

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran Jr., Circuit Court Judge

Appellate Case No. 2013-002330

Tony Moore, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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S.C. Supreme Court

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QUESTION PRESENTED

Did the post-conviction relief judge properly find counsel was not ineffective for failing to act on an alleged conflict of interest on the part of the solicitor's office where the victims of Petitioner's crimes were related to and represented by a part-time assistant solicitor?

STATEMENT OF THE CASE

In July 2011, the Chesterfield County Grand Jury indicted Petitioner for first degree burglary, three (3) counts of second degree burglary, and four (4) counts of grand larceny. (App. p. 4, lines 1-9; pp. 90-96).¹ Daniel T. Jordan, Esquire (“counsel”), represented Petitioner. (App. p. 1). On October 5, 2011, Petitioner pled guilty as indicted to each charge with the exception of the first degree burglary indictment, to which the State agreed to allow him to enter a plea to the lesser included offense of second degree burglary. (App. p. 4, lines 2-9). The Honorable Paul M. Burch sentenced Petitioner to concurrent terms of ten (10) years on each of the second degree burglary indictments and five (5) years on all but a single grand larceny indictment. (App. p. 20, lines 7-14; p. 21, lines 6-9). On the remaining grand larceny indictment, Judge Burch sentenced Petitioner to a consecutive term of three (3) years. (App. p. 20, lines 15-16; p. 231, lines 10-13). Judge Burch reserved the right to reduce the sentence if Petitioner cooperated in the prosecution of his co-defendant. (App. p. 21, lines 13-14).

Petitioner filed an application for post-conviction relief on September 31, 2012. (App. pp. 23-29). Matthew S. Swilley, Esquire, represented Petitioner. (App. p. 40). Mr. Swilley amended the application by the filing of a Supplement to the Application for Post-Conviction Relief on February 5, 2013. (App. pp. 34-39). The Honorable R. Ferrell Cothran Jr. (“the post-conviction relief judge”) convened a hearing on the application at the Darlington County Courthouse on July 17, 2013. (App. p. 40). The post-conviction relief judge denied relief in an order filed August 26, 2013. (App. pp. 82-89).

¹ Respondent notes the Appendix is missing copies of the face of each indictment as well as the entirety of the first degree burglary indictment. However, this information is otherwise available from the transcript of the guilty plea (App. p. 6, line 7-p. 9, line 5) and only collaterally relevant to the issues in this appeal.

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding Petitioner failed to meet his burden of proving counsel ineffective for not moving to disqualify the Fourth Circuit Solicitor's office.

Petitioner asserts the post-conviction relief judge erred in finding counsel was not ineffective for failing to move to disqualify the Fourth Circuit Solicitor's Office. However, a part-time assistant solicitor's relation to and representation of a victim does not automatically disqualify an entire solicitor's office from prosecuting a defendant. Disqualification is especially unwarranted where, as here, the potentially conflicted solicitor is not directly involved in the exercise of prosecutorial decisions. Thus, counsel properly determined there were no grounds to move to disqualify the entire solicitor's office. Regardless, Petitioner's failed to produce any evidence he was prejudiced by counsel's failure to move to recuse the Fourth Circuit Solicitor's office.

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 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 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 counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove 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, 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. With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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)).

A. Petitioner failed to show counsel had grounds to disqualify the Fourth Circuit Solicitor's Office.

The post-conviction relief judge properly denied Petitioner's application because Petitioner failed to demonstrate any ground to disqualify the prosecuting solicitor. The prosecuting solicitor was not operating under an actual conflict of interest. An actual conflict of interest only occurs where an attorney owes a duty to a party whose interests are adverse to his client's interests. Fuller v. State, 347 S.C. 630, 634, 557 S.E.2d 664,

665 (2001). A prosecuting solicitor does not represent a traditional client, but rather represents the interests of society as a whole in seeing that justice is vigorously, but fairly, pursued. See State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). Here, the prosecuting solicitor was Mr. Redmond. (App. p. 1). Mr. Foard, the part-time assistant solicitor related to two (2) of Petitioner's victims,² was not involved in the prosecution of the case. (App. p. 4, line 16-p5, line 7). Instead, he represented the victims at hearings related to this case. (App. p. 4, lines 22-23). There is no evidence in the record, other than Petitioner's self-serving speculation, that anyone other than Redmond acted as prosecuting solicitor in this matter. Because Redmond had no personal connection to the victims, he could not have owed any special duty to them beyond his traditional duty to them as victims and as citizens of Chesterfield County. Therefore, Petitioner has failed to demonstrate an actual conflict of interest in this case.

