

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000807

Eddie James Pilcher, Jr., Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Did the PCR judge err in failing to grant Petitioner a belated direct appeal where the record revealed the plea judge failed to advise Petitioner of his right to appeal and plea counsel equivocated on whether he advised Petitioner of his right to appeal?
2. Did the PCR judge err in denying Petitioner relief where the record revealed plea counsel was ineffective in failing to obtain the audio recording of Petitioner's statement to law enforcement showing Petitioner was guilty only of being an accessory and not as a principal?

STATEMENT OF THE CASE

Petitioner waived presentment to the Greenville County Grand Jury on charges of kidnapping (2012-GS-23-2618), armed robbery (2012-GS-23-2619), and first-degree burglary (2012-GS-23-2620). (App.pp.107-08; pp.110-11; pp.113-14). John “Jake” Erwin, Jr., Esquire represented Petitioner.

On June 26, 2012, Petitioner pled guilty. The Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 15 years for kidnapping, 5 years for armed robbery, and 15 years for first-degree burglary. (App.p.24; p.109; p.112; p.115). Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on November 14, 2012 (2012-CP-23-7210). (App.pp.32-46). A hearing was held at the Greenville County Courthouse on February 19, 2014. (App.pp.53-95). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General’s Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order filed April 9, 2014. (App.pp.97-106).

STANDARD OF REVIEW

The proper standard for review of 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to a review of his direct appeal issues.

At the PCR hearing, Petitioner stated the plea judge never advised him of the right to appeal. (App.p.77). Petitioner stated he asked his plea attorney to file an appeal because “something don’t feel right.” (App.p.78).

Plea counsel testified he did not recall whether or not he discussed the right to appeal with Petitioner. (App.p.93). Plea counsel testified, however, that Petitioner did not ask him to file an appeal and that there were no appealable issues from the guilty plea hearing. (App.p.93).

In denying Petitioner’s application for post-conviction relief, the PCR judge found plea counsel was credible. The PCR judge found Petitioner “failed to meet his burden of proving either that he asked plea counsel to file an appeal or that plea counsel had reason to think he would have wanted to file an appeal after he voluntarily pled guilty.” (App.pp.102-03).

Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). In order to make this determination, “courts must take into account all the information counsel knew or should have known.” Id. (citing Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984)). Although not determinative, a highly

relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id.

The PCR judge did not err in finding Petitioner was not entitled to a review of direct appeal issues. Even assuming arguendo that plea counsel did not advise Petitioner of the right to file an appeal, he was not obligated to have done so. Petitioner admitted to the plea judge that he was guilty and participated in the crime. (App.pp.13-14; p.23). Petitioner also told the plea judge he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (App.pp.12-14). Petitioner made a clear, informed choice to plead guilty. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969) (holding that, to be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea). Based on the thorough and complete guilty plea colloquy, it is unlikely a rational defendant would have wanted to appeal. See Roe v. Flores-Ortega, 528 U.S. at 480, 120 S. Ct. at 1036. Nothing transpired during the guilty plea hearing that would have indicated Petitioner wanted to appeal. Further, while Petitioner stated he asked plea counsel to file a notice of appeal, plea counsel disputed this and the PCR judge found specifically found plea counsel's testimony on this issue was credible. (App.pp.102-03). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses).

Accordingly, Petitioner failed to meet his burden of proving he is entitled to a

review of direct appeal issues from his guilty plea hearing. As Petitioner failed to meet his burden of proof, the PCR judge did not err in denying relief on this issue. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel should have obtained an audio recording before he pled guilty.

A.

At the guilty plea hearing, the assistant solicitor recited the following facts of Petitioner’s case:

The incident happened on September the 8th of 2010 at the Quality Inn in Greer within Greenville County. The defendant along with co-defendant, two co-defendants, gathered at Oakview Village and borrowed this defendant’s girlfriend’s car and they armed themselves with an AK-47 and a pistol, they then drove to the Quality Inn where this defendant knocked on the room where they saw a Hispanic male enter. The victim came to the door and the two co-defendants entered while armed with the weapons and robbed the victim of his money, his gold chain and car keys. This defendant waived his rights and gave Greer Police Department a voluntary statement admitting his guilt and implicating the other co-defendants.

(App.pp.16-17). Petitioner stated he was the driver and did not have a weapon.

(App.pp.17-20). The assistant solicitor stated:

I’m reading over the report and he gave a a confession on that was recorded in an audio recorder in which he he told the police that he used his girlfriend’s car, they went to Oakview Village, borrowed an AK-47 and a pistol, he went up to the door with them, the other two people had the guns. I mean, he gave all this in his confession according to the police report that I’m reading right now.

