

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

The Honorable J. Derham Cole, Circuit Court Judge

FEB 11 2015

Appellate Case No. 2014-000406

S.C. Supreme Court

Eddie J. Pilcher, 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 an actual conflict of interest existed when Counsel represented both Petitioner and one of his co-defendants at their respective pleas?

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. The Petitioner was indicted by the Spartanburg County Grand Jury for armed robbery (11-GS-42-1970) and attempted burglary – 1st degree (11-GS-42-1971). The Petitioner was represented by James A. Cheek, Esquire. On June 21, 2011, the Petitioner was sentenced by The Honorable Roger L. Couch to concurrent sentences of twenty-five years on each charge. The Petitioner did not appeal his conviction or sentence.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 21, 2011, but received by Respondent on May 17, 2012, and amendment filed September 17, 2013. The Respondent made its Return on or about February 20, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Christopher D. Brough, 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. Deputy Solicitor Derrick Balsa, Esquire, Detective Dale Arterburn, J. Roger Poole, Esquire, and James A. Cheek, Esquire, also testified. 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 an actual conflict of interest existed when Counsel represented both Petitioner and one of his co-defendants at their respective pleas.**

On June 21, 2011, Petitioner pled guilty to charges of attempted burglary – 1st degree and armed robbery. (App. p. 12). Petitioner had originally been charged with three counts of kidnapping, burglary – 1st degree, and armed robbery. (App. p. 101, lines 4-5). Petitioner was represented at the plea by Counsel and informed the plea court that not only had Petitioner had plenty of time to speak with Counsel, but was satisfied with Counsel’s representation. (App. p. 14). At the PCR hearing, Petitioner argued Counsel had an actual conflict of interest because Counsel represented both Petitioner and his co-defendant, Jonathan Goss [“Goss”], at their respective guilty pleas. (App. p. 49, lines 12-15).

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.

Petitioner testified that he was originally appointed attorney J. Roger Poole, Esquire, to represent him on these charges. (App. p. 49, lines 7). However, Counsel represented Petitioner at the guilty plea. (App. p. 49, line 8). Petitioner testified that he was not aware of Counsel's representation of Goss until the day of his guilty plea and after receiving a copy of his plea transcript. (App. p. 50, lines 1-2). Petitioner testified that he felt betrayed by Counsel's representation of Goss and believed Counsel must have used things Petitioner told Counsel to hurt instead of help Petitioner. (App. p. 59). Petitioner stated that he believed there was a conflict because Goss had informed Counsel that Petitioner had threatened Goss' family. (App. p. 73).

Petitioner acknowledged that he informed the court that he had a job until a "couple of

days before [he] committed the crime.” (App. p. 72). However, Petitioner stated that he did not specifically reference the crimes he was pleading guilty to that day because he did not say what crime he had committed. (App. p. 72). Petitioner also acknowledged that the only issue he took with the State’s recitation of the facts was the fact that Petitioner did not enter the home with a gun, but acknowledged that his co-defendants had guns and he understood the hand of one, hand of all theory. (App. p. 72). At the PCR hearing, Petitioner denied practically every statement attributed to Petitioner in the supplemental investigative report as well as statements made at the guilty plea. (App. p. 74, lines 16, 19; p. 75, lines 4, 20, 25). Further, Petitioner stated that he partially lied to the plea court during his plea, but then stated that he did not believe it was a lie because he only did what Counsel had told him to do. (App. p. 79; p. 80, lines 2-3, 8-10).

Mr. Poole, the original attorney appointed to Applicant’s case testified that he recalled Applicant’s case. (App. p. 100). Poole testified that the Applicant admitted his involvement in the crimes to the investigator/interviewer from the public defender’s office and indicated that he wanted the best possible deal. (App. p. 101, lines 11-18). Poole testified that Applicant wanted to plead guilty when the State dropped all of the kidnapping charges and allowed Applicant to plead to one count of armed robbery and burglary – 1st degree. (App. p. 101, lines 19-22). Poole testified that Counsel then received the case since Petitioner indicated his desire to plead guilty and Counsel works the cases from the jail. (App. p. 101, lines 22-25).

