

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Court of Appeals
and Richland County
L. Casey Manning, Circuit Court Judge
2008-CP-40-7794

S.C. Supreme Court

Gerald Smith,

Respondent,

vs.

State of South Carolina,

Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

ARGUMENT

 Probative evidence supports the PCR court’s denial of relief where Respondent failed to follow the plea bargain, so counsel would be unable to enforce the agreement; and where counsel’s performance did not fall below professional norms; and where the sentencing court took into consideration Respondent’s assistance and lack of assistance in his co-defendant’s prosecution. The Court of Appeals erred in failing to give deference to the PCR court's findings that are supported by probative evidence.....9

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases:

<u>Anders v. California</u> , 386 U.S. 738 (1967).....	2
<u>Caprood v. State</u> , 338 S.C. 103, 525 S.E.2d 514 (2000).....	10
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).....	11
<u>Drayton v. Evatt</u> , 312 S.C. 4, 430 S.E.2d 517 (1993).....	11
<u>Edwards v. LaMarque</u> , 475 F.3d 1121 (9th Cir. 2007).....	12
<u>Foye v. State</u> , 335 S.C. 586, 518 S.E.2d 265 (1999).....	11
<u>Gentry v. Sinclair</u> , 576 F.Supp.2d 1130 (W.D. Wash. 2008).....	13
<u>Johnson v. State</u> , 325 S.C. 182, 480 S.E.2d 733 (1997).....	10
<u>Smith v. State</u> , 407 S.C. 270, 754 S.E.2d 900 (2013).....	2
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	10
<u>Thompson v. State</u> , 340 S.C. 112, 531 S.E.2d 294 (2000).....	13
<u>Whitehead v. State</u> , 308 S.C. 119, 417 S.E.2d 529 (1992).....	10
<u>Wright v. Hopper</u> , 169 F.3d 695 (11th Circuit 1999).....	12

STATEMENT OF ISSUE ON APPEAL

Probative evidence supports the PCR court's denial of relief where Respondent failed to follow the plea bargain, so counsel would be unable to enforce the agreement; and where counsel's performance did not fall below professional norms; and where the sentencing court took into consideration Respondent's assistance and lack of assistance in his co-defendant's prosecution. The Court of Appeals erred in failing to give deference to the PCR court's findings that are supported by probative evidence.

STATEMENT OF THE CASE

Smith pled guilty before the Honorable Clifton Newman on November 15, 2004, to voluntary manslaughter as a lesser included offense to murder. Sentencing was deferred at that time until after co-defendant's trial. Smith appeared before the Honorable Reginald Lloyd on October 13, 2005, and was sentenced to twenty-seven years imprisonment. Plea counsel then filed a motion for reconsideration. After a hearing on the motion on October 19, 2005, Judge Lloyd lowered the sentence to twenty-four years imprisonment on October 20, 2005.

Smith appealed the conviction and sentence. The appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Smith, Op. No. 2008-UP-226.

Smith filed an application for post-conviction relief (PCR) on October 28, 2008. Following a hearing on the application on December 8, 2009, Judge Manning denied relief by order dated May 4, 2010. A subsequent Rule 59(e) motion was denied on June 10, 2010. Smith filed a petition for writ of certiorari and the State filed its return in the Court of Appeals. The Court of Appeals granted certiorari, and after briefing and oral argument, the Court of Appeals reversed the PCR court's denial of relief on February 5, 2014. Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (2013).

The State filed a timely petition for rehearing, which was denied on March 21, 2014. The State then filed its petition for writ of certiorari to this Court on June 30, 2013. After Smith filed his return to the State's petition, this Court granted the writ on December 10, 2014. This Brief of Petitioner follows.

STATEMENT OF FACTS

Smith was originally charged with murder. In exchange for allowing Smith to plead guilty to the lesser offense of voluntary manslaughter, Smith was required to make a proffer to the prosecution. Sentencing was deferred until the co-defendant would be prosecuted. App. p. 3, lines 7-13.

Smith and his co-defendant were charged with the brutal death of their oxycontin dealer, H.B. Sharpe. Sharpe was struck in the head about a dozen times with a rebar (basically, an iron bar) found in his apartment. A neighbor told police that he saw a grey Toyota pickup truck parked in front of the mobile home park. Ronnie Edwards, who found the dead body, suggested to law enforcement they should talk to Smith. Law enforcement checked Smith's DMV records and discovered that Smith owned a grey Toyota pickup truck. App. pp. 9-15.

