STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2014-000152

Christopher Robinson... ..... Petitioner,

v.

State of South Carolina ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR court properly find Counsel rendered effective assistance of counsel where Counsel articulated that she did not request a suppression hearing based on her client's own statements and the facts of the case and where Petitioner has failed to prove any resulting prejudice?

STATEMENT OF THE CASE

Christopher Robinson, ("Petitioner"), was indicted at the August 2007 term of the York County Court of General Sessions for Possession of Cocaine Base with intent to distribute (PWID)(2007-GS-46-2616) and Possession of Marijuana (2007-GS-46-2618). He was represented by Melissa Inzerillo, Esq. On October 4, 2007, the Applicant underwent trial by jury, pursuant to which he was convicted of PWID crack cocaine, 3rd offense and Possession of Marijuana, 2nd offense. The Honorable John C. Hayes, III sentenced Applicant to confinement for twenty (20) years for PWID crack cocaine, 3rd offense and one (1) year, concurrent, for the Possession of Marijuana, 2nd offense.

A Notice of Appeal was filed on the Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Robinson, 2010-UP-324 (S.C. Ct. App. filed June 23, 2010). The Remittitur was issued on July 7, 2010.

Petitioner subsequently filed an application for post-conviction relief (PCR) on May 16, 2011. Petitioner claimed, *inter alia*, ineffective assistance of trial counsel. Respondent made its Return on September 15, 2011. On October 12, 2012, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Eleanor Cleary, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On February 14, 2013, the Honorable Edgar W. Dickson denied and dismissed Petitioner's application with prejudice by written Order. Petitioner filed a Rule 59(e) SCRCP motion on March 18, 2013. Respondent filed a Return to this motion on March 27, 2013. Judge Dickson denied the 59(e) motion on December 30, 2013. Petitioner subsequently filed a Petition for Writ of Certiorari on August 26, 2014. 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

I. The PCR court properly found Counsel rendered effective assistance of counsel where Counsel articulated that she did not request a suppression hearing based on her client's own statements and the facts of the case and where Petitioner has failed to prove any resulting prejudice

Petitioner asserts the "PCR court erred in not finding trial counsel ineffective for failing to move for a suppression hearing to suppress the crack cocaine which was found on the sidewalk near Petitioner Robinson in a high crime area." This argument is without merit.

In a PCR 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 the 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, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea 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.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable 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.

Strickland at 689, 104 S. Ct. at 2065.

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland at 691, 104 S. Ct. at 2066.

> A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission, but also that the motion or objection would have been meritorious if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted.

People v. Mattson, 50 Cal. 3d 826, 876, 789 P.2d 983, 1017 (1990)

During the trial, Sergeant Breeden testified he, along with Officer Chavis, were dispatched in an unmarked police car to a target area from which law enforcement was receiving complaints of criminal activity. (App. p. 50 lines 8-15). There they found a group a subjects standing around in the area. (App. p. 50 lines 15-20). Upon parking his vehicle behind a car the

group was standing beside and approaching the group, Sergeant Breeden observed Petitioner walking away and gave instruction for him to stop and walk back towards Officer Breeden; which Petitioner did. (App. p. 54 lines 10-19). Sergeant Breeden then testified Officer Chavis walked past Petitioner stating he (Officer Chavis) saw something being dropped on the sidewalk and then stated he found drugs on the sidewalk. (App. p. 54 lines 17-21). On cross-examination, Sergeant Breeden again testified that Petitioner voluntarily turned around and walked back to Sergeant Breeden when he requested. There was no foot pursuit. (App. p. 68 lines 9-17). Sergeant Breeden also confirmed that he only arrested Petitioner after Officer Chavis informed him that Officer Chavis saw Petitioner drop the bag of crack cocaine onto the sidewalk (App. p. 69 lines 2-5; 20-25).

Additionally, Officer Chavis testified that when he and Officer Breeden approached the group of subjects standing around the car, Petitioner began to walk away up the sidewalk. (App. p. 79 lines 10-20). Officer Chavis stated he illuminated Petitioner with his flashlight and said "hold on a minute, sir, I need to talk to you." (App. p. 79 lines 23-25). Officer Chavis then testified:

> At that point I saw [Petitioner] put his right hand, make a tossing motion back behind him and I saw what appeared to be a white bag fall to the sidewalk. I immediately yelled to my supervisor who was Sergeant Breeden that [Petitioner] just dropped something on the sidewalk...when I picked it up it was a clear plastic baggy containing white substance that I believed to be crack cocaine. I then shouted to my supervisor Sergeant Breeden I've got crack cocaine here that [Petitioner] dropped. At that point Sergeant Breeden placed [Petitioner] in handcuffs and makes the arrest.

