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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001364

Kenneth Henry Sherman, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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QUESTIONS PRESENTED

1. Whether the PCR court correctly granted Petitioner an appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?

2. Whether the PCR judge erred in concluding Petitioner did not establish ineffective assistance of counsel by ruling that calling Petitioner to testify would not have changed the trial court's denial of his motion to suppress drug evidence?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the January 2012 term of General Sessions for possession with intent to distribute (PWID) cocaine base (2011-GS-23-5695) and trafficking heroin (2011-GS-23-5696). (App.pp.96-97; pp.99-100). John K. "Jake" Erwin, Jr., Esquire represented Petitioner.

On February 13, 2012, Petitioner pled guilty to PWID cocaine base, second offense and trafficking heroin (4 or more grams).[1] The Honorable Edward W. Miller sentenced Petitioner to concurrent sentences of 16 years on each charge. (App.p.98; p.101; p.35).

A pro se notice of appeal was filed at the South Carolina Court of Appeals. In an order filed October 30, 2012, the Court of Appeals dismissed the appeal based on Petitioner's failure to serve the notice of appeal upon opposing counsel. The remittitur was issued December 13, 2012.

Petitioner filed an application for post-conviction relief (PCR) on January 15, 2013 (2013-CP-23-0242). (App.pp.37-43). A hearing was convened at the Greenville County Courthouse on April 23, 2014. (App.pp.50-86). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. In an order filed May 20, 2014, the Honorable D. Garrison Hill (1) granted a review of direct appeal issues pursuant to White v. State and (2) denied all other issues. (App.pp.88-95).

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[1] A suppression hearing was held prior to the guilty plea hearing. (App.pp.3-27).

STANDARD OF REVIEW

The proper standard for review of 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 post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. Respondent does not contest the PCR judge's decision to grant an appeal of Petitioner's direct appeal issues from his guilty plea hearing.

At the PCR hearing, Petitioner stated he asked plea counsel to file an appeal on the way back to his holding cell but that he ended up filing the notice of appeal himself. (App.p.64). Petitioner stated plea counsel "just walked off" when he asked for an appeal. (App.p.75).

Plea counsel testified he files appeals after guilty pleas if the defendant asks him to do so. (App.p.82). Plea counsel testified either Petitioner did not ask him to do so or he "didn't get the message." (App.pp.82-83). Plea counsel testified he did not believe Petitioner asked him to file an appeal because he did not do so. (App.p.83).

The PCR judge found Petitioner "did not knowingly and voluntarily waive his right to a direct appeal." (App.p.94). Respondent submits there is no probative evidence to support the PCR judge's finding on this issue. However, Respondent does note Petitioner filed a pro se notice of appeal. Out of an abundance of caution, Respondent does not contest this issue.

II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective because Petitioner did not testify at the suppression hearing.

A.

A suppression hearing was held in this case. Officer James Godfrey testified a call went out about a speeding green Dodge Stratus. (App.pp.8-9). Officer Godfrey testified he stopped this vehicle and Petitioner was a passenger in the back seat. (App.p.9). Officer Godfrey testified he asked the driver and two occupants for identification and that Petitioner did not have identification but gave him the information. (App.pp.9-10). Officer Godfrey testified he learned Petitioner had an outstanding warrant for assault and battery and called for backup.[2] (App.pp.10-11). Officer Godfrey testified he wrote a warning ticket for the driver and then advised Petitioner of the active arrant (and that they were attempting to locate it). (App.pp.11-12). Officer Godfrey testified Petitioner exited the vehicle and ran across several lanes of traffic. (App.pp.13-15). Officer Godfrey testified he was informed during the pursuit that the warrant had been located. (App.p.15). Officer Godfrey testified Officer Brashears tased Petitioner and he also tased Petitioner when he refused to stop. (App.p.16). Officer Godfrey testified "multiple things of illegal narcotics" were removed from Petitioner's pants. (App.p.17).

Plea counsel argued this case began as a traffic stop and turned "into a fishing expedition for outstanding warrants" and that the stop was "a pretext for an investigation that does not match up with the reason for the original stop." (App.pp.21-23). Plea counsel argued there was no reasonable suspicion to investigate the vehicle's occupants.

[2] Officer Godfrey testified Officer Brashears arrived within two or three minutes. (App.p.11).

(App.p.25). Plea counsel argued "he wrote the ticket and then they asked them to stay and wait. They were going to investigate into this warrant and find out what happened. The ticket was written after the Fourth Amendment violation took place." (App.p.25). The plea judge concluded plea counsel was "fighting hard for [Petitioner] but I don't find any violation here." (App.p.26).

B.

At the PCR hearing, Petitioner stated the suppression hearing was held to argue the officer went beyond the scope of the traffic stop. (App.p.58). Petitioner stated he wanted to testify at the suppression hearing but was advised not to do so. (App.p.61). Petitioner stated he was a passenger in the stopped vehicle, refused to give his identification to the officer, and ran from the scene when the officer stated he would call for backup. (App.pp.58-60). Petitioner stated he driver had received a warning ticket for speeding but did not let them leave. (App.p.60). Petitioner stated that he would have testified at the suppression hearing that the officer "was searching the driver illegally after he wrote a warning ticket" and that they should have been released. (App.p.62).