At the time of Petitioner’s plea and in way of mitigation, Counsel informed the court that Petitioner had done very well since he had been previously released from prison a year or so prior to the incident. (App. p. 21). Counsel pointed out that Petitioner was affiliated with people such as the head of the Boy Scouts Piedmont District. (App. p. 22). Counsel informed the court that Petitioner held two jobs at one time. (App. p. 22). Counsel also informed the court that

Petitioner was influenced by co-defendant Curtis Wilke, who orchestrated the burglaries. (App. p. 23). Counsel stated that Petitioner was willing to pay restitution. (App. p. 24). Counsel told the court he wanted to distinguish Petitioner's involvement, planning, prior knowledge, and associations. (App. p. 25). Counsel also pointed out that Petitioner did turn himself in and cooperate with authorities (App. p. 26).

Petitioner gave a statement to the court and apologized and then pointed out to the court that Goss was waiting to plead. (App. p. 25). Petitioner asked the court to be lenient on Goss and indicated that Petitioner should have stepped in and stopped Goss from participating. (App. p. 25). Petitioner had a substantial prior record, which included trespassing and disorderly conduct, false information to police, breaking into a motor vehicle, two counts of grand larceny, two counts of threatening a public employee, burglary – 2nd, burglary – 3rd degree, petit larceny, indecent exposure, assault and battery of a high and aggravated nature, and malicious injury to the jail. (App. p. 26; p. 76, lines 17-18, 23-25; p. 77, lines 1, 4-5). During sentencing, the court specifically noted that because of Petitioner's prior record, the conduct of bashing in doors and going into homes with weapons was not out of the realm of possibilities for Petitioner, no matter what his involvement. (App. p. 27). Additionally, during Goss' sentencing, the court specifically pointed to the fact that Goss had no prior record and the words of his prior co-defendant (Petitioner), had weighed in Goss' favor for sentencing purposes. (App. p. 148).

The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d

254, 256 (2001) (citing Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)).

The Fourth Circuit has addressed many issues related to conflict of interest and these cases are persuasive in this case. Although an attorney's overlapping representation of two clients can affect representation when an actual conflict of interest is created, the mere fact that overlapping representation exists is insufficient to create a Sixth Amendment violation. United States v. Taft, 221 F. App'x 277, 279 (4th Cir. 2007) (holding that defendant's right to effective counsel was not violated when former trial counsel also represented a government witness for a short overlapping period). Additionally, Counsel must rely on the information provided to him by his clients. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir. 1995) (citing Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066).

Counsel testified that he did not believe there was a conflict in his representation of both Petitioner and Goss. (App. p. 117). Counsel testified that he informed Petitioner of the possibility of Goss entering a plea as well. (App. p. 107). However, Counsel testified that at the time, he was not sure that he would be handling the plea for Goss. (App. p. 107). Counsel testified that Goss decided **after** Petitioner's plea and sentencing, to have Counsel represent him at his plea as well, even though Mr. Robert Hall from the public defender's office was going to assist Goss. (App. p. 107, lines 10-14). Counsel also testified that the only information he had regarding any alleged threat made by Petitioner to Goss, was provided to Counsel right before Goss' plea and well after Petitioner's plea and sentencing. (App. p. 117).

Counsel relied on the information he received from Petitioner, which included Petitioner's admission of his participation in the two crimes to which he pled to the investigator with the public defender's office, as well as Petitioner's admission of his participation in the crimes directly to Counsel. (App. p. 101, lines 11-13; p. 104, lines 23-25; p. 105; p. 106, lines 1-9).

“[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). The PCR court found that Petitioner's testimony was completely not credible. (App. p. 172). Further, the court found that the Petitioner had failed to meet his burden of proof of establishing that Counsel operated under a conflict of interest at Petitioner's guilty plea. (App. p. 174). The Order noted that there had been no testimony or evidence to support the argument that Counsel's performance was adversely affected by a conflict of interest, in particular because Petitioner pled guilty and was sentenced prior to Goss. (App. p. 174). Counsel was not operating under a conflict of interest at the time of his representation of Petitioner at Petitioner's plea and Petitioner suffered no prejudice from Counsel's subsequent representation of Petitioner's co-defendant, Goss.

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,

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Attorney General

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SC Bar #78225

By: 
ATTORNEYS FOR THE RESPONDENT

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February 11, 2015

STATE OF SOUTH CAROLINA
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The Honorable J. Derham Cole, Circuit Court Judge

EDDIE J. PILCHER,

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:

Benjamin J. Tripp, Esquire
SC Commission of Indigent Defense - Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 11th day of February, 2015



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 11, 2015

RECEIVED

FEB 11 2015

S.C. Supreme Court

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

RE: Eddie J. Pilcher v. State of South Carolina
Lower Court Case No: 2011-CP-42-5117
Appellate Case No. 2014-000406

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: Benjamin J. Tripp, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)