STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas
R. Knox. McMahon, Circuit Court Judge

2010-CP-43-2797
Appellate Case No. 2013-002653

RANDY YONSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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ISSUES PRESENTED

I. Whether Petitioner's Sixth Amendment rights were violated when counsel failed to competently advocate the defense of accident during Petitioner's trial by not presenting to the jury or seeking a jury instruction that the defense of accident could be claimed by an individual who could not lawfully carry a weapon?

II. Whether Petitioner's Sixth Amendment rights were violated when counsel refused to allow Petitioner access to his discovery materials, including the police dash-camera video of the incident and related law enforcement investigative documents, solely on grounds of cost as this refusal deprived Petitioner of the ability to participate in his own defense and to assess the merits of the State's plea offer?

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was indicted during the January 2007 term of the Sumter County Grand Jury for two counts of Unlawful Pistol, two counts of Possession of a Stolen Pistol, Possession of a Pistol by a person under the age of Twenty-One, Possession of a Pistol by a Person Convicted of a Crime of Violence, two counts of Assaulting a Law Enforcement Officer while Resisting, Resisting Arrest with a Deadly Weapon, and Possession of Cocaine (2006-GS-43-0179). T.D. Williams, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Clifton Newman. Applicant was found guilty on all charges and on January 18, 2007, was sentenced to one year imprisonment for each count of Unlawful Pistol, two years imprisonment for Possession of a Pistol by a Person under Twenty-One, five years imprisonment for Possession of a Pistol by a Person Convicted of a Crime of Violence, twenty years imprisonment for the second count of Assault and Battery with Intent to Kill, ten years imprisonment for the first count of Assaulting a Law Enforcement Officer While Resisting Arrest, and five years imprisonment for Resisting Arrest with a Deadly Weapon; each of which to run concurrently to a twenty year sentence for the first charge of Assault and Battery with Intent to Kill.

Additionally, those charges were to run consecutively to a five year sentence for Possession of a Firearm during the Commission of a Crime of Violence and a ten year sentence for the second charge of Assaulting a Law Enforcement Officer While Resisting Arrest, for a total sentence of thirty-five years imprisonment. The Applicant appealed to the South Carolina Court of Appeals, and the sentence was Affirmed in Part and Reversed in Part. Applicant's conviction for Possession of a Pistol by a Person under Twenty-One was reversed. The Remittitur was issued on October 5, 2010.

Thereafter, Petitioner filed a timely application for PCR on December 29, 2010, alleging he was being held in custody unlawfully. Respondent made its Return on June 17, 2011, requesting that an evidentiary hearing be held on Petitioner's application.

On October 4, 2013, an evidentiary hearing on the matter was convened before the Honorable R. Knox McMahon at the Sumter County Courthouse. By Order dated November 26, 2013, Judge McMahon denied and dismissed Petitioner's application with prejudice. Petitioner subsequently filed a Petition for Writ of Certiorari on February 27, 2015. This Return 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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief 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 an 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, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of 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." 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.

ARGUMENT

I. Whether Petitioner's Sixth Amendment rights were violated when counsel failed to competently advocate the defense of accident during Petitioner's trial by not presenting to the jury or seeking a jury instruction that the defense of accident could be claimed by an individual who could not lawfully carry a weapon?

Petitioner argues his Sixth Amendment rights were violated when Trial Counsel failed to present to the jury or seek a jury instruction that the defense of accident could be claimed by an individual who could not lawfully carry a weapon. However, Petitioner failed to raise any claim that Trial Counsel was ineffective for failing to argue or request a charge on the defense of accident in his post-conviction relief application, at his evidentiary hearing, or in a Rule 59(e) motion. "To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). It is clear from the record that Trial Counsel's failure to request a jury charge on accident was never even discussed at the PCR evidentiary hearing let alone ruled upon by the PCR court.

Additionally, Petitioner's failed to raise any claim of per se prejudice in his post-conviction relief application, at his evidentiary hearing, or in a Rule 59(e). "To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). It is clear from the record that Petitioner never raised a

claim of per-se prejudice during the evidentiary hearing nor did the PCR Court rule on any claim of per-se prejudice. Therefore, Petitioner's analysis of per-se prejudice is clearly not preserved for appellate review.

Assuming *arguendo*, that this Court finds this issue is properly preserved for appellate review. Petitioner can show no prejudice as a result of Trial Counsel's failure to request an accident jury charge. In support of his argument, Petitioner simply concludes that Trial Counsel was ineffective for failing to request a jury charge, explaining that the defense of accident could be claimed by an individual who could not lawfully carry a weapon. However, Petitioner fails to cite to any authority or jury charge in support of his argument.

As noted by Petitioner, the defense of accident requires showing the harm caused was unintentional, the defendant was *acting lawfully* at the time of the incident, and *due care* was exercised in handling the weapon. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (emphasis added). Petitioner readily admitted that he was in unlawful possession of two semi-automatic pistols. Petitioner stated that a .25 caliber handgun was located in his front right pocket and another .9 millimeter handgun was "hanging out his back pocket." (App. p. 497 line 21—p. -5; p. 500 line 19-22). Petitioner admitted during trial that he was currently serving probation as a result of pleading guilty to burglary-second degree. (App. p. 312 lines 14-21). As part of his probation, Petitioner was not allowed to have weapons in his possession. Additionally, Petitioner admitted that he was armed with two weapons on the premises of an establishment that sold alcohol. (App. p. 313 lines 3-8). As a result, Counsel cannot be held ineffective for failing to request a jury instruction that would be contrary to the law. U.S. v. Anderson, 850 F.2d 563, 565 (9th Cir. 1988) (finding it is not ineffectiveness to fail to request an instruction contrary to law.)

