

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

S.C. Supreme Court

Appellate Case No.: 2014-001380
Lower Court Case No.: 2013-CP-10-1646

LLOYD WRIGHT, #304199,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
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PETITIONER'S QUESTION PRESENTED

Were Petitioner's Sixth Amendment rights violated where Petitioner would have accepted the State's prior, more favorable plea offer of twenty-five years had counsel competently advised Petitioner that the imposition of a sentence of life imprisonment without parole was mandatory, not at the discretion of the trial court, if he was found guilty?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the December 2007 term of the Charleston County Grand Jury for possession with intent to distribute cocaine base- third offense (2007-GS-10-13898) and possession with intent to distribute cocaine base within the proximity of a school (2007-GS-10-13899). James W. Smiley, IV, Esquire, represented Petitioner. On May 18, 2009, Petitioner proceeded to a jury trial before the Honorable Kristi L. Harrington. The jury returned a guilty verdict on both charges and Petitioner was sentenced to confinement for a period of life without parole on both charges.

Petitioner timely filed a Notice of Appeal. Lanelle Durant, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Wright, Op. No. 11-UP-363 (S.C. Ct. App. filed June 30, 2011). Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, which was denied on January 25, 2013 and the Remittitur was issued thereafter.

Petitioner filed a post-conviction relief (PCR) application on March 19, 2013, alleging ineffective assistance of counsel. Respondent made its Return on December 3, 2013. An evidentiary hearing convened on April 15, 2014, at the Charleston County Courthouse before the Honorable R. Markley Dennis. Petitioner was present and represented by Christopher L. Murphy, Esquire. Respondent was represented by Assistant Attorney General Ashleigh R. Wilson of the South Carolina Office of the Attorney General. By Order dated June 13, 2014 and filed June 19, 2014, Judge Dennis denied and dismissed Petitioner's application with prejudice.

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective.

Petitioner asserts that his Sixth Amendment rights were violated because his trial counsel failed to advise him that the imposition of a sentence of life imprisonment without parole was mandatory. (Pet. p. 2). This argument with without merit.

In a PCR action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, *supra*.

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, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. 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." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and **on information supplied by the defendant.**"

Strickland at 691, 104 S. Ct. at 2066 (emphasis added).

Here, Petitioner alleges that his trial counsel (hereinafter "Counsel") was ineffective for failing to advise him of the mandatory nature of a life without parole sentence. Petitioner testified at the PCR hearing that he would have accepted the plea offer of twenty-five years imprisonment had he known that a sentence of life without parole would be mandatory if he was convicted. In its Order of Dismissal, the PCR Court did not find credible Petitioner's testimony that he was not aware of the mandatory nature of a life without parole sentence. (App. p. 431).

Contradicting Petitioner's testimony, Counsel testified that, from the beginning of his representation, he advised Petitioner that "this was a possible life without the possibility of parole case because of his priors." (App. p. 401, lines 14-16). Counsel also testified, "I talked to [Petitioner] that he was looking at life without parole the first time that I met him, because I knew his history." (App. p. 407, lines 19-21). Counsel testified that Petitioner "understood the import of what he was looking at" (App. p. 407, line 25 – p. 408, line 1) and that he "never got that [Petitioner] didn't understand." (App. p. 407, line 24-25). Counsel further testified that "[i]f [Petitioner] thought that life without the possibility of parole meant that a judge could do less than that, he never – he never communicated that to me." (App. p. 408, lines 2-5). Further, when asked if he discussed the mandatory nature of such a sentence and that the Court did not have any discretion in sentencing Petitioner to life without parole, Counsel testified "I believe that I did." (App. p. 408, line 16). The PCR Court found Counsel's testimony to be credible and did not find Petitioner's testimony to be credible. Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly

observe the witnesses. 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); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

The PCR Court properly found that Petitioner did not carry his burden of proving that his trial counsel provided ineffective assistance of counsel. Counsel discussed the life without parole sentence with Petitioner on several occasions, and enough times to where Counsel believed that Petitioner understood the sentence. Under Strickland, Counsel's actions may be properly based on information supplied by Petitioner. See Strickland at 691, 104 S. Ct. at 2066. It is axiomatic that Counsel is not required to be clairvoyant and assume what Petitioner was thinking if Petitioner never communicated to Counsel at any stage that he misunderstood what life without parole meant.

Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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 issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: 
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May 6, 2015

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LLOYD WRIGHT, #304199,

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:

John H. Strom, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 6th day of May, 2015



SARA B. MOORE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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MAY - 6 2015

May 6, 2015

S.C. Supreme Court

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

Re: Lloyd Wright, #304199 v. The State of South Carolina
Appellate Case No. 2014-001380

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,

Justin J. Hunter
Assistant Attorney General
S.C. Bar No. 101254

JJH/sbm
Enclosures

cc: John H. Strom, Appellate Defenender