

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2014-000474

RECEIVED

MAR 18 2015

S.C. Supreme Court

Noel Michael Lyles, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....4

ARGUMENT

 Petitioner failed to meet his burden of proof of establishing that he
 suffered prejudice as a result of Counsel’s deficiency or lack of
 time to prepare for trial, when there was overwhelming evidence of
 Petitioner’s guilt.....4

CONCLUSION.....10

QUESTION PRESENTED

Did Petitioner fail to meet his burden of proof of establishing that he suffered prejudice as a result of Counsel's deficiency or lack of time to prepare for trial, when there was overwhelming evidence of Petitioner's guilt?

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 at the May 2009 term of the Spartanburg County Grand Jury for armed robbery and kidnapping (09-GS-42-2199, count 1 and 2), assault and battery of a high and aggravated nature (09-GS-42-2200) and grand larceny (09-GS-42-2201). He was represented by J. Roger Poole, Esquire and Kathleen J. Hodges, Esquire at trial. On November 9, 2009, the Petitioner proceeded to trial after which a jury found him guilty of armed robbery, assault and battery of a high and aggravated nature, and grand larceny. The jury returned a verdict of not guilty on the kidnapping charge. He was sentenced by the Honorable J. Derham Cole to confinement for life without parole for armed robbery, a concurrent ten (10) years for assault and battery of a high and aggravated nature, and a consecutive five (5) years for grand larceny.

A timely Notice of Appeal and Anders brief were filed on Petitioner's behalf. He was represented by Wanda H. Carter, Esquire on appeal. The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Lyles, Op. No. 2012-UP-190 (filed March 14, 2012). The Remittitur was submitted on March 30, 2012.

This matter comes before this court by way of an application for post-conviction relief filed on May 8, 2012. The Respondent filed its Return on April 17, 2013. An evidentiary hearing into the matter was convened on June 26, 2013, at the Spartanburg County Courthouse. The Petitioner was present and represented by Paul C. MacPhail, Esquire. Suzanne H. White, Esquire, represented the Respondent, State of South Carolina.

At the hearing, the Petitioner testified on his own behalf. Kathleen Hodges, Esquire, and J. Roger Poole, Esquire, both testified on Respondent's behalf. This Court also had before it a

copy of the records of the Spartanburg County Clerk of Court regarding the subject's convictions, Petitioner's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, the trial transcript, Petitioner's exhibits and memoranda provided by both parties.

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 he suffered prejudice as a result of Counsel’s deficiency or lack of time to prepare for trial, when there was overwhelming evidence of Petitioner’s guilt.**

On November 13, 2009, following a trial by jury, Petitioner was found guilty of armed robbery, assault and battery of a high and aggravated nature, and grand larceny over \$5,000. (App. p. 331-2). Petitioner was acquitted of the charge of kidnapping. (App. p. 331). At the PCR hearing, Petitioner alleged he was prejudiced because Poole had not properly prepared or investigated the case and Hodges did not have enough time to prepare to represent Petitioner at trial. (App. p. 108; p. 131, lines 2-10).

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.

Both the Petitioner and Poole testified that Poole first met with the Petitioner the Friday before Petitioner's trial was set to begin the next Monday. (App. p. 366; App. p. 410). Petitioner had been arrested on the charges in March 2009 and the trial was to begin on November 9, 2009. Petitioner testified that he was not aware that he had an attorney until he received the notice that the State intended to seek life without parole in October and the trial was set for November. (App. p. 365-6). Petitioner testified that at the beginning of trial, Petitioner expressed concern over his lack of meetings with Poole and wanted another attorney to represent him. (App. p. 367, lines 9-15). Petitioner testified that Poole never made a motion for a continuance to have more time to prepare, never interviewed the witnesses from the car wash, never talked with the Solicitor's office about a possible plea bargain, and never subpoenaed the victim's medical records to either impeach the victim's alleged timeline nor to verify her medical condition. (App. p. 370, lines 7-15; p. 372, lines 6-8; p. 373, lines 13-16; p. 374, lines 1-6).

The Petitioner testified that although he tried desperately to relieve Poole, the trial court denied the Petitioner's request to relieve Poole and proceed *pro se*. (App. p. 375, lines 3-12; p. 376, lines 16-25). However, because of the apparent conflict between the Petitioner and Mr. Poole, the trial court recessed from Monday, November 9th, until Thursday, November 12th. During that time, the court also appointed Kathleen Hodges, at Petitioner's request, to assist in representing Petitioner at trial. (p. 377, lines 1-13). Petitioner acknowledged that he specifically requested Hodges during his discussions with the trial judge. (App. p. 17, lines 13-17; p. 399, lines 5-8).

On November 12th, Hodges indicated to the court that she was prepared to proceed with the trial, fully understood the legal issues in the case and the issues Petitioner had, and the only thing that more time would offer is the chance to be more concrete with the facts of the case. (App. p. 27, lines 6-15; p. 28-29). However, Mr. Poole was still present to assist Mrs. Hodges. (App. p. 28, lines 13-18).