Notably, the jury convicted Petitioner on two counts of unlawful carry of a pistol; one count of possession of a pistol under the age of twenty-one[1]; one count of possession of a pistol by person convicted of a crime of violence; two counts of assault and battery within intent to kill; one count of possession of a firearm during the commission of a crime of violence, two counts of assaulting a law enforcement officer while resisting arrest; and one count of resisting arrest with a deadly weapon. It is clear that the jury found Petitioner was not acting lawfully nor did they believe he was acting in self-defense. As a result, Petitioner can show no prejudice as it is clear that his trial testimony that the shooting of two police officers was the result of an unfortunate "accident" fell on deaf ears.

II. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective in failing to provide Petitioner with a copy of his discovery materials prior to trial, where Trial Counsel stated he reviewed the materials with Petitioner, was prepared to try the case, and Petitioner failed to present any evidence in support of his argument.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective for failing to provide Petitioner a copy of his discovery materials prior to trial. In support of his argument, Petitioner claims that he would have been better prepared to go to trial and would have been able to accurately assess the State's plea offer. However, Respondent submits there is ample probative evidence to support the PCR Court's finding that Trial Counsel was not ineffective.

Initially, Respondent submits Petitioner's argument that Trial Counsel's failure to provide discovery materials prohibited Petitioner from properly assessing the State's plea offer is not preserved for appellate review. Petitioner only argued Trial Counsel was ineffective for

[1] The charge of possession of a pistol by a person under the age of twenty- one was later overturned on constitutional grounds. State v. Yonson, Op. No. 2010-UP-408 (S.C. Ct. App. filed September 16, 2010).

failing to provide discovery materials thereby preventing him from being prepared for trial. Petitioner's mere mention that he rejected the State's plea offer certainly does not equate to an issue being properly preserved for appellate review. Additionally, the PCR Court never ruled on whether Trial Counsel's failure to provide discovery material "rendered Petitioner unable to assess the State's plea offer." (Pet. p. 17). "To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). It is clear from the record that this issue was never raised nor ruled upon by the PCR Court. Therefore, this issue is not preserved for appellate review.

The saying "the third time is a charm" rings true with Petitioner's third argument, as it is properly preserved for appellate review. Petitioner's argument that he was unable to participate in his case due to Trial Counsel's failure to provide discovery is properly preserved for appellate review. Notably, the PCR Court found Petitioner's testimony not credible, while finding Trial Counsel's testimony to be credible. Where matters of credibility are involved, this Court gives great deference to a PCR judge's findings, because this Court lacks the opportunity to directly observe the witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265, 267 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). The PCR Court further found Trial Counsel was not deficient and Petitioner failed to provide the court with sufficient testimony or evidence to substantiate this allegation. Respondent submits ample probative evidence supports the PCR Court's finding.

In support of his argument, Petitioner simply relies on a conclusory argument that had Trial Counsel provided him with discovery he would have been able to assist in his defense. To the contrary, Petitioner admitted that his testimony at the PCR hearing was the same as his testimony at trial. (App. p. 498 lines 9-14). Petitioner's bare assertions that he would have been able to better prepare for trial falls well short of his burden of proof. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Trial Counsel testified that Petitioner was a difficult client. Trial Counsel stated Petitioner only wanted to talk about his pending civil suit against Sumter County Sherriff. Trial Counsel stated it was clear that Petitioner "did not want to assist [Trial Counsel] with his defense. (App. p. 539 lines 12-13). Trial Counsel stated Petitioner "went so far as to ask his girlfriend at the time, *the only other witness,* Mandy Teal not [to] talk with [him]." (App. p. 539 lines 14-19) (emphasis added). Despite Petitioner's lack of cooperation, Trial Counsel "spent [his] time and effort as best [he] could." Strickland, 466 U.S. at 691, 1-4 S.Ct. at 2066 ("the reasonableness of counsels actions may be determined or substantially influenced by the defendant's own statements or actions).

Trial Counsel testified that he received all Rule 5 and Brady material and reviewed it with Petitioner. (App. p. 516 line 24—p. 517 line 9). Trial Counsel testified that he met with Petitioner on December 20, 2006, for approximately two hours and reviewed some of the discovery material. (App. p. 517 lines 10-16). Trial Counsel stated he met with Petitioner on January 9, 2007, in the grand jury room and presented Petitioner with the State's plea offer, additional discovery material, and additional indictments. (App. p. 517 line 17—p. 519 line 6).

Trial Counsel stated he reviewed the relevant portions of the two patrol car videos with Petitioner prior to trial. (App. p. 521 line 5—p. 522 line 2). In addition to review the discovery material with Petitioner, Trial Counsel stated he visited the scene of the shooting. (App. p. 522 line 8-20). Trial Counsel sent Petitioner various letters detailing their conversations, the status of the case, and the applicable case law. (App. p. 522 line 21—p. 527 line 22). Despite Petitioner's concerns, Trial Counsel stated that he was prepared to try the case. (App. p. 538 lines 10-15) Based off of the foregoing, Respondent submits that the record provides ample probative evidence to support the PCR court's finding that Trial Counsel was not ineffective for failing to provide Petitioner with discovery prior to his trial.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: _____
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April 13, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Court of Common Pleas
The Honorable R. Knox McMahon, Circuit Court Judge

RANDY YONSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **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
Post Office Box 11589
Columbia, SC 29201

This 13th day of April, 2015

CAROLINE COLLINS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 13 2015
S.C. Supreme Court

April 13, 2015

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

RE: **Randy Yonson v. State of South Carolina**
Lower Court Case No.:2010-CP-43-2797
Appellate Case No.: 2013-002653

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,

Daniel Gourley
Assistant Attorney General
SC Bar No. 100934

DG/cc
Enclosures

cc: Appellate Defender John H. Strom (2 copies)