

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2011-194528

Jorge A. Rodriguez, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Attorney General

SUZANNE H. WHITE
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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective in ensuring Petitioner had proper notice regarding the date of his upcoming trial, when the Petitioner failed to demonstrate any deficient performance on behalf of Counsel?

STATEMENT OF THE CASE

The Applicant is currently in the custody of the South Carolina Department of Corrections pursuant to orders by the Spartanburg Clerk of Court. The Applicant was indicted at the February 2002 term of the Court of General Sessions for Spartanburg County for Trafficking in Cocaine over 200 grams (02-GS-42-0715, count 1), Possession of a Weapon During the Commission of a Violent Crime (02-GS-42-0715, count 2), and Pointing and Presenting (02-GS-42-0715, count 3). He was represented by John C. Gutierrez, Esquire. On December 9-11, 2003, Applicant was tried in his absence and found guilty of the indicted offenses. The sentences were sealed at that time. On April 2, 2004, the Petitioner was brought before the trial court and The Honorable J. Derham Cole pronounced the sentences twenty-five (25) years for Trafficking and five (5) years each for Possession of a Weapon and Pointing and Presenting, concurrent. Judge Cole also sentenced Applicant to serve the five-year sentence consecutive to the twenty-five year sentence. The Applicant did not appeal his conviction or sentence.

Petitioner filed an Application for Post-Conviction Relief on February 17, 2005. The Respondent made its Return on August 15, 2005. An evidentiary hearing was held before the Honorable Doyet A. Early III on September 18, 2006, at which time the Applicant was present and represented by David C. Alford, Esquire. Paula Magargle, Esquire, of the South Carolina Attorney General's Office represented the Respondent. Although the matter was heard by Judge Early, because of a mistake, the Honorable Roger L. Couch signed an Order of Dismissal on August 6, 2008.

Petitioner then filed a second Application for Post-Conviction Relief on January 25, 2010. The Respondent made its Return and Dismiss all claims except for his claim for a belated PCR appeal (Austin claim) on June 23, 2010. An evidentiary hearing was held before the

Honorable Roger L. Couch on September 14, 2010, at which time the Applicant was present and represented by M. Terry Haselden, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented the Respondent. The Honorable Roger L. Couch signed an Order granting Petitioner's Austin claim and denying all other claims on November 16, 2010.

A timely Notice of Appeal was filed on Petitioner's behalf. However, because of the early scrivener's error, Respondent filed a Motion to Remand to correct the error, remove Judge Couch's name from the first Order of Dismissal and have the appropriate judge, review and sign the Order. Thereafter, this Court vacated the first Order of Dismissal and the Order granting the Petitioner's Austin claim and granted an appeal from the Order of Dismissal signed by Judge Early. A Petition for Writ of Certiorari was submitted and 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).

ARGUMENTS

- I. The PCR Court properly held that Counsel was not ineffective in ensuring Petitioner had proper notice regarding the date of his upcoming trial, when the Petitioner failed to demonstrate any deficient performance on behalf of Counsel.**

In 2003, Petitioner and his cousin, who was also his co-defendant, were tried jointly for charges that included trafficking in cocaine, possession of a weapon during the commission of a violent crime, and pointing and presenting a firearm. (App. Vol. II, p. 539). Neither Petitioner nor his cousin appeared for trial and were ultimately tried in their absences. The Petitioner now argues that defense counsel was ineffective for failing to provide notice to the Petitioner as to his trial date and for failing to ensure that the trial court made the required findings on the record as to the Petitioner’s absence from trial.

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). 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.

Petitioner testified at the PCR hearing that he was not informed of the trial date by his trial attorney. (App. Vol. I, p. 487). Petitioner testified that at the time of trial he lived at 246 Cooper Bridge Road in Woodruff, SC, and was in Woodruff during the week of December 8, 2003. (App. Vol. I, p. 488, l. 5; p. 489, l. 19). However, he testified that not only did he never receive any mail from his attorney at that address, but he also never received any mail at that address. (App. Vol. I, p. 488). Petitioner testified that the house was his aunt's house, but that he and other cousins lived at the home. (App. Vol. I, p. 489). Petitioner acknowledged speaking with Counsel about a trial, but claimed that Counsel never told him the actual date. (App. Vol. I, p. 488, l. 5).

