

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas

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DEC 15 2014

The Honorable Frank R. Addy, Jr., Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2013-002106

Robert Orlando Hill, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR court properly find Appellate Counsel was not ineffective for not briefing the issue of inferred malice as part of a jury instruction because in South Carolina, attorneys are not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial?

STATEMENT OF THE CASE

Robert Orlando Hill, (Petitioner), is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Abbeville County. Petitioner was indicted at the November 1999 term of the Abbeville County Grand Jury for Murder and Possession of a Firearm during Commission of a Violent Crime (1999-GS-01-0494). E. Charles Grose, Jr., Esquire, represented him. On March 21, 2000, Petitioner proceeded to trial and was found guilty. The Honorable J. Derham Cole sentenced Petitioner to confinement for the balance of his natural life for Murder and to five (5) years for Possession of a Firearm during Commission of a Violent Crime.

A timely Notice of Appeal was filed and an appeal was perfected on Petitioner's behalf. The South Carolina Court of Appeals reversed and remanded Petitioner's case by written opinion filed June 21, 2004. State v. Hill, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004).

Petitioner was then granted a new trial. E. Charles Grose, Jr., Esquire, represented Petitioner again. Petitioner proceeded to trial on July 11, 2005, after which he was found guilty of Voluntary Manslaughter as a lesser-included offense of Murder, and of Possession of a Firearm during Commission of a Violent Crime. The Honorable Wyatt T. Saunders sentenced Petitioner to confinement for a period of thirty (30) years for Voluntary Manslaughter and to five (5) years for Possession of a Firearm during Commission of a Violent Crime (1999-GS-01-0494), sentences running consecutively.

A timely Notice of Appeal was filed and an appeal was perfected on Petitioner's behalf. This time the South Carolina Court of Appeals affirmed the conviction by written order filed February 6, 2008. State v. Hill, Op. No. 2008-UP-081 (Ct. App. Filed February 6, 2008).

Petitioner then submitted a Petition for Writ of Certiorari to the Supreme Court of South Carolina. The Petition was denied by written order dated February 19, 2009. The Remittitur was issued February 24, 2009.

Petitioner subsequently filed an application for PCR on August 10, 2009 and amended on January 19, 2010. Respondent made its Return on March 16, 2010. On March 13, 2012, an evidentiary hearing was held at the Greenwood County Courthouse in Newberry, South Carolina. Petitioner was present and represented by Tommy Stanford, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On April 19, 2012, the Honorable Frank R. Addy, Jr. denied and dismissed Petitioner's application with prejudice by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The PCR court properly found Appellate Counsel was not ineffective for not briefing the issue of inferred malice as part of a jury instruction because in South Carolina, attorneys are not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.

Petitioner asserts the PCR court “erred in finding appellate counsel provided effective assistance of counsel where appellate counsel failed to raise on appeal the preserved issue that the Trial Court’s jury charge that inferred malice may arise when the deed is done with a dangerous instrumentality was erroneous because Petitioner presented evidence reducing, mitigating, excusing or justifying the homicide, including evidence of self-defense.” This issue is without merit as Appellate Counsel rendered effective assistance of counsel.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Petitioner must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the

record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

This Court stated, "[w]e have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). See also Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993); see also Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992); Kirkpatrick v. State, 306 S.C. 359, 412 S.E.2d 389 (1991).

In this case, Appellate Counsel Cleary testified when she received a case, she would read the entire transcript, take notes, research the substantive issues and raise any meritorious issues. (App. p. 865 line 12- p. 866 line 11.) She then stated she is under no obligation to raise non-meritorious issues. (App. p. 866 lines 12-14). Cleary testified that at the time of this appeal, the law on inferred malice was that it was an acceptable instruction that malice could be inferred from the use of a deadly weapon. (App. 866 lines 17-22). Cleary then testified she does not remember ever receiving the email send from Counsel Grose to Counsel Savitz and that the first time she had seen the brief from Rauch Wise raising the inferred malice argument was on the day of the evidentiary hearing. (App. p. 866 line 23-p. 867 line 3). Cleary also testified she based her appellate brief on the law at the time of the appeal and that she did not have any reason to believe this Court would make a ruling like State. v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Cleary lastly testified that there was 100 years of prior precedent in South Carolina jurisprudence prior to the Belcher decision.

On cross-examination, Cleary testified:

No, no, I definitely considered [raising the issue of inferred malice]. I, I would consider anything that Mr. Grose would, would raise to be a serious appellate issue. But just from my research, all I could find was that the inference of malice could be inferred from the use of a deadly weapon, and I was not aware of any kind of growing movement to check – to change that precedent.

(App. p. 870 lines 15-21).

In its Order of Dismissal, the PCR court held:

This Court finds the Applicant's testimony regarding Appellate Counsel's ineffectiveness is not credible while also finding Ms. Cleary's testimony credible. I find Ms. Cleary was not ineffective for not pursuing this theory pursuant to Gilmore in that she is not required to be clairvoyant of changes in the law, especially in the light of over one hundred years of legal precedent in this state. While Mr. Grose and Mr. Savitz communicated about briefing the malice charge, Ms. Cleary was not made aware of such communications. Additionally, I find Ms. Cleary, in her professional judgment, decided to brief the issues according to their potential merit. Furthermore, the Applicant has failed to demonstrate that any alleged errors in the factual recitation on appeal by appellate counsel prejudiced the Applicant. Accordingly, this allegation is denied.

(App. pp. 892-893).

The PCR court correctly found Counsel Cleary was not ineffective as she is not required to be clairvoyant or anticipate changes in the law which were not in existence at the time of this case pursuant to Gilmore. Counsel Cleary testified she was unaware of the email between Counsel Grose and Counsel Savitz, yet based her research on the then-existing case law. This case's appeal was finalized on February 24, 2009. The Belcher decision was not published until October 12, 2009. There was no way for Counsel Cleary to have known that a case like Belcher would overturn 100 years of South Carolina jurisprudence. She was under no obligation of duty to be clairvoyant. Therefore, she correctly relied on the existing case law and provided effective assistance of counsel.

Because the PCR court based its decision on the testimony of Appellate Counsel at the evidentiary hearing, and found PCR counsel was credible, sufficient “evidence of probative value” exists to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

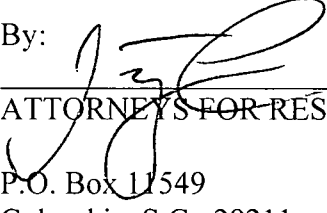
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT

P.O. Box 11549
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(803) 734-3737

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ALAN WILSON
ATTORNEY GENERAL

December 15, 2014

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

**RE: Robert O. Hill, #265223 v. State of South Carolina
2013-002106**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services