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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Jr., Circuit Court Judge

Appellate Case No.: 2012-212940

Domonique Brown..... Petitioner,

v.

State of South Carolina Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the post-conviction relief court properly found Counsel's decision to withdraw the pre-trial motion to suppress Petitioner's statement and physical evidence without the consent of Petitioner a valid strategic decision and whether Petitioner can prove resulting prejudice from Counsel's decision.

STATEMENT OF THE CASE

Domonique Brown, (Petitioner), was indicted at the February 2007 term of the Laurens County Grand Jury Murder (2007-GS-30-220), Armed Robbery (2007-GS-30-221), and Possession of a Firearm or Knife during the Commission of a Violent Crime (2007-GS-30-222). Bill McGuire, Esquire, E. Charles Grose, Jr., Esquire, and Claude H. Howe, III, represented the Petitioner.¹ On May 18, 2009, Petitioner pled guilty as indicted to the aforementioned charges. The Honorable D. Garrison Hill sentenced Petitioner to a negotiated sentence of thirty (30) years for Murder, thirty (30) years for Armed Robbery, and five (5) years for the weapon charge, sentences running concurrently.

Petitioner filed a timely Notice of Appeal, along with an explanation pursuant to Rule 203, SCACR. By written Order dated July 13, 2009, the South Carolina Court of Appeals dismissed the Petitioner's appeal pursuant to Rule 203, SCACR, for failure to identify an issue which is reviewable on appeal. The Remittitur was issued on August 4, 2009.

Petitioner subsequently filed an application for post-conviction relief (PCR) on July 6, 2010. Respondent made its Return on January 21, 2011. An evidentiary hearing into the matter was convened on June 4, 2012, at the Newberry County Courthouse. Spencer Langley, Esquire represented Petitioner. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On June 28, 2012, the Honorable Thomas A. Russo denied and dismissed Petitioner's application with prejudice by written Order. Petitioner subsequently filed a Petition for Writ of Certiorari on December 9, 2013. Respondent filed its Return to Petition for Writ of Certiorari on January 24, 2014. This Court granted certiorari and ordered briefing on

¹ Bill McGuire was lead counsel. At the PCR hearing, Petitioner waived ineffective assistance of counsel claims against Mr. Grose and Mr. Howe.

September 11, 2014. Petitioner filed its “Brief-in-Chief” which Respondent construes as a Brief of Petitioner on November 12, 2014. This Brief of Respondent follows.

ARGUMENT

The PCR court properly found Counsel's decision to withdraw the pre-trial motion to suppress Petitioner's statement and physical evidence without the consent of Petitioner was a valid strategic decision and properly found Petitioner failed to prove resulting prejudice from Counsel's decision.

Petitioner asserts Counsel was ineffective because he, "against Petitioner's expressly stated demands and goals, withdrew a pivotal motion, leaving Petitioner with no choice but to accept the plea negotiated by [Counsel]." Further, Petitioner claims there existed a "substantial conflict of interest that adversely affected Petitioner's defense" and that Counsel "failed to expose the State's case to the crucible of meaningful adversarial testing" in contradiction of Cuyler v. Sullivan, 446 U.S. 335 (1980) and United States v. Cronic, 466 U.S. 648 (1984).

As to the issue that Counsel had a conflict of interest in defending Petitioner's case, Petitioner cites almost solely to cases, specifically Cuyler, which concern defense counsel representing multiple clients in a case which possibly created a conflict of interest. Clearly, that was not the case in Petitioner's case as he was the only defendant.

As to the issue that Counsel failed to submit the State's case to any meaningful adversarial testing, specifically under Cronic, the record clearly indicates Counsel, who is death-penalty certified and had practiced criminal defense for many years, conducted a thorough review of the evidence, was prepared to try this case on Petitioner's behalf and correctly advised Petitioner, based on the severity the allegations, to accept a guilty plea to the minimum sentence for the charge of murder.