Counsel testified that after receiving a letter from the Solicitor's office regarding scheduling the trial for the week of December 8, 2003, Counsel sent a letter to Petitioner at the

246 Cooper Bridge Rd. address in Woodruff, SC. The letter, dated November 26, 2003, indicated that the trial had been scheduled for December 8, 2003, at 9:00am, and requested that Petitioner contact him. (Supp. App. p. 2). Counsel testified that the letter was returned to him with the note that it should be returned to sender because the resident had left and provided no forwarding address. (Supp. App. p. 3). However, Counsel testified that Petitioner had informed him that he lived at the 246 Cooper Bridge Rd. address, although he had previously lived in North Carolina. (App. Vol. I, p. 478-9). Counsel testified that most of the communication he had with Petitioner was through phone calls or visits at Counsel's office. (App. Vol. I, p. 479). In fact, Counsel testified that Petitioner's first appearance was in January and Counsel recalled that he informed Petitioner of the times that Petitioner needed to be present at the courthouse beginning in September because there were ongoing plea negotiations. (App. Vol. I. p. 482). Counsel testified that because the plea offer was not accepted, he spoke with Petitioner about the fact that a trial would be scheduled. (App. Vol. I. p. 483). The record also reflects that Counsel informed the trial court that he had discussed with Petitioner the fact that his trial would be held at that time in December and that Petitioner would need to be present or he would be tried in his absence. (App. Vol. I. p. 12-13). Counsel also informed the trial court of the returned letter, but went on to say that he spoke with Petitioner over the phone and informed Petitioner that he needed to be at the courthouse on Monday, December 8th. (App. Vol. I. p. 13).

Counsel also testified that Petitioner's cousin, Maria Leatherwood, whose husband was testifying at the trial, as well as other members of Petitioner's family and friends of Petitioner were present for the trial. (App. Vol. I. p. 483). Maria Leatherwood was the sister of Petitioner's co-defendant and was married to one of the cooperating witnesses for trial. She testified that she was present for the trial. (App. Vol. I. p. 495).

Jessica Thill, the prosecutor who handled the case, also testified at the hearing that Petitioner was originally issued a bond on November 29, 2001, which included information that informed Petitioner of his right to be present at trial and the fact that should he fail to attend the trial, it would still proceed in his absence. (App. Vol. I, p. 497). At the time Petitioner bonded out, he listed the address of 246 Cooper Bridge Rd., Woodruff, SC, as his address. Petitioner was also made aware that a condition of his bond was to notify the State in writing if he ever changed his address. (App. Vol. I, p. 497). Thill testified that notice of the trial date was sent directly to Counsel, sent to Petitioner's bail bondsman and the docket was published on the Spartanburg County website. (App. Vol. I, p. 499). Furthermore, Thill testified that when neither Petitioner nor his cousin appeared for trial on December 8, 2003, the trial court continued the case until the next day to allow Petitioner and his cousin the chance to appear for trial. (App. Vol. I, p. 499).

The PCR Court noted on the record that Petitioner's bond sheet instructed Petitioner to appear at the January 2, 2003, term of Court of General Sessions, and if his case was not disposed of at that time, Petitioner was to appear and remain through each succeeding term of court until his case was disposed of unless ordered otherwise by the Court. (App. Vol. I, p. 481-482). The Court also noted that the bond sheet appeared to be signed by Jorge Rodriguez, 224 Cooper Bridge Rd. Woodruff, and also by his South Carolina bail bondsman. (App. Vol. I, p. 482). After reviewing the record and presented testimony, the Court ruled on the record that the testimony of Petitioner was not credible, but the testimony of both Counsel and Ms. Thill was credible. (App. Vol. II, p. 504). The Court found that based upon the testimony and evidence presented, the Petitioner failed to carry his burden of establishing either prong of the Strickland test. (App. Vol. II, p. 509).

Respondent submits that there was clear evidence of probative value in the record to support the PCR judge's findings. Respondent submits that Petitioner has failed to meet his burden of proof as to this argument.

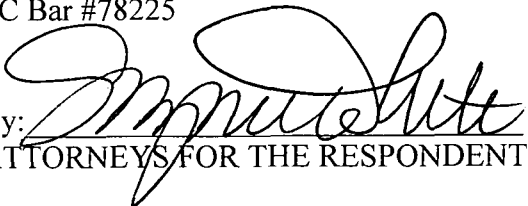
CONCLUSION

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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Attorney General

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By: 
ATTORNEYS FOR THE RESPONDENT

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August 15, 2012.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Case No.: 2005-CP-42-0449
Appellate Case No.: 2011-194528

JORGE A. RODRIGUEZ,

Petitioner,

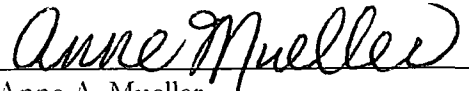
v.

STATE OF SOUTH CAROLINA,

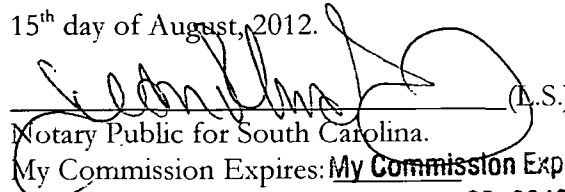
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Wanda H. Carter, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 15th day of August, 2012.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
15th day of August, 2012.



(L.S.)
Notary Public for South Carolina.

My Commission Expires: ~~My Commission Expires~~
January 30, 2013