Law enforcement was already on their way to interview Smith when Smith's future co-defendant, Areheart, provided law enforcement with a tip. Areheart claimed Smith came over to his residence and started burning clothes and wanted to hide his truck in Areheart's garage. Areheart told law enforcement that Smith said he wanted to hide the truck because he claimed he had warrants for his arrest for bad checks. According to Areheart, they decided to buy oxycontin from Sharpe, but when they arrived, they encountered two men in a van who said Sharpe was shot. Smith "feaked out" and they went to check Smith out of his motel room, which was near Sharpe's residence. Then they went back to Areheart's residence. Smith was so upset that he drove erratically and hit a well. They needed to call a plumber to fix the problem. App. pp. 15-17.

The State indicated at the guilty plea that the plumber would verify he arrived to find something burning. Smith and Areheart told the plumber it was yard debris. App. p. 17.

Based on this information, law enforcement picked up Smith and towed his truck. Smith gave five statements to law enforcement: the first claiming no involvement; the second claiming that he drove Areheart to Sharpe's and waited outside; in the third, he put himself inside the trailer. In the last statement, Smith claimed Areheart started an argument with Sharpe because Sharpe would not sell him anymore Oxycontin. Smith admitted hitting Sharpe over the head with the rebar and then Areheart took over and bludgeoned Sharpe to death with the rebar. App. pp. 17-19.

The proffer

Smith claimed at the proffer that he went to Sharpe's with Areheart, but was nervous about it because he knew Areheart and Sharpe had some arguments in the past. When they arrived, Areheart argued with Sharpe. Smith hit Sharpe with the rebar and Smith claims he then went outside, leaving Areheart alone with Sharpe. Areheart came outside and got back in the truck. Areheart was agitated. Smith and Areheart rode in the truck to a bridge over Broad River. Smith proffered that Areheart threw something in the river. Smith explained that at the time, he thought it was the weapon, but Smith waived and said he was not sure it was the weapon. When they arrived back at Areheart's, Areheart proceeded to burn various items. Smith assumed they were Areheart's clothes because Areheart had blood on his clothes at Sharpe's trailer. App. pp. 20-25.

After Smith gave this narrative answer, he was examined by the prosecution. He read aloud his fifth statement to law enforcement in which he admitted hitting Sharpe

with the rebar. Areheart then hit Sharpe repeatedly with the rebar when he attempted to fight back. Areheart killed Sharpe. Areheart disposed of the rebar at a bridge. In the statement, Areheart burned the items. App. pp. 31-33.

Smith agreed that this written statement was correct, including the fact that he hit Sharpe with the rebar first. However, Smith told Judge Newman that when he hit Sharpe, it was not that hard and it did not do anything to Sharpe. App. p. 36; pp. 42-44. This differed from Smith's fourth statement, in which he admitted hitting Sharpe real hard with the rebar. App. p. 59. Judge Newman accepted the plea and sentencing was deferred.

The sentencing hearing

At the sentencing hearing before Judge Lloyd, the prosecution advised Judge Lloyd that in preparation for trial, they met with Smith and discussed statements from other witnesses that conflicted with Smith's version of events. During this interview, Smith then began to minimize his own role and placed the blame on Areheart, **without demonstrating any problem recalling events**. Consequently, Areheart's attorney filed a motion to exclude Smith's testimony and ultimately, the State felt they could not pursue a murder charge against Areheart and allowed Areheart to plead guilty to accessory after the fact. The prosecution felt Areheart got away with murder due to Smith's unreliability. The prosecution noted Smith had some memory impairment due to his drug addiction, but felt **this was not a factor** in Smith's continuously changing version of events. App. pp. 57-61.

The prosecution asked for the maximum sentence. App. p. 64. In response, counsel made a spirited argument that Smith was consistent with law enforcement about

his involvement. App. 65-67. Counsel questioned the prosecution's charging decisions in regards to Areheart. App. p.p. 68-69. Smith apologized to the court. App. pp. 68-70. A member of the victim's family told Smith she forgave him. Judge Lloyd sentenced Smith to twenty-seven years imprisonment taking into consideration Smith's efforts to help the prosecution as well as the problems Smith caused with his co-defendant's case. App. p. 71.

