STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Berkeley County
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2014-000563

DERRICK GRANT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF AUTHORITIES

Cases:

Other Authorities:

QUESTION PRESENTED

I. Whether there is probative evidence to support the lower court's finding that the Petitioner failed to carry his burden of proving appellate counsel was ineffective for failing to attend a January 29, 2010 hearing to reconstruct the Petitioner's April 30, 2003 hearing where he waived his right to counsel?

II. Whether there is probative evidence to support the lower court's finding that the Petitioner failed to carry his burden of proving appellate counsel was ineffective for failing to raise on the appeal that the Petitioner did not freely and voluntarily waive his right to counsel at a June 11, 2003 Schmerber hearing?

STATEMENT OF THE CASE

The Petitioner was indicted at the March 2003 term of the Berkeley County Grand Jury for murder (2003-GS-08-0499). Shortly after arrest, the Petitioner moved to relieve counsel George Bishop, Esquire. Counsel was relieved and the Petitioner proceeded *pro se*. Public defender Patricia Kennedy was appointed to act as stand-by counsel to answer any questions the Petitioner had at trial. On February 23-27, 2004, the Petitioner proceeded to trial without counsel and was found guilty. The Petitioner was sentenced by the Honorable R. Markley Dennis to confinement for life without parole.

A Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Joseph Savitz, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal in the form of an Anders brief. After review of the record, the Court requested briefing on the issue of the Petitioner's waiver of counsel. Because the transcript of the waiver of counsel hearing held on April 30, 2003 was unavailable, the Court of Appeals remanded the case to the lower court to reconstruct the record regarding the Petitioner's waiver of counsel. A reconstruction hearing was held on January 29, 2010. After remand and briefing by both sides, the Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Grant, No. 2011-UP-495 (S.C. Ct. App. November 9, 2011). In an unpublished opinion, the Court of Appeals found "the record showed "Grant was knowingly and voluntarily exercising his informed free will" and "the record supports the finding Grant understood his right to counsel and the consequences of self-representation." The Remittitur was issued on November 27, 2011.

The Petitioner subsequently filed an application for post-conviction relief on May 11, 2012. The Respondent filed is Return on July 1, 2013. An evidentiary hearing on the matter was convened on September 18, 2013 at the Charleston County Courthouse. The Petitioner was

present at the hearing and represented by Charles T. Brooks, III, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Also present and testifying was Blair Jennings, assistant solicitor. Joseph Savitz, Esquire, appellate counsel for the Petitioner testified by phone. By Order dated March 10, 2014, the Honorable Roger M. Young denied and dismissed the Petitioner's application for post-conviction relief with prejudice. This appeal follows.

ARGUMENT

The Petitioner asserts the post-conviction relief court erred by finding the Petitioner failed to carry his burden of proving ineffective assistance of appellate counsel. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The petition should be denied and the appeal dismissed.

I. There is probative evidence to support the lower court's finding that appellate counsel was not ineffective for failing to attend the Petitioner's January 29, 2010 reconstruction hearing when counsel secured another attorney who was familiar with the case to represent the Petitioner at the hearing and appellate counsel's absence did not preclude the Petitioner from making arguments regarding the completeness of the appellate record on appeal.

The Petitioner asserts appellate counsel was ineffective for failing to attend a remand hearing held on January 29, 2010 to reconstruct the record of an April 30, 2003 hearing in which the Petitioner waived his right to counsel prior to trial. The Petitioner claims counsel's absence precluded him from arguing to the Court that the record of the hearing was incomplete. The Respondent submits this claim is wholly without merit. There is probative evidence to support the lower court's finding that counsel was not ineffective for not being present at the Petitioner's January 29, 2010 reconstruction hearing.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. 466 U.S. 668, 104 S.Ct. 2052 (1984). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on

appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005) (citing Anderson, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999)).

The Respondent submits appellate counsel was not deficient for failing to attend the Petitioner's January 29, 2010 reconstruction hearing. The record reflects appellate counsel notified the Court that he would not be present at the hearing and secured the presence of another attorney to represent the Petitioner at the hearing.

At the start of the reconstruction hearing, the Court says "I've received a call from Mr. Savitz who has Miss Kennedy here, sort of standing in his place." (App. 890:10-13). Patricia Kennedy, Esquire, was a public defender who had previously acted as stand-by counsel for the Petitioner when he represented himself at trial. It is clear from the record that Kennedy was present at the hearing in place of Savitz to assist the Petitioner. During the hearing, Kennedy spoke multiple times on the Petitioner's behalf in response to the Court's inquiries about the missing transcripts. Kennedy also conveyed to the Court the substance of her conversations with appellate counsel and spoke about their unsuccessful attempts to locate the missing records. (App. 893:4-12, 894:1-22, 915:23-916:5).

The Petitioner also asserts Kennedy was present at the hearing solely to act as a witness. However, the record is void of any indication that Kennedy was present at the April 2003 hearing they were reconstructing and unlike others present at the hearing, she provided no testimony to the Court about what took place at the 2003 waiver hearing. There is probative evidence to support the lower court's finding that the Petitioner was not deficient for failing to be present at the Petitioner's reconstruction hearing. Appellate counsel secured another attorney to

be present at the hearing who was familiar with the Petitioner's case and adequately represented the Petitioner's interest at the hearing.

The Respondent submits further appellate counsel's absence at the January 29, 2010 reconstruction hearing did not result in any prejudice to the Petitioner. The lower court correctly found that appellate counsel's presence at the reconstruction hearing would not have resulted in the Petitioner prevailing on appeal. The purpose of the January 29, 2010 reconstruction hearing was to recreate a record of the Petitioner's waiver hearing since the hearing transcript was missing from the appellate record. Since appellate counsel was not present at the 2003 waiver hearing, his presence at the 2010 reconstruction hearing was not necessary to recreate the record.

