Solicitor Campbell terminated the inchoate informant relationship with Petitioner.

Consequently, Petitioner made the decision to retain substituted counsel 'Attorney White.' Solicitor Campbell testified that Attorney White pressed him to revive the terminated informant relationship with Petitioner. Solicitor Campbell declined and noted that Petitioner's case was the oldest case on his docket. He opined that he did not want to run afoul of this Court's scheduling orders for the disposition of General Sessions cases. App.p.179.

Petitioner's case was scheduled on the trial docket. Solicitor Campbell made numerous discovery disclosures and worked admirably to provide all relevant materials to Attorney White in an expeditious fashion. App.p.179-81. At the time Solicitor Campbell conveyed the offer to plead Petitioner to a lesser-included offense and recommend a cap of fifteen (15) year term of imprisonment, he had provided Attorney White all discovery materials excluding the original informant tapes from the controlled buy that resulted in Petitioner's arrest. He stated, "we don't give those C.I. tapes out until ten days before trial." App.p.181, ln. 19-20. Solicitor Campbell noted that he made the offer prior to the scheduled trial date. The trial was ultimately continued to allow Attorney White time to review the informant tapes. Subsequently, Solicitor Campbell testified that the Tenth Circuit Solicitor, Chrissy Adams, stepped in and made a subsequent offer of a recommended eighteen year term of imprisonment after the prior offer terminated.

At the PCR hearing, Attorney Tavernier testified that his course of conduct in representing Petitioner between 2006 and 2008. App.pp.96-105. Pursuant to Attorney Tavernier's discovery requests, he independently reviewed and evaluated the State's evidence. He stated, "I got the incident report, I reviewed, listened to the tapes,

statements.” App.p.96, ln.12-13. Attorney Tavernier apprised Petitioner of the State’s evidence, his view that it was overwhelming, and advised Petitioner to offer himself as an informant in hopes of eliciting a favorable plea deal. App.p.97; p.104. He explained his long standing with Solicitor Campbell. Attorney Tavernier stated:

[Solicitor Campbell] and I have handled most of the drug cases. I had had previous cases where individuals had been charged with trafficking in excess of a pound and were looking at a mandatory minimum of 25 years and based on the individuals who had no prior record, we usually arrived somewhere between 10 to 15 years as the given sentence.

App.p.97, ln.9-15. Attorney Tavernier’s summary of the terms of informant relationship, requirements on Petitioner to elicit the favorable plea offer, and the dissolution of the relationship over a two year period was consistent to Solicitor Campbell’s testimony on the matter. App.pp.97-100; p.103; pp.171-73. Attorney Tavernier closed his file in March of 2008 after Petitioner retained Attorney White as substituted counsel. App.p.95.

Attorney White testified to her course of conduct as substituted counsel in Petitioner’s case. App.pp.138-68. She testified to her receipt of Petitioner’s file from Attorney Tavernier and initial consultations with Petitioner in April of 2008. She testified that Petitioner told her that the State offered him probation to work as an informant. App.p.143.

She testified that on September 5, 2008, Solicitor Campbell offered to plead Petitioner to a lesser-included offense, based on weight, and recommend a cap of a fifteen (15) year term of imprisonment. The offer expired and terminated on September 16, 2008. App.p.141. She opined that she felt as if Petitioner did not have the adequate time to accept or decline it based on her aspersions towards the State for purportedly not

providing her the informant tapes and the drug analysis¹ report until after the offer's expiration, October 2, 2008. App.p.142; pp.146-47. She testified that she provided a copy of the offer to Petitioner and discussed it with him. App.p.150. She advised him that she was unaware of possible spoliation of evidence concerns at this juncture. App.p.150. Attorney White testified regarding her advice to Petitioner on the consequences accepting or rejecting the September 2008 plea offer. App.p.167. It was Petitioner's decision not to take the plea, the 15-year (September 2008) until Attorney White had the opportunity to review the informant tapes. App.p.167. Attorney White testified that Petitioner was aware of that the offer would terminate upon expiration.

Yet, during the pendency of the September 2008 offer, Attorney White testified that she and Petitioner met with law enforcement and Solicitor Campbell to attempt to revive the terminated informant relationship. App.p.166. She testified, "I, what I was, frankly, trying to do was to get whatever had happened moved out and let everybody work and let [Petitioner] start working (as an informant) and kind of get a fresh start." App.p.166, ln.12-15 (emphasis added).

She testified that by the time she fully reviewed all of the State's evidence, she communicated Petitioner's desire to accept the offer to Solicitor Campbell on October 10, 2008. App.p.154. She testified to her zealous attempts to force the State to revive the September 2008 offer. App.pp.155-58.

In denying and dismissing Petitioner's Application, the PCR Judge found that

¹ Respondent notes that Attorney White also testified that she received a discovery disclosure from the Solicitor that included the following, among other things, on July 1, 2008: drug analysis report, incident report and investigative follow-up, Detective Jordan's log, chain-of-custody, mug shots, photographs, Petitioner's statement, BEST Kit envelope, and ACSO property sheets and notes from Detective Jordan

Petitioner failed to prove Attorney White was ineffective for failing to adequately advise him on the terms and conditions of the State's September 2008 plea offer. App.pp.212-13. As a matter of general impression, the PCR Judge found Petitioner's testimony not credible and the State's evidence of his guilt to be overwhelming. App.p.208. The PCR Judge noted that Petitioner's argument here itself was flawed because "there was no prejudice when former counsel listened to the wire tapes and advised [Petitioner] accordingly. App.p.209.