Because Petitioner cannot demonstrate an actual conflict, he attempts to rely on an imputed conflict to the entire Fourth Circuit Solicitor's Office. However, a potential conflict by one member of a solicitor's office does not automatically disqualify the entire office. No South Carolina authority directly addresses the question of whether an entire prosecuting office should be disqualified based on a single prosecutor's relationship to the victim. However, other circuits have addressed this issue and found a rule of automatic disqualifications is inappropriate. See Head v. State, 560 S.E.2d 536, 538 (Ga. Ct. App. 2002) (declining to "presume or find the appearance of such conflict solely because an investigator who works for the district attorney has a close personal relationship with the victim."). Instead, the appropriate inquiry is whether the potentially

² Respondent notes Applicant committed (4) separate burglaries. Foard was related to the Simpsons, who were the victims in only two (2) of the burglaries. (App. p. 11, lines 16-21). Foard did not appear on behalf of the remaining victims. (App. p. 15, lines 8-9).

conflicted prosecutor can be shielded from the prosecution to prevent the appearance of impropriety. See People v. Petrisca, 41 Cal. Rptr. 3d 182, 188 (Cal. Ct. App. 2006) (reversing an order of disqualification where prosecution was assigned to unaffected prosecutor who's discretion was not influenced by conflicted prosecutor); People v. Mayhew, 600 N.W.2d 370, 380 (Mich. Ct. App. 1999) (upholding denial of motion to disqualify where "[n]o evidence existed that [conflicted prosecutor] was involved in any manner with the attorneys who prosecuted this matter"); contra State v. Gonzales, 119 P.3d 151, 163 (N.M. 2005) (upholding disqualification where supervising prosecutor with potential conflict "admitted that no screening was attempted and that she personally participated in the proceeding"). This Court has also adopted the rule that an appearance by a solicitor as a witness in a case does not automatically disqualify the entire solicitor's office. State v. Inman, 395 S.C. 539, 558, 720 S.E.2d 31, 41 (2011)

Here, the record sufficiently demonstrates Foard had no involvement in the actual prosecution of this case. The only evidence in the record relating to Redmond's prosecutorial decisions came at the guilty plea. There, he overwhelmingly indicated he had made all the decisions as it related to Petitioner's case. (App. p. 4, lines 22-25). Applicant attempts to couch Redmond's statement that his "recommendation in this case is a little different[,] (App. p. 4, lines 10-11), as an admission he was acting differently based on his professional relationship with Foard.³ However, such an argument ignores the fact Redmond immediately indicated he was seeking consecutive sentences because

³ Petitioner also emphasizes Redmond's use of the word "we" when arguing for a consecutive sentence. Respondent submits that a solicitor's use of the "royal we" is not evidence the solicitor has so aligned his interests with those of the victim that he has lost sight of his duty to act fairly. Instead, Redmond likely intended the word "we" as a substitute for "the State." See Royal We, Oxford Dictionaries, [http://www.oxforddictionaries.com/us/definition/american_english/royal-\"we\"](http://www.oxforddictionaries.com/us/definition/american_english/royal-\) (last visited March 1, 2015) (defining the "royal we" as "[t]he use of 'we' instead of 'I' by an individual person, as traditionally used by a sovereign").

the statutory penalty for the offenses had recently changed. (App. p. 4, lines 11-13). This argument also ignores counsel's testimony at the evidentiary hearing that consecutive sentences are not uncommon for defendants in Petitioner's situation. (App. p. 75, line 25-p. 76, line 8). Counsel also testified he understood Redmond was the prosecuting solicitor, and Foard merely represented the victims. (App. p. 69, line 3-p. 70, line 17). Finally, part-time *Assistant* Solicitor Foard presumably exercised no supervisory authority over *Deputy* Solicitor Redmond. In sum, Applicant has presented no credible evidence, other than statements taken out of context, that a professional relationship with Foard affected Redmond's prosecutorial discretion.

The post-conviction relief judge properly found no conflict of interest existed in Petitioner's case. Counsel testified he did not believe a conflict existed because Foard was not involved in the prosecution. As outlined above, the record supports this belief. Therefore, counsel would have no grounds to move to disqualify the Fourth Circuit Solicitor's Office. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments"). Accordingly, this Court should defer to counsel's strategic decision not to pursue allegations of a conflict. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))); Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct [...] 'might be considered sound trial strategy.'"). The record does not support Petitioner's allegations of a conflict of interest, and this Court should uphold the findings of the post-conviction relief judge.

B. Petitioner failed to show he was prejudiced by counsel's failure to move to disqualify the Fourth Circuit Solicitor's Office.

