

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000736

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S.C. Supreme Court

Brian O'Neil Robinson, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did Petitioner fail to meet his burden of proof of establishing that Counsel was ineffective for failing to fully investigate the charge of felony DUI resulting in death and the possibility of an intervening act causing the victim's death?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the October 2011 term of the Spartanburg County Grand Jury for count one – felony DUI – death (2011-GS-42-5932) and count two – reckless homicide (2011-GS-42-5932A). The Petitioner was represented by Robert Hall, Esquire. On January 30, 2012, the Petitioner pled guilty before the Honorable Roger L. Couch and was sentenced to confinement for fifteen years for felony driving under the influence, death results. Petitioner did not appeal his conviction and sentence.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 23, 2012. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on October 3, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by J. Brandt Rucker, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Petitioner testified on his own behalf. Robert B. Hall, Esquire, testified on behalf of the State. Following the hearing, the Honorable J. Derham Cole denied the PCR application by written Order dated February 20, 2014.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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 post-conviction relief 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. Petitioner failed to meet his burden of proof of establishing that Counsel was ineffective for failing to fully investigate the charge of felony DUI resulting in death and the possibility of an intervening act causing the victim’s death.**

On January 30, 2012, after selecting a jury for a trial on charges of felony DUI and Reckless Homicide, Petitioner pled guilty to felony DUI resulting in death and the charge of reckless homicide was dismissed. (App. p. 64). During the Solicitor’s presentation of facts, it was undisputed that once the victim was thrown from his motorcycle following the hit by Petitioner, a separate vehicle ran over top of the victim as he lay in the road. (App. p. 80-1). In his PCR application and at the PCR hearing, Petitioner alleged Counsel was ineffective for failing to fully investigate the fact of the separate vehicle hitting the victim. (App. p. 108; p. 131, lines 2-10).

Where ineffective assistance of counsel is alleged 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies to guilty plea challenges based on ineffective assistance of counsel. However, to meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59.

Petitioner testified that on the night he hit the victim, a second vehicle stopped to assist and had their flashing lights on, but then a third vehicle did not see the victim and hit the victim. (App. p. 124, lines 20-25; p. 125, lines 1-4). Petitioner testified that he believes an intervening

act caused the death of the victim because the coroner could not “determine the actual cause of death and which vehicle actually – impact was the cause of death.” (App. p. 131).

Petitioner acknowledged that the victim’s motorcycle was “stuck to the front of [his] truck.” (App. p. 126, line 2-3). Petitioner also acknowledged that he and Counsel discussed the coroner’s report and the fact that the report did not identify which vehicle caused the victim’s death. (App. p. 131, lines 11-14). Petitioner also testified that he spoke with Counsel about the third vehicle being responsible for the victim’s death. (App. p. 131, lines 19-25; p. 132, line 1). However, Petitioner testified that he pled guilty even after discussing the third vehicle hitting the victim because he was told by Counsel that he would receive no more than ten years. (App. p. 132). Later in his testimony, Petitioner admitted that Counsel did not promise a sentence of fifteen years, but Petitioner understood based on his conversations with Counsel that he would receive a more lenient sentence if he plead guilty. (App. p. 133).

Counsel testified that he had time to prepare and had put a lot of work into this case. (App. p. 157). Counsel testified that he looked into the possibility of the Petitioner’s culpability based upon there being an intervening act when the third vehicle hit the victim. (App. p. 157). Counsel testified that the Petitioner and Petitioner’s witnesses stated they thought the victim was moving before the third vehicle hit him. (App. p. 157, lines 20-23). However, the victim’s motorcycle was essentially impaled on the Petitioner’s truck and the MAIT report indicated that the victim’s right blinker had been on. (App. p. 151, lines 23-25; p. 152, lines 1, 10-13). Counsel stated that it was clear, “the man would not have been in the road but for what had just happened when the car [Petitioner] was driving struck him from the rear.” (App. p. 158).

Counsel testified that he discussed with Petitioner the fact that the State would have to prove that the intervening act of the third vehicle was not the cause of death, along with other

issues that they could vigorously pursue at a trial. (App. p. 159-160). Counsel testified that he was ready for trial, but Petitioner brought up the plea and wanted to discuss the possibility of a plea with his mother. (App. p. 161).

The PCR court found the testimony of Counsel to be more credible than the testimony of the Petitioner. (App. p. 181). The court properly found that Counsel had reviewed all facts and evidence, as well as defenses that could have been presented at trial. (App. p. 182). Further, the court found that the Petitioner failed to meet his burden of establishing that Counsel was ineffective for failing to pursue the issue of the third vehicle and possibly intervening act. (App. p. 182). Petitioner failed to establish that pursuit of those issues would have led to a different outcome in this situation. (App. p. 182). The South Carolina Court of Appeals has held that in the case of a felony DUI resulting in death, “[t]he defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased.” State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct.App.2008). Further, “[o]ne who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of the other. The fact that other causes also contribute to the death does not relieve the actor from responsibility.” Id. (citing State v. Riley, 219 S.C. 112, 112, 64 S.E.2d 127, 130 (1951)).

The court also found that the Petitioner failed to demonstrate that he would have proceeded to trial, but for, Counsel’s alleged failure to fully investigate this particular issue. (App. p. 182). It is clear that Counsel fully investigated the defense of the third vehicle being considered an intervening act and advised Petitioner properly. Petitioner voluntarily chose to plead guilty. Not only did the Petitioner fail to establish that Counsel failed to prepare for trial or that Petitioner did not fully understand the charge he was pleading guilty to, but the Petitioner

has failed to establish that he would have proceeded to trial, but for, these alleged deficiencies of Counsel. Therefore, the lower court's decision should be affirmed.

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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By: 
ATTORNEYS FOR THE RESPONDENT

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February 7, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

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The Honorable J. Derham Cole, Circuit Court Judge **S.C. Supreme Court**

BRIAN O'NEIL ROBINSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense - Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 4th day of February, 2015



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 4, 2015

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

RECEIVED
FEB - 4 2015
S.C. Supreme Court

RE: Brian O'Neil Robinson v. State of South Carolina
Lower Court Case No: 2012-CP-42-3582
Appellate Case No. 2014-000736

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Suzanne H. White
Assistant Deputy Attorney General
SC Bar No. 78225

SHW/ah
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)