

THE STATE OF SOUTH CAROLINA
In the Supreme Court

POST CONVICTION RELIEF APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

James R. Barber III, Circuit Court Judge

Appellate Number 2014-002709

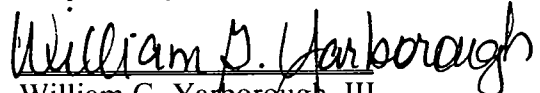
Derrick Antron Young, Appellant,

v.

The State of South Carolina, Respondent.

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,



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S.C. Supreme Court

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QUESTIONS PRESENTED

- I. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in the underlying proceedings by finding that the cumulative effect of trial counsel's errors in failing to provide full and fair representation of petitioner's rights under counsel's Constitutional obligation and failing to investigate the petitioner's case fully by questioning and/or subpoenaing necessary witnesses?

- II. Did the circuit court lack jurisdiction over the Defendant because he plead guilty in Greenville County, yet the alleged offenses took place in Anderson County?

STATEMENT OF CASE

On October 9, 2012, Petitioner pled guilty and was sentenced to concurrent terms of ten years for resisting arrest with assault, thirteen years for possession with intent to distribute cocaine base (second offense), thirteen years for trafficking cocaine, thirteen years for trafficking cocaine base (first offense), and three years for failure to stop for a blue light. Petitioner did not file an appeal. At absolutely no time during the plea did the Appellate waive jurisdiction of the Anderson County case to have it proceed in Greenville County.

Petitioner then brought this action seeking post-conviction relief on August 21, 2013. He alleged. . . .

Trial counsel's performance fell below an objective standard of reasonableness and caused prejudice in the outcome of Petitioner's decision to plead guilty and in the ultimate result of his plea hearing. Petitioner was arrested on October 1, 2012 on the above charges that occurred from 2010-11. Petitioner met with Mr. Posey on October 4, 2012 at which time Mr. Posey informed Petitioner he had reached an agreement with the trial judge, Mrs. Verdin, whereby Petitioner would plead guilty to all charges and receive a concurrent sentence of seven years. Trial counsel testified that, to his knowledge, he received full discovery from the State but was unsure if he provided Petitioner with all evidence. Mr. Posey testified that he reviewed the discovery provided but did not independently investigate by questioning the police officers involved or other witnesses involved in his traffic stops and arrests. Based on the State's discovery and no independent investigation of his own, Mr. Posey advised Petitioner that he did not believe he had any Fourth Amendment arguments that would warrant suppression of evidence. Petitioner testified that Mr. Posey relayed to him that he had an agreement with Judge Verdin for a concurrent sentence of seven years. Petitioner relied on advice of counsel and the promise of a plea

deal when signing the sentencing sheet, which Mr. Posey had him sign without specific years listed on the sentence sheet. Petitioner testified that Mr. Posey reassured him there was no problem with him signing the sheet without the number of years specified. On advice of counsel, Petitioner signed the plea deal. Petitioner was sentenced to thirteen years on October 9, 2012 and filed this petition for post-conviction relief.

The Appellate will argue that the Court lacked Personal Jurisdiction over the Defendant because he did not waive presentation of the Anderson County Indictment in Greenville County.

ARGUMENT

- I. Petitioner's trial counsel was ineffective in the underlying proceedings by failing to provide full and fair representation of petitioner's rights under counsel's Constitutional obligation and failing to investigate the petitioner's case fully by subpoenaing necessary witnesses?

Mr. Posey met with Petitioner while incarcerated and advised him that he should not go to trial due to the number of charges and apparent evidence against him. Mr. Posey informed Petitioner that he had worked out a deal with Judge Verdin for him to plead guilty to all charges in return for a concurrent term of seven years.

The U.S. Supreme Court has left no doubt that plea negotiations are important elements of client representation for purposes of Sixth Amendment right to effective counsel. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012), *see e.g.*, Hill v. Lockhart, 474 U.S. 52 (1985).

Communicating the proper information to the defendant is critical to an intelligent plea. When counsel advises his client as to any plea offers "on the table," his or her guidance and legal conclusions must be completely competent in order to reach the standard of effective assistance.

In Lafler v. Cooper, decided the same day as Frye, the U.S. Supreme Court held that defense counsel's legal advice conveyed to a defendant during the plea process must be legally sound and accurate. Lafler v. Cooper, 132 S. Ct. 1376 (2012). While the Frye Court did not directly decide the prejudice issue, the South Carolina Supreme Court held in Davie v. State that the petitioner was prejudiced by his plea counsel's deficient performance in failing to convey a 15-year plea offer from the solicitor. Davie, 381 S.C. 601, 617, 675 S.E.2d 416, 424 (S.C. 2009).