Contrary to the Petitioner's assertions, appellate counsel also did not need to be present at the reconstruction hearing in the circuit court to make arguments regarding the completeness of the appellate record. The record before this Court reflects appellate counsel properly made arguments on the Petitioner's behalf about the completeness of the appellate record in Petitioner's Brief of the Appellant. (Supp. App. 14-22). The incompleteness of the appellate record was appellate counsel's sole argument in support of his claim that the Petitioner did not knowingly and intelligently waive his right to counsel. (Supp. App. 17). Appellate counsel's absence at the reconstruction hearing did not preclude him from making any arguments regarding the completeness of the appellate record.

The record of the reconstruction hearing reflects an attempt by the parties present at the 2003 hearing to recreate from memory what took place at the waiver hearing. No witnesses were sworn and no arguments were made to the Court by the Petitioner or the State regarding the completeness of the record. The Respondent submits the Petitioner has failed to show that counsel's absence from the reconstruction hearing resulted in any prejudice to the Petitioner.

This Court should affirm the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to be present at the Petitioner's January 29, 2010 reconstruction hearing.

II. There is probative evidence to support the lower court's finding that appellate counsel was not ineffective for failing to challenge on appeal the Petitioner's waiver of his right to counsel at a June 11, 2003 Schmerber hearing when appellate counsel properly his exercised his discretion by challenging the Petitioner's initial waiver of counsel at a April 2003 hearing and the Petitioner has failed to show that he was prejudiced and this issue would have prevailed on appeal.

The Petitioner asserts appellate counsel was ineffective for failing to argue on appeal the Petitioner did not knowingly and intelligently waive his right to counsel at a June 11, 2003 Schmerber hearing. The Respondent submits this claim is wholly without merit. There is probative evidence to support the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to raise this issue on appeal.

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) (emphasis added)). For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. Jones, 463 U.S. at 754, 103 S.Ct. 3308. The exercise of judgment in framing issues on appeal makes it "difficult to demonstrate that [appellate] counsel was incompetent under Strickland for omitting a particular argument." Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746 (2000).

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Id. at 751-52. "One of the first tests of a discriminating advocate is to

select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Id. at 752 (citing Jackson, *Advocacy Before the Supreme Court,* 25 Temple L.Q. 115, 119 (1951)).

The Respondent submits counsel was not deficient for failing to argue on appeal the Petitioner did not freely and voluntarily waive his right to counsel at the June 11, 2003 Schmerber hearing. It is clear from the case law that appellate counsel has great discretion in determining which issues to pursue on appeal. In this case, appellate counsel chose to argue "Appellant (the Petitioner) did not knowingly and intelligently waive his right to counsel" and that "a transcript of the initial waiver hearing is apparently unavailable, the proper remedy would be to reverse Grant's convictions and remand for a new trial." (Supp. App. 17). Appellate counsel testified at the evidentiary hearing that the Petitioner's initial waiver of his right to counsel was the only issue he saw to pursue on appeal and that he did not consider a challenge to the Petitioner's waiver of counsel at the Schmerber hearing to be a meritorious issue. (App. 975:2-14).

The Petitioner has also made no showing that a challenge to Petitioner's waiver of counsel at a subsequent Schmerber hearing would have prevailed on appeal. Appellate counsel unsuccessfully challenged Petitioner's **initial** waiver of counsel at an April 2003 hearing. The failure of a challenge to the Petitioner's waiver of counsel at a **subsequent** June 2003 Schmerber hearing is particularly certain considering the Court of Appeals found the Petitioner had

knowingly and intelligently waived his right to counsel at the initial waiver hearing in April 2003 which was held **prior to** the Schmerber hearing. There is no requirement that a defendant, after knowingly and intelligently waiving his right to counsel once, must be re-advised of and waive his right to counsel during every subsequent *pro se* encounter with the court. Any finding by the Court of Appeals that the Petitioner had not knowingly and intelligently waived his right to counsel would have extended to the Petitioner's entire proceeding including any subsequent hearings and his trial.

The Respondent submits it was not necessary for appellate counsel to challenge on appeal both the Petitioner's initial waiver of his right to counsel in April 2003 and any subsequent waiver at the Schmerber hearing in June 2003. Appellate counsel properly exercised his discretion by choosing to only challenge on appeal the Petitioner's initial waiver of his right to counsel. The Respondent submits the Petitioner has also failed to show that had counsel challenged the waiver of Petitioner's right to counsel at the Schmerber hearing he would have prevailed on appeal. There is probative evidence to support the lower court's finding that the Petitioner failed to carry is burden of proving counsel was ineffective in this regard. This Court should affirm the lower court's findings.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
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ATTORNEYS FOR RESPONDENT

January 7, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Berkeley County
The Honorable Roger M. Young, Sr. Circuit Court Judge

DERRICK GRANT Petitioner

v.

STATE OF SOUTH CAROLINA, Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari to the SC Supreme Court has been delivered to the respondent's attorney Lara Caudy.

Anne R Henley

Anne R. Henley
Legal Assistant

SWORN to before me this
7th day of January, 2015.

Judy a Carey (L.S.)
Notary Public for South Carolina.
My Commission Expires: 5/14/2024

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

January 7, 2015

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

RE: Derrick Grant v. State of South Carolina
Appellate Case No. 2014-000563
Lower Court Case No. 2012-CP-08-1399

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Lara Caudy, Esquire