STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable George C. James Jr., Circuit Court Judge

Appellate Case No. 2014-001649

Michael J. Lackey, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the post-conviction relief judge properly find trial counsel was not ineffective in failing explore an Alford plea with Petitioner where trial counsel was under no duty to advise Petitioner of the existence of an Alford plea and where no evidence suggests Petitioner would have accepted such a plea?

STATEMENT OF THE CASE

In January 2008, the Horry County Grand Jury indicted Petitioner for first degree burglary, armed robbery, unlawful carrying of a pistol, and possession with intent to distribute marijuana. (App. pp. 1248-55). Ralph J. Wilson Sr., Esquire ("trial counsel"), represented Petitioner. (App. p. 3). On May 17, 2010, Petitioner proceeded to trial before the Honorable Larry B. Hyman Jr., and a jury. (App. p. 1). On May 20, 2010, the jury found Petitioner guilty as indicted. (App. p. 1191, line 24-p. 1192, line 17). On May 21, 2010, Judge Hyman sentenced Petitioner to concurrent terms of eighteen (18) years for first degree burglary, ten (10) years for armed robbery, one (1) year for unlawful carrying of a pistol, and five (5) years for possession with intent to distribute marijuana. (App. p. 1245, lines 13-25). The South Carolina Court of Appeals dismissed Petitioner's appeal on May 2, 2012. State v. Lackey, Op. No. 2012-UP-257 (S.C. Ct. App. filed May 2, 2012).

Petitioner filed an application for post-conviction relief on November 27, 2012. (App. pp. 1430-36). Tommy A. Thomas, Esquire, represented Petitioner. (App. p. 1257). The Honorable George C. James Jr. ("the post-conviction relief judge") convened a hearing on the application at the Horry County Courthouse on March 20, 2014. (App. p. 1257). The post-conviction relief judge denied relief in an order dated May 16, 2014, and filed May 28, 2014. (App. pp. 623-30). The post-conviction relief judge denied Petitioner's post-trial motions by order filed July 8, 2014.

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective for failing to explore an Alford plea with Petitioner.

Petitioner asserts trial counsel was ineffective for not advising Petitioner he could take advantage of the State's plea offers under North Carolina v. Alford, 400 U.S. 25 (1970). However, trial counsel was not deficient because he had no professional duty to inform Petitioner of the existence of Alford pleas. Furthermore, Petitioner has failed to demonstrate prejudice because the record indicates he would not have accepted an Alford plea if the State offered one.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trail counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

Petitioner has not shown trial counsel was under any duty to advise him of the existence of an Alford plea. When negotiating a plea on behalf of a defendant, counsel must "fully communicate with the client so that the client can make an informed decision regarding any proposals by the State." Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009). Counsel has the following duties regarding plea negotiations:

> "1) notify the client of a plea offer; 2) advise the client of the option to proceed to trial; 3) present the client with the probable outcomes of both the guilty and sentencing phases of each alternative; and 4) permit the client to make the ultimate decision."

Carr v. United States, No. 3:08CV123, 2009 WL 1867672, at *8 (N.D.W. Va. June 29, 2009) (citations omitted). Counsel's duties during plea negotiations do not require informing the client of the existence of an Alford plea as an alternative to the State's offers. Furthermore, the Constitution does not guarantee a criminal defendant the right to

plead guilty under Alford. Rivers v. United States, No. 7:04-CR-85-2-F, 2010 WL 3063215, at *8 (E.D.N.C. Aug. 3, 2010) (citing Santobello v. New York, 404 U.S. 257 (1971); Alford, 400 U.S. at 38). Because Petitioner had no right to an Alford plea, trial counsel was under no constitutionally imposed duty to explore this option with Petitioner or the State.