The petitioner received a sentence of 27 years and only learned of the 15-year plea offer two years after he pled guilty. The Court concluded that the petitioner had established prejudice because the solicitor and plea counsel both acknowledged the original plea offer.

Here, the offer of a 7-year plea deal was communicated to Young by Mr. Posey, and Young was not aware that despite the judge's discussion of the possible length of sentences, that he could receive more than seven years based on the presumed agreement between Mr. Posey and Judge Verdin. Additionally, Counsel has acquired new and material evidence in the form of an affidavit from Young's mother, which states that she was present during the discussion of the 7-year plea deal between Mr. Posey and Young. While the U.S. Supreme Court has not issued a formal opinion on the question of whether a defendant receives ineffective assistance if defense counsel provides incorrect sentencing information during a plea, the Court's holdings in related ineffective assistance cases indicate a willingness to expand the scope of the Sixth Amendment. The U.S. Supreme Court and the Supreme Court of South Carolina have stated that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." State v. Rice, 401 S.C. 330, 332 (quoting Tollett v. Henderson, 411 U.S. 258, 267). Nevertheless, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. S.C. Code Ann. § 17-27-20(A)(4) (2014). Thus, by its plain language, the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence – not just individuals convicted and sentenced following trial.

Second, counsel's approach to criminal representation conflicts with his Constitutional obligation to provide full and fair representation. The Sixth Amendment right to counsel requires not only that a person accused of a crime have the assistance of counsel for his or her

defense but also that such assistance be "effective." This is so whether the defendant's counsel is appointed or retained. Am. Jr. 2d, Criminal Law § 1223. Another issue is how much factual discovery and investigation regarding the matter is needed before defense counsel can give competent advice and a defendant can make a knowing and intelligent plea. Chief Justice Toal has recognized this potential issue and discussed the same in a memorandum dated March 1, 2004. Justice Toal stated her belief that conditioning a plea agreement on relinquishing the right to discovery is unethical and "is going to have adverse consequences in the future with claims of ineffective assistance of counsel based on a claim that the plea was not voluntary because the applicant did not have access to the solicitor's file." Memorandum from C. J. Jean Hoefler Toal on Plea Agreements and Discovery (March 1, 2004). This memorandum raises questions as to defense counsel's ethical obligations if such a plea agreement is proposed and suggests that the failure to properly review the solicitor's file prior to advising a client regarding a plea deal could create issues as to future claims of ineffective assistance of counsel.

Additionally, it has been stated that ". . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. 668, 691. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991). Moreover, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (S.C. 2008). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of

the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007).

The phrase "effective assistance of counsel" has been characterized as an elusive term, difficult if not impossible to define precisely or all-inclusively, which must be equated to the facts of each case. In offering definitions, the courts have tended to speak in terms of what effective assistance is not rather than in terms of what it is. Thus, it has been said that effective assistance of counsel is not flawless, perfect, or error-free assistance, nor assistance that in hindsight is deemed ineffective, but is, rather, competent representation, that is, representation that is within the range of competence demanded of attorneys in criminal cases generally. A defendant has the right to make a decision to plead not guilty, and he has the right to make the decision to plead guilty, but an attorney must explain all the possibilities to the client for him to make an informed decision.

Although due process under the 14th Amendment tolerates the variances in procedure appropriate to the nature of the case, it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result.

Carey v. Phipus, 435 U.S. 247, 266-67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 120 S.Ct. 1579 (2000) (amendment of judgment to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute). The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation, cross-examination, and discovery; that a decision be made based on the record and a party allowed to be represented by counsel.

Here, Young either was never given the full discovery for his charges. Whatever the circumstance for why Young never received this evidence, neither Young or Mr. Posey were able to make a fair and fully knowledgeable assessment of the case against Young and whether to plead guilty or pursue suppression of evidence or other means of either reducing or perhaps having certain charges dropped. Additionally, Mr. Posey testified that Young's file is one that was damaged in his storage facility and required Mr. Posey to recreate it when passing it along to Ms. Horlbeck. Furthermore, Mr. Posey did not seek statements from multiple sources that Young requested (i.e., a statement from JTM Enterprise that may have shown their trade practices would have made it impossible for a police officer to stop Young for improper tags). As such, it is impossible to know from Mr. Posey's re-creation of the file and lack of due diligence in investigating potential leads that Young requested whether Mr. Posey had everything from the State or perhaps forgot things or never received necessary evidence.