Nevertheless, these first two issues are not preserved for this appeal. "To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be

reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). These first two issues and arguments were not raised in Petitioner's PCR application, were not argued at the PCR hearing, were not ruled upon by the PCR court, and were not raised in the Petition for Writ of Certiorari. Clearly, these issues are not preserved for appeal and not properly before this Court.

Concerning the bare assertion that Counsel was ineffective because he, "against Petitioner's expressly stated demands and goals, with drew a pivotal motion, leaving Petitioner with no choice but to accept the plea negotiated by [Counsel]," the record and case law demonstrate this issue is without merit.

First, the proper standard for reviewing 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 PCR proceeding, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Additionally, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

Moreover, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 547 (Ct. App. 2014), reh'g denied (Apr. 24, 2014), cert. denied (Jan. 15, 2015) (citing Strickland, 466 at 691, 104 S.Ct. 2052). "Counsel must articulate a valid reason for employing a

certain strategy to avoid a finding of ineffectiveness.” Abney at 46, 757 S.E.2d at 546-47 (Counsel’s decision to not request a lesser included offense was a tactical decision to be made by counsel and not the defendant). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Also see South Carolina Ann. Rules of Professional Conduct Rule 1.2 (a) “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.” *and* Rule 1.2 cmt. 2 (“On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.”).

Further, a defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea are conclusive unless the defendant presents reasons why they should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Lastly, great deference is given to the PCR court’s findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 cert. denied, 510 U.S. 1014, 114 S.Ct. 607 (1993).

During the pre-trial phase of Petitioner’s case, Counsel filed motions to suppress Petitioner’s statements to law enforcement and physical evidence found as a result of Petitioner’s

statements. (App. p. 35 line 22- p. 36 line 4; p. 38 lines 18-20). During the PCR hearing, Counsel testified he decided to withdraw these motions in order for the prosecutor to withdraw the notice of death penalty and try Petitioner's case as a non-capital murder case. (App. p. 40 lines 2-5). Counsel admitted he did this without Petitioner's consent. (App. p. 40 lines 11-19). However, Counsel clearly testified he took such action for Petitioner's benefit. "What I did was I used the bargaining leverage that we had with a pretty good motion based on a pretty good investigation to have the prosecutor withdraw the death notice." (App. p. 41 lines 3-6). Counsel relayed this decision to Petitioner: "I told [Petitioner] I was going to withdraw [the motion to suppress]; that I had discussions with the prosecutor; that in exchange for withdrawing the motion, the prosecutor was going to rescind the notice of his intent to seek the death penalty; and that we could proceed to trial as a noncapital-murder trial." (App. p. 42 lines 1-6).

On cross-examination, Counsel admitted that there was sufficient evidence to find Petitioner guilty of murder, and there were aggravating circumstances which could warrant the death penalty. (App. p. 47 line 19- p. 48 line 4). Counsel also stated that even if the trial judge would have ruled in Petitioner's favor concerning the motions to suppress Petitioner's statements and physical evidence, the State still had sufficient evidence to convict Petitioner of Victim's murder. (App. p. 49 lines 1-6). Further, Counsel stated, "I mean, there was—there was real exposure there. So withdrawing the motion to get the death penalty off the table, I think, was a very reasonable strategic move to make. And it was obviously very successful." (App. p. 49 lines 6-9).

Counsel then articulated: "And the prosecutor, still recognizing that he had some problems with this case was willing to offer the minimum, a negotiated 30-year sentence where Mr. Brown would know, as soon as he walked up in front of the judge and pled guilty, that he's

not be receiving more than 30 years.” (App. p. 49 lines 12-16). Further, Counsel testified he did not coerce Petitioner to plead guilty, and that this was Petitioner’s decision. (App. p. 50 lines 15-22).