(App.p.21) (emphasis added). Petitioner told the plea judge “for the most part I did the crime, I participated.” (App.p.23). Petitioner received a 15-year sentence (while his two

co-defendants had received 20- and 25- year sentences). (App.pp.23-24).

B.

At the PCR hearing, Petitioner stated he had two meetings with plea counsel. (App.pp.64-65). Petitioner stated they discussed “everything that the police said.” (App.p.65). Petitioner stated he had previously spoken to the Greer Police Department and that they had made a hidden recording. (App.p.66). Petitioner stated he was unaware of this recording until 45 days after he pled guilty. (App.pp.67-68). Petitioner stated the prosecutor should have been able to retrieve the recording. (App.pp.73-74). Petitioner stated the recording indicated he said he did not commit the crime but was an accessory. (App.p.70). Petitioner stated he would not have pled guilty if he had reviewed this recording. (App.p.66).

Plea counsel testified Petitioner had given a statement to the Greer Police Department. (App.p.91). Plea counsel testified he did not receive a copy of the audiotape in discovery but did have the supplemental report “that had the substance of the interview.” (App.p.84). Plea counsel testified he and Petitioner reviewed this supplemental report. (App.p.84). Plea counsel testified “me and [Petitioner] reviewed that. And he wanted to plead guilty. He acknowledged that that was what he said. Never had the actual tape, but he acknowledged that the report that we had was what he had said.” (App.p.84). Plea counsel testified the information in the supplemental report was consistent with Petitioner’s statement. (App.p.85).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner “failed to meet his burden of proving plea counsel should have obtained the

audio recording made by the Greer Police Department before his guilty plea hearing.” the PCR judge found plea counsel was credible. The PCR judge found Petitioner entered a voluntary guilty plea and “failed to demonstrate he would have gone to trial if plea counsel had obtained the recording.” (App.pp.101-02).

C.

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. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective. Petitioner failed to demonstrate plea counsel did not render reasonably effective assistance. Plea counsel testified that, while he did not have the Greer audiotape, the substance of that interview was in the supplemental report he received in discovery. Plea counsel testified he reviewed the supplemental report with Petitioner prior to the guilty plea hearing and Petitioner acknowledged the information in the report was what he told police. Further, plea counsel testified the information in the

supplemental report was consistent with Petitioner's confession. The PCR judge specifically found plea counsel's testimony was credible regarding this issue. (App.p.102). See Drayton v. Evatt, 312 S.C. at 13, 430 S.E.2d at 522. It should be noted that there was no proof provided at the PCR hearing that the assistant solicitor was in possession of the audiotape and simply did not turn it over. Plea counsel, in fact, testified he believed that he received full discovery from the State. (App.p.91). There would have been no reason for plea counsel to have requested the audiotape from the solicitor's office. Further, there would have been no reason for plea counsel to have requested the audiotape from the Greer Police Department. Petitioner's argument at the guilty plea hearing was that he was not armed and was merely the driver. This was actually presented as the factual scenario in his statement, the supplemental report, and the assistant solicitor's recitation of the facts at the guilty plea hearing. Petitioner did not tell plea counsel these facts were inaccurate. Rather, he told plea counsel the information in the report and statement were accurate. As such, it was not incumbent upon plea counsel to have investigated any further. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 (holding "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct").

Petitioner also failed to demonstrate he suffered any prejudice. Petitioner gave a confession to police in which he described his involvement in the crime, as well as the roles played by his co-defendants. While he attempted to dispute the factual recitation given at the guilty plea hearing, those facts actually comported with what he stated his

role was in this crime. Petitioner told the plea judge he participated in this crime and did not dispute the veracity of his confession. Petitioner failed to present any credible evidence or testimony that he would never have pled guilty if he had listened to the audiotape that was the basis of the confession he reviewed with plea counsel. Further, the PCR judge's finding that plea counsel's testimony was more credible is supported by the fact that, while Petitioner testified he was unaware of the audiotape until 45 days after his guilty plea hearing, the audiotape was mentioned by the assistant solicitor at the plea hearing. (App.p.21). Petitioner has failed to demonstrate there was a reasonable probability that – had he reviewed the audiotape sooner – he would have gone to trial instead of pleading guilty. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370; see also Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

January 21, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000807

Eddie James Pilcher, Jr., Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 21st day of January, 2015.


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ATTORNEY GENERAL

January 21, 2015

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

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JAN 21 2015

S.C. Supreme Court

Re: Eddie James Pilcher v. State of South Carolina
Appellate Case No: 2014-000807
Lower Court Case No: 2012-CP-23-7210

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services Counselor