In fact, no precedent exists to indicate the Sixth Amendment right to effective representation includes a mandate counsel explore the possibility of Alford pleas. See Id., at *8 ("Furthermore, this court is unaware of any authority for the proposition that an attorney must inform or advise a client to consider entering an Alford plea."); Matthews v. Koppel, No. CCB-08-1389, 2009 WL 3488349, at *9 (D. Md. Oct. 21, 2009) ("The court is unaware, and petitioner's counsel does not provide, case precedent holding that counsel must pursue an Alford plea."); Carr, 2009 WL 1867672, at *8 ("The Court has not found a case that holds that an attorney must inform or advise a client to consider entering an Alford plea."). Thus, "[t]here is no constitutional requirement that the meaning of an Alford plea be explained to a criminal defendant." Johnson v. Comm'r of Correction, 652 A.2d 1050, 1058 (Conn. 1995). Because trial counsel was under no constitutional duty to advise Petitioner of the existence of Alford pleas, trial counsel was not deficient.

Trial counsel was also not deficient under the facts of this case because the evidence overwhelmingly indicates Petitioner never indicated he was interested in any resolution to his charges other than a trial and acquittal. Petitioner never indicated to trial counsel he wanted the benefit of the State's offers without the admission of guilt. (App. p. 1323, line 21-p. 1324, line 5; p. 1325, lines 6-11). Thus, trial counsel had no indication Petitioner would have been interested in an Alford plea. Matthews, 2009 WL

3488349, at *9 ("[T]rial counsel testified [...] 'but I don't think Mr. Matthews, Jr. was going to take a plea no matter what.'").

Furthermore, Petitioner has not shown trial counsel failing to explore an Alford plea prejudiced him. See, e.g., Lafler v. Cooper, __U.S. ___, 132 S. Ct. 1376, 1385 (2012) (in the context of ineffective assistance of counsel regarding plea bargains, defendant must show he "would have accepted the plea" to show prejudice). The only evidence supporting Petitioner's allegation is his own testimony that he would have accepted the ten (10) or twelve (12) year offers if he could have maintained his innocence. Although Petitioner testified he would have entered an Alford plea, he also continually indicated he did not believe he should be in jail for a crime he maintains he did not commit. (App. p. 1270, line 20-p. 1271, line 1; p. 1282, lines 6-11). Because Petitioner continues to believe he should not be incarcerated for his crimes, his testimony that he would have accepted an Alford plea to an active sentence rings hollow. Trial counsel also testified Petitioner maintained his innocence and did not want to enter any type of plea. (App. p. 1308, lines 15-24). Accordingly, Petitioner has failed to demonstrate he would have accepted an Alford plea had one been offered. See Matthews, 2009 WL 3488349, at *9 ("Although Matthews testified before the post-conviction court that he would have accepted a plea, his attorney gave contradictory testimony.").

Furthermore, both Petitioner and his family were present in the courtroom when a co-defendant entered an Alford plea. (App. p. 77, lines 22-24; p. 1293, lines 3-23; p. 1301, lines 7-8). Judge Hyman discussed the parameters of an Alford plea, including the absence of an admission of guilt, during the co-defendant's plea. (App. p. 85, line 12-p. 86, line 2). Thus, Petitioner was aware of the existence of Alford pleas at that time, yet

failed to raise the issue with trial counsel. See State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot now complain of an error which his own conduct induced." (citations omitted)).

The Sixth Amendment does not impose upon counsel a duty to advise clients of the possibility of entering an Alford plea. Trial counsel was especially under no such duty where Petitioner never indicated he wanted any resolution to his charges but a trial and acquittal. The post-conviction relief judge properly found trial counsel was not ineffective because he had no duty to seek an Alford plea for petitioner, and because Petitioner's claim he would have accepted an Alford plea is not supported by the record. Accordingly, the post-conviction relief judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

February 19, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable George C. James, Jr., Circuit Court Judge

MICHAEL J. LACKEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **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:

Tommy A. Thomas, Esquire
7588 Woodrow St.
Irmo, South Carolina 29063

This 19th day of February, 2015.

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

February 19, 2015

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

RE: **Michael J. Lackey v. State of South Carolina**
Appellate Case No: 2014-001649

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,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Tommy A. Thomas, Esquire (2 copies)