

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-001698

RECEIVED

APR 30 2015

S.C. Supreme Court

Eugene Rhinehart,.....Petitioner,

v.

State of South Carolina,.....Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the lower court properly rule on the Petitioner's presentation of alleged newly discovered evidence of the victim's recantation, when the evidence did not meet the requirements of newly discovered evidence and the victim testified and affirmed the Petitioner's commission of the assault?

Did the lower court properly rule that Petitioner's guilty plea pursuant to NC v. Alford was knowing and voluntary when the court found Petitioner's testimony was not credible and the plea transcript reflects the voluntary nature of the plea?

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. He was indicted at the March 2011 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor – 2nd degree (2011-GS-42-2027). James A. Cheek, Esquire, represented Petitioner. On October 9, 2012, Petitioner pled guilty pursuant to NC v. Alford. Following a recommendation by the State, the Honorable R. Ferrell Cothran sentenced Petitioner to a sentence of eight years. The Petitioner did not appeal his conviction and sentence.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 13, 2012. The Respondent made its Return on or about February 28, 2014. An evidentiary hearing into the matter was convened on April 11, 2014, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Petitioner testified on his own behalf. Cory Walker, Petitioner's son, testified on Petitioner's behalf. The victim in this matter also testified. James A. Cheek, Esquire, testified on behalf of the State. Following the evidentiary hearing, the Honorable J. Derham Cole denied the application by written Order dated July 25, 2014. 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. **The lower court properly ruled on the Petitioner’s presentation of alleged newly discovered evidence of the victim’s recantation, when the evidence did not meet the requirements of newly discovered evidence and the victim testified and affirmed the Petitioner’s commission of the assault.**

On October 9, 2012, Petitioner pled guilty pursuant to NC v. Alford to criminal sexual conduct with a minor – 2nd degree. (App. p. 3). Following the State’s recommendation of a cap of ten years, Petitioner was sentenced to serve a term of eight years in the South Carolina Department of Corrections. (App. p. 9). At the PCR hearing, Petitioner presented evidence that he should receive a new trial based upon alleged newly discovered evidence.

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.

The Petitioner alleged that he should be granted a new trial because of newly discovered evidence. At the time of Petitioner's post-conviction relief hearing, the standard for a defendant requesting a new trial based on after discovered evidence requires the defendant show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

Recently, this Court affirmed that the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence, including someone who pled guilty. Jamison v. State, 410 S.C. 456, 468, 765 S.E.2d 123, 129 (2014), reh'g denied (Dec. 3, 2014). However, this Court also held that the standard for granting relief for a newly discovered evidence claim from a guilty plea should be a two prong review: "(1) the newly discovered evidence [must have been] discovered after the entry of the plea and, in the exercise of

reasonable diligence, *could not have been* discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the ‘interest of justice’ requires the Petitioner's guilty plea to be vacated.” Id. (emphasis added). However, this Court stated that it will be rare when “the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence.” Id.

In support of his claim of newly discovered evidence, Petitioner presented testimony from Cory Walker. Cory Walker testified that the Petitioner is his father. Walker testified that the victim was possibly his sister and he believed that she was his sister. (App. p. 44). Walker testified that he reached out to the victim once the allegations came out and asked her what happened. Walker testified that the victim told him that nothing ever happened. (App. p. 46). Walker acknowledged that at the time of the conversation with the victim, he was 16 years old and the victim was probably 12 or 13 years old. (App. p. 46). Walker testified that the conversation occurred prior to Petitioner’s guilty plea when the allegations against Petitioner first came out. (App. p. 45-46). Walker testified that he never told Petitioner or Counsel about the conversation at the time it occurred and the first time he mentioned this conversation with the victim was the week of Petitioner’s scheduled PCR hearing; however, the conversation occurred a year before Petitioner pled guilty. (App. p. 47-8)

The victim testified that when she first reported the abuse, she spoke with officers and the Children’s Advocacy Center about the allegations. The victim in this matter testified that she knew the Petitioner and was aware that there was a possibility that Petitioner was her father. The victim also testified that she knew Cory Walker and considered him a family member. (App. p. 40). The victim acknowledged that Walker approached her after the allegations were known and

asked her if the abuse occurred and she told him it did not. (App. p. 41). However, the victim testified that she told Walker that the abuse never occurred simply because she did not want to talk with anyone about what happened, especially another male from the family and because she was scared and afraid. (App. p. 41, lines 12-24). At the time of the conversation with Cory, the victim testified that she was 11 years old. (App. p. 41, line 5).

Counsel testified that he would have advised the Petitioner to still plead guilty to the charge, even if he had been informed of the victim's conversation with Walker, based upon Counsel's investigation and review of discovery materials and the risks Petitioner would face if he proceeded to trial. (App. p. 56).

The lower court found both Walker and the victim's testimonies to be credible; however, the court found the victim truthful when she testified that she did not want to discuss the details of the abuse with Walker, so she instead told him the abuse had not occurred. (App. p. 64). The court, after hearing the testimony, found that in light of the allegations, the alleged relationships between the victim, Petitioner, and Walker, and victim's age at the time of the conversation, it was more likely than not that the victim's denial was an attempt to protect herself. (App. p. 64). Therefore, the court found that the conversation between the victim and Walker did not qualify as newly discovered evidence. (App. p. 64). The lower court did not find Petitioner's testimony that he would have proceeded to trial if he was aware of the information or that the outcome would have been different, had he been aware of the conversation between the victim and Walker. (App. p. 64). Furthermore, the court found that the information was discoverable at the time of the plea based upon Walker's own testimony that the conversation took place well in advance of Petitioner's guilty plea. (App. p. 64).

