

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BARNWELL COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

2011-CP-06-0088
Appellate Case No. 2013-002334

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S.C. Supreme Court

Michael Kennedy Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ISSUE PRESENTED

Whether probative evidence supports the Post-Conviction Relief Court's finding that Plea Counsel was not ineffective for failing to object to the presence and comments made by retired Circuit Court Judge Rodney Peeples on behalf of the Victim?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. The Petitioner was indicted at the May 2007 term of the Barnwell County Grand Jury for Armed Robbery (2007-GS-06-0144); Assault and Battery with Intent to Kill (ABWIK) (2007-GS-06-0145); and Conspiracy (2007-GS-06-0146). Petitioner was represented by Franchot A. Brown, Esquire. On May 7, 2007, Petitioner appeared before the Honorable Thomas A. Russo and pled guilty to Armed Robbery and ABWIK. Pursuant to the plea agreement, the conspiracy charge was dismissed. Judge Russo sentenced Petitioner to thirty years imprisonment for Armed Robbery and a consecutive twenty years imprisonment, suspended to three years probation upon the service of ninety days imprisonment, for ABWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire, submitted a brief pursuant to Anders v. California, 386 US. 738 (1967). The Court of Appeals dismissed the Applicant's appeal by Order dated January 25, 2011. The remittitur was issued on February 10, 2011.

Petitioner filed an application for PCR on February 22, 2011 (2011-CP-06-0088). The State made its Return on or about August 4, 2011, and the matter was scheduled for an evidentiary hearing before the Honorable Ralph F. Cothran, Jr., on July 8, 2013. Petitioner was present and represented by Melisa J. Armstrong, Esquire. The State was represented by David Spencer of the Office of the South Carolina Attorney General. In a written order signed August 19, 2013, Judge Cothran denied and dismissed Petitioner's application with prejudice. Petitioner appealed Judge Lee's order of dismissal.

This Return to the Petition of Writ of Certiorari 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) (emphasis added). Appellate courts give great deference to the PCR Court’s findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

ARGUMENT

Probative evidence supports the Post-Conviction Relief Court's finding that Plea Counsel was not ineffective for failing to object to the presence and comments made by retired Circuit Court Judge Rodney Peeples on behalf of the Victim?

Petitioner alleges that Counsel was ineffective in failing to object to the presence and comments of a retired Circuit Court judge (Judge Peeples) on the victim's behalf. Petitioner further alleges that if Counsel had objected, Petitioner would have received a sentencing hearing that "comported with due process and the outcome of his sentence might have been different."

The Respondent respectfully submits Petitioner's argument is without merit. There is substantial evidence of probative value to support the PCR Court's finding that Petitioner's right to effective assistance of counsel was not violated.

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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

In the instant case, Petitioner cannot show that Counsel's performance in failing to object to Judge Peoples' comments during sentencing was deficient because Counsel was acting pursuant to a valid trial strategy. App. p. 138. "[W]hen [C]ounsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (*citing* Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). Counsel indicated during the PCR evidentiary hearing that he did not want a contentious plea hearing, but instead hoped to "basically show the judge that [Petitioner] was somebody who deserved leniency." App. p. 104, l. 13-20. Counsel was not sure objecting to Judge Peoples' comments "would have helped [the] situation...." App. p. 104, l. 24-25. Furthermore, Counsel considered the sentencing judge capable of sorting out any inappropriate considerations in determining a just sentence. App. p. 105, l. 2-10. Counsel had thoroughly researched the sentencing judge, finding that he had "a positive reputation for being

fair,” particularly with his experience as both a solicitor and a defense attorney. App. p. 98, l. 23 – p. 99, l. 3.

Consistent with this strategy, the PCR Court found that Counsel made a “well-presented plea for mitigation.” App. p. 138. Counsel pointed out that Petitioner had no prior record and came from a good family. App. p. 40, l. 2-5. Counsel told the court that there were no drugs involved, and that Petitioner was enrolled in a G.E.D. program in Aiken. App. p. 38, l. 20-25. Counsel also stated that Petitioner had “never been in any trouble before in his life” and had “just never done anything wrong.” App. p. 38, l. 18-20. Counsel said that he knew Petitioner was “very sorry for what he had done,” and that he had just “[done] something super stupid.” App. p. 38, l. 17 – p. 39, l. 3. Based on the foregoing, it is clear that probative evidence supports the PCR Court’s findings that Counsel provided a valid strategic reason for not objecting to Judge Peeples’ comments.