Petitioner testified he admitted to the plea judge that he pled guilty because he was guilty. (App. p. 61 line 20- p. 62 line 2). He also stated no one threatened him or coerced him to plead guilty. (App. p. 62 lines 3-6). Additionally, Petitioner stated he chose to plead guilty on his own free will. (App. p. 62 lines 7-9). Petitioner testified he did not tell the plea judge that he wanted a trial. (App. p. 64 lines 6-8). Petitioner lastly stated he understood all of the plea court’s questions, agreed with the facts of the case, and, most importantly, agreed with the negotiations in the case. (App. p. 64 lines 12-17).

The PCR court correctly held Counsel was not ineffective for withdrawing the motions to suppress Petitioner’s statements and physical evidence resulting from those statements. The PCR court also correctly held Counsel articulated valid strategic reasons for negotiating with the prosecutor to remove the death penalty as a potential outcome of Petitioner’s trial, albeit without Petitioner’s consent. Counsel negotiated with the State to withdraw the notice of intent to seek the death penalty in exchange for Petitioner withdrawing his motions to suppress. Counsel also negotiated Petitioner’s sentence down to the minimum on a murder charge: 30 years. This strategic decision limited Petitioner’s exposure; thus, giving Petitioner the knowledge of his exact sentence. Petitioner testified, under oath, that he understood and agreed with the negotiations in this case. Had Petitioner not agreed with these negotiations, he had ample opportunity to enlighten the plea judge, but chose not to. Further, Petitioner presented no evidence at the PCR hearing why he should be allowed to depart from the truth of his statements during the guilty plea. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975).

Moreover, Counsel was completely within his discretion to negotiate with the State, even without Petitioner's consent, to have the death penalty removed as a possibility as this decision was clearly in Petitioner's best interest. While Petitioner argues that Rule 1.2 of the South Carolina Rules of Professional Conduct stands for the principle that the client is in ultimate control of his criminal case, and that the lawyer should abide by the client's wishes, he fails to acknowledge that part (a) and comment 2 clearly state that Counsel may take such action as he is impliedly authorized to take. Clients also normally defer to the knowledge and skill of the lawyer with respect to legal and tactical matters. Here, Counsel made a very informed and strategic decision which was in Petitioner's best interest. Counsel acted well within his professional discretion and took an action which ultimately benefitted Petitioner. Therefore, this decision cannot be deemed ineffective assistance of counsel. Lastly, Petitioner can prove no resulting prejudice because had Counsel not made this choice, Petitioner would have been facing the death penalty.

Accordingly, sufficient "evidence of probative value" exists to sustain the PCR judge's findings that Counsel rendered effective assistance of counsel in this case, and Petitioner failed to prove any resulting prejudice from Counsel's alleged deficiencies. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION


For all the foregoing reasons stated above, Respondent respectfully requests the judgment of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
S.C. Bar # 78871

By:



ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

March 9, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

The Honorable Thomas A. Russo, Circuit Court Judge

DOMONIQUE BROWN, 336455

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

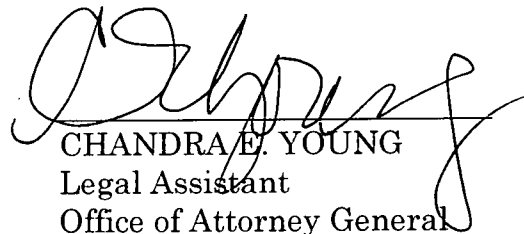
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Brief of Respondent on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Spencer Langley, Esquire
1 Augusta St., Ste 301-D
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.

This 9th day of March, 2015.


CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

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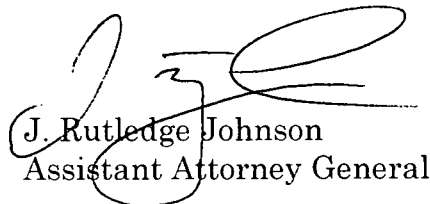
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Domonique Brown v. State of South Carolina
2012-212940**

Dear Mr. Shearouse:

I am enclosing the original and fourteen (14) copies of the Brief of Respondent in the above case.

Sincerely,


J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Spencer Langley, Esquire
Trisha Allen, Victim Services