If this Court reviews the lower court's decision based upon the standard in Hayden, which was used by the lower court, Respondent submits that there is probative evidence to support the lower court's ruling and this denial of post-conviction relief should be affirmed. Even in light of the Jamison ruling changing the standard, Respondent submits that the application was properly denied. The conversation between Petitioner's own son and alleged daughter, the victim, was well in advance of the Petitioner's guilty plea. There is no reason that the Petitioner could not have discovered, in the exercise of reasonable diligence, that the victim did not admit the allegations to Walker. There was no testimony that Petitioner did not speak with Walker during that period or that either one was unavailable for any reason. Even if the evidence was newly discovered, the lower court found that it was not significant enough for the outcome to have changed, which Respondent submits falls well below the standard requiring the guilty plea of Petitioner be vacated in the interest of justice. Therefore, the lower court's decision should be affirmed.

II. The lower court properly ruled that Petitioner's guilty plea pursuant to NC v. Alford was knowing and voluntary when the court found Petitioner's testimony was not credible and the plea transcript reflects the voluntary nature of the plea.

Petitioner alleged that Counsel guaranteed him that he would receive three years suspended to one year of probation if Petitioner pled guilty. (App. p. 31-2). Petitioner testified that he was never aware that he faced a potential sentence of twenty years, but instead – contradicting his earlier testimony – testified that he believed he was pleading to “the ten years.” (App. p. 34, lines 11-12). However, he acknowledged that he informed the plea judge that he was aware that the maximum on the charge was twenty years. (App. p. 35, lines 4-6). Petitioner also testified that he was unaware that the charge required sex offender registry. (App. p. 32). Although Petitioner acknowledged that he told the plea judge that he understood the charge was

a most serious, violent and required sex offender registry, Petitioner testified at the hearing that he did not really know what was going on at the time of the plea. (App. p. 35).

Counsel testified that he spoke with Petitioner about the twenty year maximum sentence, as well as possible negotiations for a specific sentence. (App. p. 49). Counsel testified that he was aware of the Petitioner's federal parole violation and the Petitioner indicated that he was very concerned as to whether or not he would serve his time in the South Carolina Department of Corrections or the Federal Bureau of Prisons. (App. p. 50). Counsel testified that he never guaranteed the Petitioner that the sentence would run concurrent with the parole violation. Counsel also testified that he discussed with the Petitioner the requirement to register as a sex offender and the fact that the charge would be violent. (App. p. 50, lines 12-25; p. 51, lines 1-19).

The lower court did not find Petitioner's testimony to be credible, but found Counsel's testimony to be credible. (App. p. 62). The court found that Counsel discussed the elements and nature of the charge with the Petitioner, potential sentences Petitioner could receive, the collateral consequence of sex offender registry, and the effect the plea may have on Petitioner's federal parole. (App. p. 62-3). The court properly found that the Petitioner pled guilty freely and voluntarily with full knowledge of the consequences he faced. (App. p. 63).

First, Respondent submits that the consequence of the charge as violent is a collateral consequence, which Counsel is not required to advise Petitioner of prior to his plea. Smith v. State, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997) (holding counsel's failure to inform defendant of the consequences of a violent crime conviction does not result in an involuntary plea because that is a collateral consequence).

Second, the Petitioner was advised on the record by the plea court that the charge he was pleading to carried up to twenty years, but there was a negotiated cap of no more than ten years. (App. p. 4-5). Petitioner was further advised on the record that the charge was a most serious and violent offense and Petitioner would be required to register as a sex offender. (App. p. 5). Even where counsel fails to advise, or even misadvises, a defendant regarding a critical aspect of his charges, such as sentencing range, the error is cured where the trial court during a guilty plea properly advises the defendant about the matter in question. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). See also Knox v. State, 340 S.C. 81, 86, 530 S.E.2d 887, 889 (2000), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

The record is clear that the Applicant pled freely and voluntarily and there was probative evidence to support the lower court's denial of relief. The decision should be affirmed.

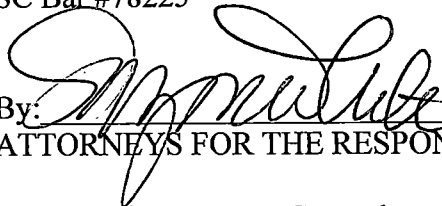
CONCLUSION

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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By: 
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April 30, 2015

STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

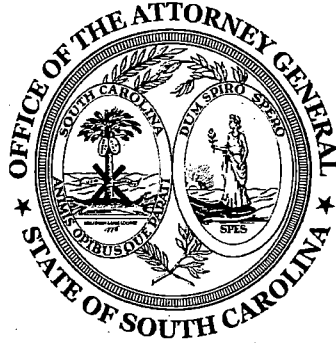
The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 30th day of April, 2015



ASHLEY HAWORTH
LEGAL ASSISTANT



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APR 30 2015

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

April 30, 2015

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

RE: Eugene Rhinehart v. State of South Carolina
Lower Court Case No: 2012-CP-42-5340
Appellate Case No.: 2014-001698

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: Lara M. Caudy, Esquire (2 copies)
Trisha Allen, Victim Services (1 copy)