Furthermore, Petitioner can show no prejudice as a result of Counsel’s alleged deficiency. Petitioner argues that “words uttered from a learned former circuit court judge who volunteered sentencing guidance regarding how to sentence [P]etitioner violated his right to due process at his sentencing,” and that Judge Peeples’ opinions “[u]ndoubtedly ... constituted an improper influence.” On the contrary, according to the PCR Court, the reason for the duration of Petitioner’s lawful sentence was the “particularly mean and brutal” nature of the crime. App. p. 138. This conclusion is supported by the words of the sentencing judge, noting that while some people would say that the Judge Peeples’ appearance on behalf of the family would “affect the judgment of the court,” the major considerations were “the facts and circumstances surrounding [the] crime.” Supp. App. p. 35, l. 25 – p. 36, l. 6; p. 40, l. 25 – p. 41, l. 1. Most troubling was the fact that Petitioner did not ask the victim for money first, but instead “led with a bottle” and

struck the victim almost immediately. Supp. App. p. 55, l. 4-8. The sentencing judge emphasized, in particular, how awful these specific circumstances were, noting that he could not “express how horrible this armed robbery was,” even though he “[saw] them all the time.” Supp. App. p. 41, l. 10-11. In light of these circumstances, the sentencing judge stated that Judge Peoples’ presence had no impact on Petitioner’s lawful sentence. Supp. App. p. 35, l. 25 – p. 36, l. 6.

Furthermore, Petitioner points to no legitimate reason that the sentencing judge should have declined to hear from Judge Peoples. Prior to determining what sentence to impose, “a judge may appropriately conduct an inquiry broad in scope, *largely unlimited* either as to the kind of information he may consider or *the source from which it may come.*” State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (emphasis added). The record reflects that the sentencing judge conducted a broad inquiry in trying to determine an appropriate sentence and in determining whether that sentence was appropriate upon reconsideration. See App. p. 52-57; Supp. App. p. 36-45. The sentencing judge heard from Petitioner, his family, and prominent community members who spoke on his behalf. App. p. 45-446; Supp. App. p. 4-13. The sentencing judge also heard from the State. Supp. App. p. 22-24.

The State would further point out that Petitioner’s argument, logically applied, extends to *all* retired judges acting as defense attorneys or solicitors in South Carolina—many of whom would presumably be surprised to learn that the sentencing recommendations they make on behalf of their clients offend the principles of due process. Bearing in mind that serving as a Circuit Court judge is not a permanent bar to practicing criminal law in South Carolina, the

Respondent would simply submit that Petitioner has submitted no evidence tending to prove that Judge Peeples' presence or comments were actually inappropriate.¹

Because the sentencing judge specifically stated for the record that the facts and nature of the crime were the reasons for Petitioner's lawful sentence duration, and that Judge Peeples' statements were not a factor, Petitioner was not prejudiced by Counsel's failure to object to Judge Peeples' statements or presence.

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 Deputy Attorney General
Bar No. 100934

By: 
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November 26, 2014

¹ Petitioner's sole cited case in support of his argument deals with inappropriate statements made in front of *juries* during the *guilt phase* of a trial. See e.g., *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744 (1990) (finding that an argument urging *jurors* to convict a defendant in order to deter future law breaking was improper). Petitioner cites no cases which outline what information may be so prejudicial or what source may be so influential as to preclude being heard or seen by a *judge*.

STATE OF SOUTH CAROLINA
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Certiorari to Barnwell County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

MICHAEL KENNEDY,

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

**Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201**

This 26th day of November, 2014



CAROLINE COLLINS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

November 26, 2014

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S.C. Supreme Court

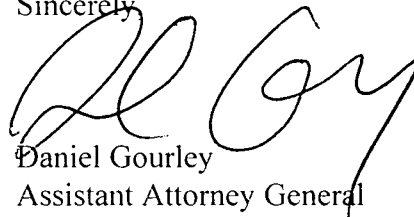
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Michael Kennedy v. State of South Carolina
Lower Court Case No.: 2011-CP-06-0088
Appellate Case No.: 2013-002334

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari 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/cc
Enclosures

cc: Appellate Defender Wanda H. Carter (2 copies)