Plea counsel testified he and Petitioner reviewed the discovery materials and Petitioner's version of events and discussed that drugs were found on Petitioner's person when he was arrested. (App.pp.77-78). Plea counsel testified he decided there would be a suppression hearing "pretty much from the beginning." (App.p.78). Plea counsel testified he was prepared to argue the motion that day. (App.p.79). Plea counsel testified he and Petitioner had discussed whether Petitioner would testify but that he decided not to call him as a witness. (App.p.79). Plea counsel explained:

> I just didn't – we had talked about his story. I felt like it didn't really add anything. The legal arguments that I was going to make were going to be supported by the officer's testimony. And, you know, I felt like it wasn't going to help and the sort of – the things that [Petitioner] wanted to testify to were the legal arguments that I was going to make. And I felt like I could do that more effectively.

(App.pp.79-80).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving plea counsel did not properly represent him at the hearing on the motion to suppress." (App.p.91). The PCR judge found plea counsel's testimony that he and Petitioner discussed his right to testify was credible. (App.p.92). The PCR judge found plea counsel made a strategic decision that Petitioner would not testify and that Petitioner's testimony at the suppression hearing would not have changed the outcome of that hearing. (App.pp.92-93).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985).

D.

Petitioner failed to meet his burden of proving plea counsel's performance was deficient. Initially, it should be noted the PCR judge found credible plea counsel's testimony that he had discussed with Petitioner his right to testify at the suppression hearing. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses). Regardless, the PCR judge was correct in finding Petitioner could not demonstrate any deficiency in plea counsel's decision not to call him as a witness at the suppression hearing because counsel provided a strategic reason for this decision. At the suppression hearing, plea counsel argued: the traffic stop was "a fishing expedition," there was no reasonable suspicion to obtain identification from the vehicle's occupants, and the warning ticket for the driver was written after the Fourth Amendment violation had occurred. These were clearly legal, not factual, arguments. Plea counsel testified at the PCR hearing that he did not need Petitioner's testimony at the suppression hearing because he was – in fact – making legal arguments that were supported by the officer's testimony. Plea counsel testified Petitioner's testimony would not have added anything to his argument. This was an objectively reasonable strategic decision. See Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) ("Counsel's strategy will be reviewed under an objective standard of reasonableness.") (citation omitted). As such, plea counsel articulated a valid reason that he did not have Petitioner testify as a witness at the suppression hearing. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain

strategy, such conduct should not be deemed ineffective assistance of counsel). The PCR judge was correct in determining Petitioner failed to meet his burden of proving plea counsel was deficient. See Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics.").

E.

Petitioner failed to meet his burden of proving his case was prejudiced because he did not testify at the suppression hearing. Petitioner cannot demonstrate prejudice because he cannot demonstrate the outcome of the suppression hearing would have been different if he had testified. At the PCR hearing, Petitioner recounted the facts surrounding the vehicle stop and subsequent action. These facts were brought out during the suppression hearing. Petitioner stated he would have testified at the suppression hearing that the officer "was searching the driver illegally after he wrote a warning ticket" and that they should have been released. This argument was made by plea counsel at the suppression hearing. It is clear that plea counsel was correct in his statement that Petitioner's testimony would not have added anything to his argument at the suppression hearing. As Petitioner failed to prove his testimony at the suppression hearing would have resulted in a different outcome, he failed to meet his burden of proving prejudice. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625 (holding prejudice must be such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

F.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that

plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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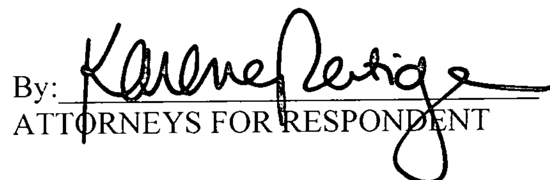


By: ______________________
ATTORNEYS FOR RESPONDENT

March 17, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001364

Kenneth Henry Sherman,..Petitioner,

v.

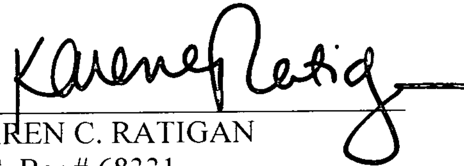
State of South Carolina,..Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, 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 17th day of March, 2015.



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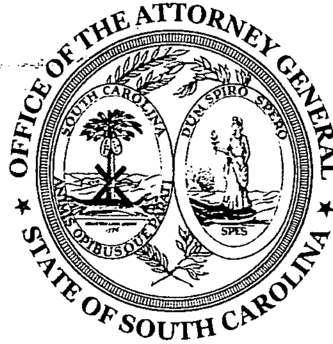

ALAN WILSON
ATTORNEY GENERAL

March 17, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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Columbia, South Carolina 29211

RECEIVED
MAR 17 2015
S.C. Supreme Court

Re: **Kenneth H. Sherman v. State of South Carolina**
Appellate Case No: 2014-001364
Lower Court Case No: 2013-CP-23-0242

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,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc
Enclosures

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