The language of the Strickland opinion suggests that the Supreme Court anticipated that appeals would involve multiple claims of deficiency by counsel and that courts should review the resulting prejudice cumulatively. John H. Blume & Christopher Seeds, Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error, 95 J.

Crim. L. & Criminology 1153, 1165 (2005). Strickland provides an almost “insurmountable test” for criminal defendants attempting to prove ineffective assistance of counsel. Martin C. Calhoun, Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 GEO. L.J. 413, 414-15 (1988); see also Strickland v. Washington, 466 U.S. 668, 687 (1984). The Strickland test is often criticized by legal commentators as being the “foggy mirror” test, under which “[if] you place a mirror in front of defense counsel during trial and it fogs, counsel is in fact effective.” Joshua Dressler & George C. Thomas, III, Criminal Procedure: Investigating Crime 1010-11 (4th ed. 2010) (quoting Randall Coyne, Capital Punishment and The Judicial Process, Teacher’s Manual 148 (1995)) (internal quotation marks omitted). Giving credence to this criticism, a survey of over 37,000 cases that included challenges to convictions for ineffective assistance of counsel shows that lower courts applying Strickland have found that almost all defendants (97%) have received constitutionally adequate representation. See Id. at 105. The odds are against challenges for ineffective counsel primarily because of the U.S. Supreme Court’s firm directive that “[j]udicial scrutiny of counsel’s performance must be highly deferential” to the professional soundness of defense counsel’s conduct at trial. Strickland, 466 U.S. 668, 689 (1984). Indeed, to prevail under Strickland, criminal defendants must overcome the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id. Here Young did not have an opportunity to fully explore this possibility.

The PCR judge incorrectly found that Young has not established any constitutional violations or deprivations before or during his guilty plea and sentence proceedings because of the ineffective assistance of counsel. The PCR judge’s finding that Mr. Posey was not deficient

in any manner and Young was not prejudiced by counsel's representation is not supported by the record as well as new and material evidence recently received.

- II. The circuit court lacked jurisdiction over the Defendant because he plead guilty in Greenville County, yet the alleged offenses took place in Anderson County.

The Appellate plead guilty to burglary second in Greenville County on October 9, 2012 and at no time did he waive presentation to the Grand Jury or jurisdiction to the burglary second charge. Appellate will argue that jurisdiction can be raised at any time and he has not waived this issue by raising it for the first time on his appeal of his Post-Conviction Relief application. The Appellate was sentenced on an Anderson County Indictment in Greenville County without waiving jurisdiction; thus violating his Due Process by not taking the plea in the Court of proper jurisdiction.

The circuit court denied the application on November 6, 2014; it was filed on November 17, 2014, and a notice of appeal was served on December 18, 2014. Petitioner now seeks a writ of certiorari to review this denial. He raises this jurisdictional defect for the first time on Appeal of the PCR.

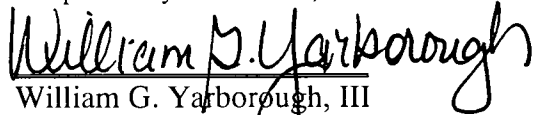
The findings of the PCR judge should be reversed.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

February 6, 2015

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

James R. Barber, III, Circuit Court Judge

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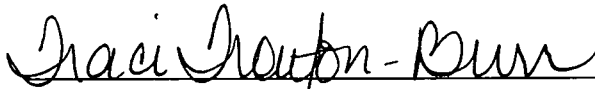
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PROOF OF SERVICE OF
PETITION FOR WRIT OF CERTIORARI

I hereby certify that I delivered by US Mail an original and 7 copies of the PETITION FOR WRIT OF CERTIORARI in the above-captioned case to South Carolina Supreme Court Clerk of Court, Mr. Daniel E. Shearouse, at the following address: PO Box 11330, Columbia, SC, 29211.



Traci Trouton-Burr, Paralegal
Office of William G. Yarborough, Attorney at Law

March 10, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

James R. Barber, III, Circuit Court Judge

Case No. 2014-002709

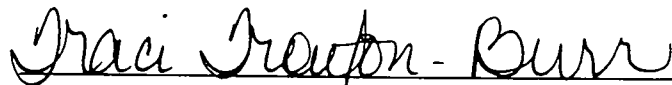
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March 10, 2015