The hearing on the motion for reconsideration

At the motion for reconsideration of Smith's sentence, Counsel advised Judge Lloyd that Sharpe kept the rebar to beat people who did not pay up for the illegal drugs. He was a gun-carrying drug dealer. App. p. 73. Counsel continued to argue that memory problems were what made trial preparation difficult, not Smith's willingness to cooperate. App. pp. 74-76.

The prosecution argued in reply that it gave Smith the opportunity to come clean and he changed his version of events yet again in front of Judge Newman. The prosecution observed the following:

Your Honor, I agree with Ms. Sampson that this oxycontin drug absolutely has an impact on people's recollection and ability to remember facts.

However, in this case, Your Honor, every time we would try to refresh his memory with statements provided by other witnesses, **he would conveniently be able to remember** that it was the co-defendant that did certain things, placing the blame on the co-defendant in certain matters.

And I just don't believe a jury would have believed him. **We provided him with every opportunity to fulfill his end of the agreement. . . .**

App. p. 86, lines 15-22 (emphasis added).

Judge Lloyd sagely discussed his quandary:

Everybody says that – with all due respect about justice and all, I’ve got a dead person, quite literally, that had his skull caved in, and two defendants who were there, who admit to being there, whose ability to recount what happened either against the other or for their own personal benefit is somewhat impeded by their level of drug use.

App. p. 84, lines 14-20.

Judge Lloyd, who obviously gave the matter serious consideration, called the case the next day and reduced the sentence by three years. In so doing, Judge Lloyd noted: “[T]his is still a heinous act. And a lot of the circumstances of why we’re here now and what you’re complaining about is due to your own fault.” App. p. 85, lines 19-22.

The PCR hearing

At the PCR hearing, counsel’s testimony reflected that she remained partial to her client, but nonetheless counsel agreed that “when he proffered, there was problems.” App. p. 160, lines 15-24.

Counsel was agreeable to have sentencing in front of Judge Lloyd because she had two clients in the past plead before Judge Lloyd where the victim was a drug dealer. They received lower sentences. Counsel understood that Judge Lloyd’s view was that “because they were drug dealers . . . they were going to take that chance at being involved in illegal activity, then that’s what they get, that was his perspective.” App. p. 168, lines 1-5.

Counsel testified she was surprised when they asked for the maximum sentence, but she explained: “I didn’t expect that, but when they did it, I remember going, well, I guess they don’t have to go along with their plea deal because he was not able to go along

with his part of it.” App. p. 169, lines 13-20. Counsel recalled chambers meetings where the judge was advised that the original plea agreement was an open plea in which the State was not going to take a position. App. p. 171.

ARGUMENT

Probative evidence supports the PCR court's denial of relief where Respondent failed to follow the plea bargain, so counsel would be unable to enforce the agreement; and where counsel's performance did not fall below professional norms; and where the sentencing court took into consideration Respondent's assistance and lack of assistance in his co-defendant's prosecution. The Court of Appeals erred in failing to give deference to the PCR court's findings that are supported by probative evidence.

The Court of Appeals reversed the denial of relief on the grounds that plea counsel was ineffective for failing to enforce a plea agreement with the State, which, in addition to the State reducing the charge from murder, the State would also not make a recommendation at sentencing. This was error because probative evidence supports the PCR court's denial of relief – the Court of Appeals failed to give any deference to the PCR court. Although counsel demonstrated bias in her former client's favor during her testimony at the PCR hearing, counsel also testified that she considered whether the State violated the plea agreement and recognized that the State would not be bound because Smith failed to live up to his part of the agreement. App. p. 169, lines 13-20. Accordingly, the record supports that she did not attempt to enforce the plea agreement as a matter of trial strategy and reasonable professional judgment; instead of fighting a losing battle, she took a tact that minimized the prejudice from Smith's own selective amnesia.

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. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The proper measure of attorney performance is reasonableness under professional norms. Id. In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Id. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Strickland).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

In Strickland, the United States Supreme Court declared:

. . . a fair assessment of attorney performance requires that every effort be made to **eliminate the distorting effects of hindsight**, to reconstruct the circumstances of counsel's challenged conduct, and to **evaluate the conduct from counsel's perspective at the time**. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (emphasis added).

