

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2014-000802

Devon Miles Brown.....Petitioner,

v.

State of South Carolina.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

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QUESTIONS PRESENTED

- I. Did the PCR court properly find Petitioner's application was filed outside of the statute of limitations?

- II. Did the PCR court err in refusing to rule on the merits of the claim pertaining to trial counsel's alleged failure to investigate and challenge the use of two prior convictions which enhanced Petitioner's sentence where Petitioner only proceeded on a claim that trial counsel was ineffective under Lafler v. Cooper, 132 S.Ct. 1376 (2012)?

STATEMENT OF THE CASE

Devon Mile Brown, (“Petitioner”), was indicted by the January 2008 term of the York County Grand Jury for Trafficking Marijuana (2008-GS-46-0406). David Cook, Esquire, represented him. On March 19, 2008, the Applicant proceeded to a jury trial pursuant to which he was found guilty of Trafficking Marijuana, 10-100 lbs., 3rd offense. The Honorable Lee S. Alford sentenced the Applicant to confinement for twenty-five (25) years Trafficking Marijuana, 3rd offense.

A Notice of Appeal was filed on the Applicant’s behalf and an appeal perfected. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Brown, 2011-UP-265 (S.C. Ct. App. filed June 7, 2011). The Remittitur was issued on June 23, 2011.

Petitioner subsequently filed an application for post-conviction relief (PCR) on October 24, 2012. Respondent made its Return and Motion to Dismiss on February 15, 2013. On December 12, 2013, an evidentiary hearing was held at the Moss Justice Center in York, SC. Petitioner was present and represented by Dale L. Smith, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General’s Office. On January 9, 2014, the Honorable John C. Hayes, III denied and dismissed the Petitioner’s application with prejudice by written Order. Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e) SCRPC on February 6, 2014, after receiving the Order of Dismissal on January 29, 2014. The Honorable John C. Hayes, III issued an Order denying the 59(e) motion on March 11, 2014. Petitioner subsequently filed a Petition for Writ of Certiorari on January 7, 2015. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR 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 PCR proceeding, the Petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENTS

I. The PCR court correctly concluded that Petitioner's application was filed outside of the statute of limitations.

Petitioner asserts the PCR court erred in finding Petitioner's application untimely. Under S.C. Code Ann. §17-27-45(A):

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

In Petitioner's case, the Remittitur, which divests the appellate courts of jurisdiction, from Petitioner's direct appeal was issued by the South Carolina Court of Appeals on June 23, 2011. On August 30, 2011, the Court of Appeals issued an order denying a motion to enlarge the time for petition for rehearing. On October 25, 2011, this Court issued an order explaining that because no petition for rehearing was submitted to the Court of Appeals and because the Court of Appeals properly issued the Remittitur, this Court had no authority to recall the Remittitur. This order also stated no further motion or petition can be considered because this Court lacked jurisdiction over the case after the issuance of the Remittitur. Applicant did not file his PCR application until October 24, 2012.

Respondent's position is that the Remittitur ended Petitioner's direct appeal. Therefore, Petitioner must have timely filed on or before June 24, 2012. He simply failed to do so. Respondent also submits the Order from this Court dated October 25, 2011 is simply an advisory Order, explaining that it lacked authority to reinstate Petitioner's appeal. Thus, Petitioner's PCR application was filed untimely by four months.

Therefore, Petitioner has failed to meet his burden of proof as to this argument and the PCR court's Order must be affirmed.

II. Petitioner's assertion that the PCR erred in refusing to rule on the merits of the claim pertaining to trial counsel's alleged failure to investigate and challenge the use of two prior convictions which enhanced Petitioner's sentence is without merit as Petitioner only proceeded on a claim that trial counsel was ineffective under Lafler v. Cooper, 132 S.Ct. 1376 (2012).

Petitioner claims "the PCR court erred in refusing to rule on the merits of the ineffective assistance of counsel claim pertaining to trial counsel failure to investigate and challenge the use of two prior invalid convictions to unlawfully enhance the sentence when the evidence at the hearing demonstrated that counsel's deficient performance resulted in a mandatory 25-year sentence." This argument was abandoned at the PCR hearing; nonetheless, the PCR court found in its Order denying Petitioner's Rule 59(e) and Rule 60 SCRPC motions that Petitioner failed to meet his burden of proof. This, this argument is without merit.

At the beginning of the evidentiary hearing on December 12, 2013, the State renewed its motion to dismiss Petitioner's claims as untimely. Petitioner's counsel stated, "[o]ne of the issues stated by my colleague, Mr. Johnson, I think will be moot because we are focused on the Lafler [,] Lafler being Lafler versus Cooper, cited at 132 Supreme Court 1376, a 2012 case. And I believe Mr. Johnson will agree with me that if that is the only issue we are pursuing, that is a timely motion." (App. p. 19 line 21-p. 20 line 1). The State then responded, "I'll agree with that, but the State's motion for a statute of limitations is to bar any of the other issues that were raised in his original application but certainly I will agree with Mr. Smith that (a motion under Lafler is timely) because it overturned precedent in the United State, he timely filed under Lafler v. Cooper, we ask that that be the only issue that [Petitioner] proceeds on today." (App. p. 20 lines 6-12). The PCR court then stated, "[Petitioner's counsel] indicated that was so we'll go forward." (App. p. 20 line 13). Clearly, the only issue Petitioner proceeded on at the evidentiary hearing was whether Counsel was ineffective under the rubric of Lafler v. Cooper. Therefore,

Petitioner cannot now claim that the PCR court erred in not ruling on the issue of counsel not challenging Petitioner's two prior guilty pleas from New York.