(App. p. 79 line 25- p. 80 line 13).

At the PCR hearing, Petitioner testified he was at the top of an alley when officers approached in an unmarked police car. (App. p. 250 lines 10-19). He then stated the first officer asked for his name, checked to see if Petitioner had any outstanding warrants and told Petitioner

he was free to leave. (App. p. 251 lines 1-9). Petitioner testified another officer approached him and detained him. (App. p. 251 line 10- p. 252 line 1). Petitioner also stated he heard the second officer say that the officer found crack cocaine. (App. p. 252 line 23). That officer then placed Petitioner in handcuffs, conducted a pat-down and found marijuana on Petitioner's person. (App. p. 252 line 24- p. 253 line 4). Petitioner then testified he was not detained until the second officer stated he found crack cocaine. (App. p. 253 lines 8-9).

Counsel first testified concerning the suppression motion issue that Petitioner's version of facts as presented at the PCR hearing were not presented to Counsel in her preparation for trial; in essence this was the first time Counsel had heard these details. (App. p. 265 lines 19-21). Counsel then testified that Petitioner told her two different stories concerning the location of the crack cocaine. (App. p. 265 line22- p. 266 line 3). Counsel also stated part of her trial strategy was to show that Petitioner never threw any crack on the ground or ever had possession of the crack. (App. p. 266 lines 14-23).

The PCR court held Counsel's testimony was very credible while finding Petitioner's testimony not credible. (App. p. 298). See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court's findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses.)

In its Order of Dismissal, the PCR court also held:

> This Court finds Counsel's failure to request a suppression hearing was not ineffective assistance of counsel. Counsel testified she did not have a good faith basis for a suppression motion due to the Applicant's inconsistent statements during the course of this case. For Counsel to advance an argument with no factual or legal basis could be construed as attempting to commit a fraud upon the court. Further, the Applicant provided no evidence that had Counsel moved for a suppression hearing, the crack cocaine would have been excluded. This Court finds the Applicant has failed to meet his burden of proving Counsel was ineffective and also failed to prove any resulting prejudice. Accordingly, this allegation is denied.

(App. p. 304).

The PCR court properly found Counsel rendered effective assistance of counsel in this case. Officer Chavis testified he personally witnessed Petitioner throw a bag of crack cocaine onto the sidewalk when he asked Petitioner to turn around and speak to him. Contrary to Petitioner's claim that anyone could have thrown the crack the crack cocaine on the ground, there is eye-witness testimony that directly refutes that claim. Additionally, Counsel testified Petitioner gave her two wavering factual accounts of the local of the crack cocaine. The first time Counsel heard the facts as recited by Petitioner at the PCR hearing was at the hearing itself. Under Strickland, Counsel was actions were rightly guided by the information provided to her by Petitioner in this case. Counsel's decision not to pursue a suppression motion may not now be challenged as unreasonable. See Strickland at 691. As Counsel testified she had no legal basis to challenge the drugs, a suppression motion was unnecessary in this case. Counsel further testified she based her assessment of whether or not she had a good faith basis to challenge the admission of the drugs on her experience as a criminal defense attorney and on the facts of the case, themselves. As such, Counsel cannot be said to be ineffective.

Furthermore, as the PCR court correctly concluded, Petitioner failed to prove any resulting prejudice from Counsel's failure to request a suppression motion. Petitioner presented no testimony, such as eye-witness or expert testimony, to show that law enforcement's conduct or any search was illegal. Moreover, Petitioner has provided no legal basis on which the drug evidence would have been suppressed; thus, he has failed to prove a suppression motion would have been meritorious. Therefore, he has failed to meet his burden of proving any resulting prejudice from Counsel's alleged ineffective assistance. Accordingly, there is clear "evidence of

probative value" to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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
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S.C. Bar # 78871

By: _____
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January 6, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Edgar W. Dickson, Circuit Court Judge

CHRISTOPHER ROBINSON, 265006

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

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

This 6TH day of January 2015.

CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

January 6, 2015

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

***RE:* Christopher Robinson, # 265006 v. State of South Carolina**

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: LaNelle C. DuRant, Esquire
Trisha Allen, Victim Services