Effective Assistance of Counsel

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)).

Defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Missouri v. Frye, ___

App.p.165, ln.5-13 (emphasis added).

U.S. ___, 132 S. Ct. 1399, 1402 (2012). “To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law.” Id. at 1402-03.

And when there are multiple trial counsel, a challenge against one may be rejected where the subject was adequately covered by another attorney. Johnson v. Burke, 903 F.2d 1056, 1061 (6th Cir. 1990). See also Porter v. Lockhart, 925 F.2d 1107, 1110 (8th Cir. 1991) (no evidence that misunderstanding of law by one counsel representing the defendant was shared by other counsel representing him). A last minute substitution of counsel may create a claim of ineffectiveness. yet the First Circuit Court of Appeals noted in U.S. v. Pellerito, 878 F.2d 1535, 1540 (1st Cir. 1985) recognizing that a defendant is deemed to be aware of the need for and rigors of proper preparation as is counsel who accepts such a substitution

Discussion

The PCR Judge’s sound finding that Petitioner failed to prove that he would have accepted the September 2008 plea offer that included a fifteen year cap, but for counsel’s purported deficient performance, is supported by ample probative evidence. See Frye, 132 S. Ct. at 1409. The PCR Judge aptly made the appropriate Strickland findings despite abundant posturing and testimony from Attorney White, borne from historical animosity and wholly irrelevant the adjudication of Petitioner’s PCR action.

First, the PCR Judge made the sound finding that Petitioner was made aware of the informant tapes; furthermore, the PCR Judge found that Attorney Tavernier apprised Petitioner of their substance and content of the State's evidence well before Attorney White's involvement in the case. App.p.212. "In cases of successive counsel, the alleged failure of first counsel to give information to the second will be overcome if the information is within the defendant's own power to convey." U.S. v. Avery, 15 F.3d 816, 817-19 (9th Cir. 1993) (emphasis added). The PCR Judge found Attorney Tavernier's representation to be diligent. App.p.208. Probative evidence corroborates the PCR Judge's finding here where Solicitor Campbell's testimony that Attorney Tavernier sought out law enforcement and met with them at outset of the representation in November of 2006. Simply, Petitioner made the knowing and intelligent decision to attempt to work as an informant based upon Attorney Tavernier's evaluation and advice concerning the overwhelming strength of all of the State's evidence, which included the informant tapes.

Because Petitioner neglected to inform Attorney White of his knowledge concerning the existence, substance, and import of the insignificant informant tapes that he garnered as a result of Attorney Tavernier's prior labor, the purported *post hoc* assertion of Attorney White's deficiency was borne from his own failings; thus vitiating the prospect of prejudice. Petitioner made the decision here at his own peril. Simply, it was Petitioner's failing to not apprise Attorney White of this matter at their initial consultations, or at minimal apprise her of this matter in September of 2008 when Attorney White was waging a fruitless 'discovery war' on her former office. See U.S. v.

Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) (“If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of “ineffectiveness” for which relief can be granted.”).

Second, and in alternative, the PCR Judge made the sound finding that “Petitioner’s posture to prolong the disposition of his charges resulted from his unreasonable desire of obtaining another informant agreement with the police in hopes of to avoid a prison sentence.” App.p.212. This finding was supported by Attorney White’s testimony that Petitioner and her met with the State to discuss a revival of the informant relationship during the critical pendency of the September 2008 offer at issue. App.p.116. The availability of the informant tapes does not become an issue until weeks after the offer terminating. If Petitioner’s decision to accept the September 2008 offer hinged on the availability of the informant tapes to counsel, then logic dictates this matter would have been the primary issue of the September meeting.

Third, and again in alternative, the PCR Judge found Petitioner’s testimony that he would have accepted the September 2008 offer from the State but for counsel’s insistence that the State provide her the opportunity to review the informant tapes prior to making a decision to be not credible. “The PCR court’s findings on matters of credibility are given great deference by this Court.” Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) Solicitor Campbell, Attorney Tavernier, and even Attorney White rejected Petitioner’s incredible assertion that State offered the possibility of a probationary sentence after Petitioner was arrested for substantial interstate trafficking that involved

pounds of narcotics.

Notably, Petitioner attached a purported investigative report to his PCR Application that read, “a written statement was taken from [Petitioner] which is also located in this Agents case jacket. The statement does contain historical content of [Petitioner] getting other pounds of meth from the same hispanic male.” App.p.73 (emphasis added). In contrast, Petitioner falsely assured the Plea Judge that this was the first time that he ever been involved with selling illegal narcotics. App.p.37 (emphasis added). Thus, probative evidence supports the PCR Judge’s credibility finding here.

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

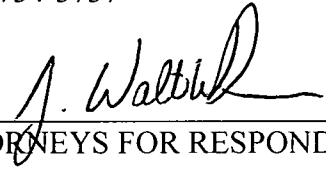
For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

Nov 24th, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2014-000100

REYNALDO GONZALEZ,

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 has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Benjamin John Tripp, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211**

This 24th day of November, 2014



Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

NOV 24 2014

November 24, 2014

S.C. Supreme Court

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

RE: Reynaldo Gonzalez v. State of South Carolina
Appellate Case No: 2014-000100

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Benjamin J. Tripp, Esquire