The post-conviction relief judge also properly found Petitioner failed to demonstrate any alleged conflict of interest prejudiced Petitioner. Despite Petitioner's hollow protestations otherwise, the record contains no credible evidence Petitioner received disparate treatment because of Foard's representation of the victims. Instead, the record indicates Petitioner received several benefits during his plea bargaining process. Redmond allowed Petitioner to enter a plea to a lesser included offense on the first degree burglary indictment. (App. p. 4, lines 7-9; p. 78, lines 9-11). He also agreed to move for a sentence reduction if Petitioner assisted in the prosecution of his co-defendant. (App. p. 11, lines 8-12). These actions do not appear to be the result of a prosecutor determined to ignore his responsibility to justice. In light of the number and severity of Petitioner's charges, Redmond's actions actually appear to be those of a prosecutor seeking justice tempered with mercy.

Petitioner also cannot show Redmond acted adversely to him in light of the fact sentencing is left to the discretion of the judge, not the solicitor. State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citing State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981)). Counsel advised Petitioner he was entering his plea without negotiations or recommendations.⁴ (App. p. 787, lines 8-16). Although Redmond and the victims argued for consecutive sentencing, counsel asked Judge Burch for concurrent sentencing. (App. p. 14, lines 10-13). Petitioner's argument his sentence was harsher because of Foard's participation implies the sentencing judge failed to exercise his

⁴ Respondent notes the post-conviction relief judge found counsel's testimony to be credible and Petitioner's to be not credible. (App. p. 86). This Court should honor this credibility finding as to the conflicting testimony about counsel's sentencing advice. See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a post-conviction judge's credibility findings).

discretion in sentencing Petitioner. However, Judge Burch was not required to issue consecutive sentences simply because the State and victims requested them. See State v. Green, 337 S.C. 67, 71, 522 S.E.2d 602, 604 (Ct. App. 1999) (court not bound to accept State's recommendation (citing Brooks v. State, 325 S.C. 269, 481 S.E.2d 712 (1997); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982); Lambert v. State, 260 S.C. 617, 198 S.E.2d 118 (1973))).

Similarly, Foard's participation at the sentencing hearing representing the victims could not have prejudiced Judge Burch against Petitioner. The victims were entitled to representation in this matter. See S.C. Code Ann. § 16-3-1545(D) ("The prosecuting agency must inform each victim of his right to legal counsel and of any available civil remedies."). Foard was merely a part-time solicitor (App. p. 70, lines 10-12) and made clear at the hearing that he was present as a representative of the family. (App. p. 11, lines 14-17). Judge Burch had a right to be fully informed of the circumstances surrounding the crimes as well as the impact on the victims. See State v. Cantrell, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967) ("Historically courts in this country have practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). Foard's presence on behalf of the victims was not prejudicial merely because he also acts as a part-time solicitor. To argue otherwise presumes Judge Burch abdicated his role as a sentencing judge.

The post-conviction relief judge properly found Petitioner was not prejudiced by Foard's representation of the victims. Redmond offered Petitioner the opportunity to enter a plea to a lesser included offense without negotiations or recommendations, with the possibility of a downward departure at a later date. Petitioner presented no testimony

he would have insisted on going to trial instead of accepting this plea had counsel acted on the conflict allegation.⁵ Hill, 474 U.S. at 59. His allegations of prejudice rest upon the harshness of his sentence, yet he pled guilty with the understanding Judge Burch would determine the sentence. Petitioner's claims are wholly without merit. Accordingly, this Court should uphold the post-conviction relief judge's finding that Petitioner failed to demonstrate he was prejudiced by counsel's actions.

⁵ Respondent submits this is yet another troubling occurrence of an individual expressing contentment with counsel's representation and the terms of his plea at his plea colloquy (App. p. 9, line 15-p. 10, line 13), only to later change his mind based on information known to him at the time he expressed such contentment. See Kolle v. State, 386 S.C. 578, 597 n.7, 690 S.E.2d 73, 83 n.7 (2010) (Kittredge, J., dissenting).

CONCLUSION

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

Respectfully submitted,

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By: 
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March 2, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2013-002330

Tony Moore, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Joshua L. Thomas, 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:

**Benjamin J. Tripp, 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 2nd day of March, 2015.



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March 2, 2015

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

Re: Tony Moore v. State of South Carolina
Appellate Case No. 2013-002330
Lower Court Case No. 2012-CP-13-0601

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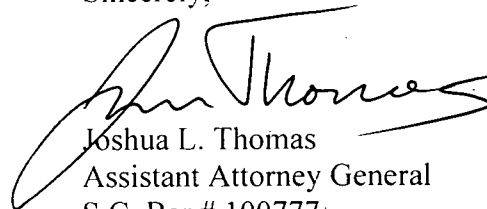
MAR - 2 2015

S.C. Supreme Court

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,



Joshua L. Thomas
Assistant Attorney General
S.C. Bar # 100777

JLT/jacc
Enclosures

cc: Benjamin J. Tripp, Esquire
Trisha Allen, Victim Services