In a PCR action, 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 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, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. 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 trial counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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 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.

Under Lafler v. Cooper, counsel has a duty to properly advise a defendant concerning a plea offer from the State. In Lafler, defense counsel improperly advised defendant not to accept

the plea offer, which resulted in defendant being convicted at trial and sentenced to a more severe penalty than the plea offer.

In this case, Counsel testified he reviewed the case and negotiated with the State for a five-year offer. (App. p. 45 line 17-p. 46 line 8). Counsel conferred with Petitioner, explained the criminal process in York County and explained to Petitioner that the five-year offer would be the best offer Petitioner would receive. (App. p. 47 line 2- p. 48 line 6). Counsel then explained that Petitioner was facing a mandatory 25-year sentence if convicted at trial. (App. p. 48 lines 16-24). Counsel testified he practically begged Applicant to accept the five-year offer. (App. p. 49 lines 1-9). Counsel also stated he was very aware of Petitioner's prior criminal history, and explained to Petitioner, in detail, that it would cause Petitioner's sentence to be enhanced. (App. p. 55 lines 15-19). Counsel stated it was entirely Petitioner's decision to reject the offer. (App. p. 49 line 11).

The PCR court first found Counsel's testimony concerning Counsel's alleged ineffective assistance of counsel credible, while finding Petitioner's testimony not credible. (App. p. 128) See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court's findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses).

The PCR court also held:

The Court finds Counsel conveyed the five-year offer from the State to [Petitioner]. This Court finds Counsel advised [Petitioner] that if he pursued a jury trial that he was facing a mandatory minimum of twenty-five years. This Court also finds Counsel made diligent efforts to convince [Petitioner] to accept the five-year offer...This Court finds that under the parameters of Lafler, Counsel's pre-suppression hearing advice regarding the five-year offer establishes effective assistance of counsel.

(App. p. 130).

The PCR court then held:

The issue of the enhancement impact of [Petitioner's] two prior drug offenses in New York is not before this Court. This issue is outside the rubric of Lafler. This issue could have been raised by [Petitioner] by a timely filed application for post-conviction relief, pursuant to §17-27-20, South Carolina Code of Laws of 1976, as amended.

(App. p. 130).

The PCR court correctly found Counsel effective represented Petitioner under Lafler. Counsel testified that he not only negotiated with the State to obtain a very favorable plea offer on Petitioner's behalf, but also practically begged Petitioner to accept the offer. Unlike Lafler, where counsel improperly advised the defendant to reject the offer, Counsel urged Petitioner to accept the offer. It was Petitioner's decision to reject the offer. This is simply a case of buyer's remorse.

Even though Petitioner abandoned his argument that Counsel was ineffective for failing to challenge the prior guilty pleas as unconstitutional at the PCR evidentiary hearing, the PCR court still addressed the issue in its "Order Denying Plaintiff's Motion to Amend of Alter and Plaintiff's Motion for Relief From Judgment" dated March 11, 2014. In this Order, the PCR court found the plea transcripts from Petitioner's New York guilty pleas "on their face, do not demonstrate the unconstitutionality of [Petitioner's] prior convictions." (App. p. 137). The PCR court also held, "[t]here is no evidence in the plea transcripts introduced at the PCR hearing that indicates that such prior convictions were invalid by virtue of not being knowing, intelligent, and voluntary." (App. p. 137). The PCR court later held:

The failure of trial counsel to obtain the trial transcripts, in itself, does not render his assistance of counsel ineffective. The testimony of trial counsel was credible and made clear that trial counsel adequately investigated and advised [Petitioner] of the effect of his prior convictions. Therefore, [Petitioner's] assistance of Counsel was not ineffective based on trial counsel's failure to investigate and

failure to object to the prior convictions used to enhance the [Petitioner's] sentence.

(App. p. 138).

Essentially, Petitioner failed to present credible evidence that his prior guilty plea were unconstitutional or that Counsel was ineffective for not challenging them. Therefore, Petitioner has failed to meet his burden of proof as to this argument.

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry, supra.

CONCLUSION

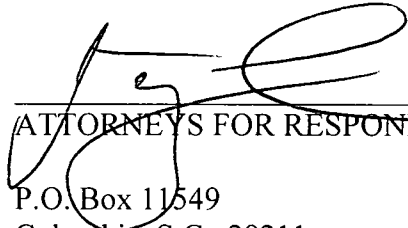
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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May 13, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

DEVON MILES BROWN, 327309

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

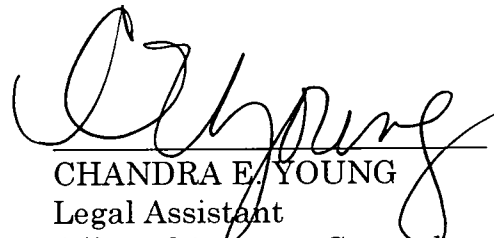
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Dale Lionel Smith, Esquire
483 Broadway, Suite 502
New York, New York 10013

I further certify that all parties required by Rule to be served have been served.

This 13th day of May 2015.



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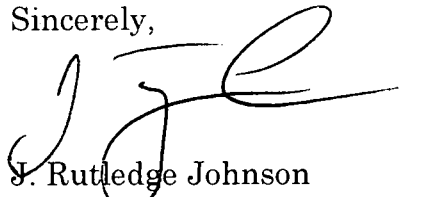
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
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**RE: Devon Miles Brown, #327309 v. State of South Carolina
2014-000802**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,



J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Dale Lionel Smith, Esquire
Trisha Allen, Victim Services