The Court of Appeals erred because it took its own view of the facts instead of deferring to the fact finder. The PCR court's denial of an application for post-conviction relief will be upheld when supported by probative evidence. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). An appellate court gives great deference to a PCR judge's factual findings because the reviewing court, unlike the PCR judge, lacks the opportunity to directly observe the witnesses. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265, 267 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

In the instant case, the plea agreement was no longer enforceable due to Smith's continuously changing version of events where his culpability waxed and waned. Counsel instead took a tact that maximized the mitigating aspects of Smith's conduct, emphasized the less-than-savory character of the victim, and minimized Smith's credibility issues.

Counsel provided effective representation in relaying Smith's alleged memory issues, the mitigating factors involved, and his cooperation in making a motion for reconsideration. Counsel's motion for reconsideration was successful as Judge Lloyd lowered the sentence by three years. Counsel also leveraged her experience with Judge Lloyd to pursue a strategy emphasizing Sharpe's profession as a drug dealer because she was aware Judge Lloyd apparently took a position that violence was an assumption of the risk for those in the illegal narcotics trade, and therefore, sentences would be lower for those committing acts of violence on drug dealers. That Judge Lloyd did not adhere to this reasoning for Smith's benefit does not diminish counsel's excellent trial strategy

otherwise.

Further, Smith was not prejudiced. It is apparent, based on Judge Lloyd's comments at the motion for reconsideration, that he would consider the plea agreement breached by Smith's inconsistent statements during the proffer and trial preparation. Indeed, it appears Judge Lloyd was made aware of the prior agreement. App. p. 171. Additionally, Smith failed to show there was a reasonable probability the result would have been different had counsel brought the matter to Judge Lloyd's attention during the sentencing or reconsideration hearings. Finally, the PCR court found Smith's testimony – that but for counsel's alleged deficiency; he would not have pled guilty but gone to trial – to lack credibility. App. pp. 207-210.

The Court of Appeals allowed itself to be distracted from counsel's candid observations by what the Court of Appeals considered "admissions." The reality is that defense counsel, without repercussion, often slants testimony in favor of their former clients. PCR courts have the trying task of sorting the validity of attestations of a witness's self-proclaimed ineffectiveness from the more candid and objective testimony that their oath requires. Also, the PCR courts must consider the reality of counsel's actions made apparent in the cold record – often despite their PCR testimony. See Wright v. Hopper, 169 F.3d 695, 707 (11th Circuit 1999) (the issue of ineffectiveness is for the court to decide, so admissions of deficient performance by attorneys are not decisive – no error in finding trial strategy, even though counsel categorically denied making a strategic choice); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"). Counsel's claim she would have done something different in hindsight is

unhelpful because it is the wrong test. See Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D. Wash. 2008) (finding “counsel’s current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial”).

Further, the Court of Appeals erred as a matter of law by its undue reliance on Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000). In Thompson, the prosecution breached its agreement; in the instant case Smith breached the agreement, and counsel had to move on to a damage-control mode. That is why Thompson does not apply.

In the instant case, the PCR court’s findings are supported by probative evidence, even if a person viewing the cold record might find room to disagree. Accordingly, the PCR court’s findings should be affirmed.

CONCLUSION

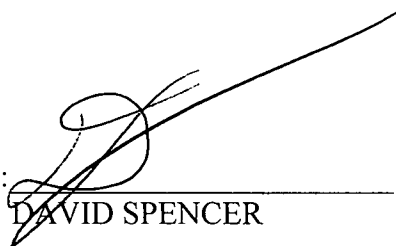
For all of the foregoing reasons, this Court should reverse the Court of Appeals decision and affirm the PCR court's denial of relief.

Respectfully submitted,

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December 12, 2014

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IN THE COURT OF APPEALS

Appeal From Richland County

Honorable L. Casey Manning, Circuit Court Judge

Gerald Smith

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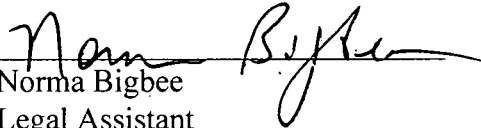
Petitioner.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Pachak, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 12th day of November, 2014.


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Re: **Gerald Smith v. State of South Carolina**
Appellate Case No: 2014-000951

Dear Mr. Pachak:

Enclosed please find two (2) copies of the Brief of Petitioner along with proof of service in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General

DS/nb
Enclosures

cc: The Honorable *Dan Shearouse*
(Original and 15 copies of Brief of Petitioner and 13 copies of Appendix and 13 Copies of the Supplemental Appendix enclosed)
Ms. Trisha Allen - with enclosure