At the PCR hearing, Poole testified that he had previously handled cases as serious as death penalty cases during a period of thirty-three years. (App. p. 410-411). Poole testified that although he did not meet with the Petitioner until the Friday before trial, he had prepared for trial. This preparation included reviewing all discovery materials, including the lengthy witness statements. Poole testified that he met with the Petitioner, reviewed the elements of each charge and discussed Petitioner's understanding of what each witness would offer. (App. p. 411, lines 17-25; p. 412, lines 1-10). Poole acknowledged that he did not conduct an independent investigation, did not visit the scene of the crime, and did not interview any witnesses. (App. p. 419, lines 12-25; p. 420, line 1).

Hodges also testified that she met with the Petitioner several times prior to trial and discussed concerns regarding identifications and publicity from a separate incident. (App. p. 421, lines 18-22; p. 422-424; p. 435, lines 14-25; p. 436, lines 1-2). Hodges also testified that she was not informed of any potential witnesses by Petitioner, but instead subpoenaed a witness on her own following review of the case file. (App. p. 426, lines 2-16). Hodges also testified that Poole was able to assist her during cross-examination by pointing out various inconsistencies in witness statements and testimony. (App. p. 432, lines 15-25). Hodges testified that she was prepared for trial and only believed that she could have possibly done additional research had she had more time to prepare. (App. p. 425, lines 16-24).

In this case, the Petitioner was accused of stealing a truck, assaulting a woman and stealing personal items while driving the stolen truck, and then being arrested in possession of the stolen truck and items. (App. p. 127, lines 18-21; p. 128, lines 11-25; p.129, lines 1-20; p. 130, lines 1-8). Petitioner was identified through a photo line-up by the two victims as the person who robbed each of them. (App. p. 162-3; p. 181-3). Additionally, the Petitioner was arrested driving the truck stolen from one of the victims, with items in the truck that belonged to the second victim. (App. p. 220-221). The two witnesses who saw Petitioner robbing and assaulting the second victim also identified Petitioner. (App. p. 206; 213). The second victim was able to recall the license tag number of the vehicle that was being driven by the man who attacked her. (App. p. 204, lines 7-14). Finally, the passenger in the stolen truck identified the Petitioner as the person in the truck who attempted to sell several rings to him. (App. p. 237-239). The jury found the Petitioner guilty of armed robbery, assault and battery of a high and aggravated nature, and grand larceny over \$5,000. (App. p. 331). The jury acquitted Petitioner

of the kidnapping charge. (App. p. 331, lines 17-18). The deliberations took only approximately two hours. (App. p. 329, lines 15-20; p. 330, lines 3-11).

To establish counsel was inadequately prepared, a Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (Petitioner is not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Furthermore, the "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, a Petitioner challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

After hearing the testimony and reviewing both parties' memoranda, the PCR court found that although there was deficient conduct on behalf of Poole, there was no evidence of prejudice to the Petitioner. The PCR court correctly found that Petitioner failed to establish that had his attorneys taken different actions or had more time to prepare, the outcome of his trial would have been any different. (App. p. 481). The court found that Petitioner offered no witnesses that should have been called, defenses that could have been developed, or information that would have assisted at trial that either Counsel failed to obtain because of the lack of preparation time or investigation. (App. p. 481). All witnesses and their statements were known to his counsel prior to trial based upon the discovery responses from the State. The court found that the Petitioner failed to demonstrate how the information in the documents introduced as exhibits at

the hearing would have affected the outcome of the case. (App. p. 481). Additionally, the court found that based upon the overwhelming evidence of guilt, there was no prejudice to Petitioner as a result of any deficient representation. (App. p. 482).

Petitioner offered no witnesses or specific testimony to show how additional preparation would have resulted in a different outcome or that he would have had a defense if he had had additional time to prepare for trial. Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997). See Skeen v. State, 325S.C. 210, 481 S.E.2d 129 (1997)(where PCR Petitioner fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's incomplete preparation); Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)(Court will not speculate concerning what might have occurred if counsel had conducted further investigation).

"The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application." Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This matter is distinguishable from Lounds v. State, 380 S.C. 454, 463, 670 S.E.2d 646, 651 (2008) – Counsel testified at Lounds' hearing that he only learned of defense witnesses that could have testified at trial, which had been never interviewed or subpoenaed. The court in Lounds found that, based upon the witness testimony, there is a reasonable likelihood the result of the trial would have been different on the kidnapping count. Id. In this matter, Petitioner failed to demonstrate that there were any witnesses or defenses that could have been presented and would have affected the outcome of his trial.

"[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Smith v. State, 386 S.C. 562, 566, 689

S.E.2d 629, 631 (2010) (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

Therefore, the lower court's decision should be affirmed.

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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SUZANNE H. WHITE
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By: 
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March 18, 2015

STATE OF SOUTH CAROLINA
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Certiorari to Spartanburg County
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The Honorable R. Lawton McIntosh, Circuit Court Judge
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NOEL MICHAEL LYLES,

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:

LaNelle C. DuRant, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 18th day of March, 2015


ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

March 18, 2015

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MAR 18 2015

S.C. Supreme Court

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

RE: Noel Michael Lyles v. State of South Carolina
Lower Court Case No: 2012-CP-42-1955
Appellate Case No. 2014-000474

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: LaNelle C. DuRant, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)