

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No.: 2014-001240

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JUN - 8 2015

S.C. Supreme Court

TURUK SAUNDERS, #199803,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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PETITIONER'S QUESTION PRESENTED

Did the PCR court erroneously rule that defense counsel had a valid "strategy" not to challenge the sufficiency of the search warrant where counsel misunderstood the concept of "standing" to challenge the warrant, and counsel erroneously decided that if he was going to assert "mere presence" as a defense, that he had to accept the judge's erroneous ruling that he could not challenge the search warrant pre-trial?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. Petitioner was indicted at the March 2007 term of the Beaufort County Grand Jury for possession with intent to distribute (PWID) marijuana (2007-GS-07-0505), PWID cocaine (2007-GS-07-0506), PWID ecstasy (2007-GS-07-0507), trafficking cocaine, 10-28 grams (2007-GS-7-0508), and possession of a weapon during the commission of a violent crime (2007-GS-07-0509). He was represented by Cory Fleming, Esquire.

Petitioner proceeded to trial and was found not guilty of possession of a weapon during the commission of a violent crime, but was found guilty on all the other charges. On May 26, 2010, Petitioner was sentenced by the Honorable Ernest Kinard to twenty (20) years for PWID marijuana and PWID ecstasy and twenty-seven (27) years for PWID cocaine and trafficking cocaine with all sentences to be served concurrently.

A Notice of Appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. Nicole Mace, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Saunders, Op. No. 2012-UP-456 (S.C. Ct. App. July 25, 2012). The Remittitur was issued August 10, 2012.

On November 27, 2013, Petitioner filed an application for post-conviction relief (PCR), alleging ineffective assistance of trial and appellate counsel. Respondent made its Return on February 25, 2013. An evidentiary hearing on the matter was convened on August 27, 2013 at the Beaufort County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and represented by Scott W. Lee, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented Respondent. On March 5, 2014,

Judge Jefferson signed an Order of Dismissal, denying and dismissing the 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 for failing to challenge the search warrant where a valid strategy existed.

Petitioner asserts that the PCR court erred in ruling that his trial counsel (hereinafter "Counsel") had a valid strategy not to challenge the sufficiency of the search warrant. Petitioner claims that Counsel misunderstood the concept of standing to challenge the warrant and wrongly decided that if he was going to assert a "mere presence" defense, that he had to accept the trial judge's "erroneous ruling" that he could not challenge the search warrant pre-trial. This argument is 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.

This Court has held that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

At the conclusion of the pre-trial motions, Counsel discussed with the trial court that he had a dilemma about bringing a motion to suppress the search warrant while simultaneously adopting the theory that Petitioner "neither owned, operated, stayed in, domiciled, spent the night, or in any other way had any control over the trailer in question." (App. p. 33 ll. 13-15). Counsel told the court he believed that by adopting this defense strategy, Petitioner had "no standing to challenge a search warrant because he's not the subject of the search." (App. p. 33 ll. 16-18). Counsel stated that he believed the State would attempt to show that Petitioner was in possession or control of the house, and Counsel might have to challenge the search warrant; however, Counsel did not "want to in any way prohibit [his] ability to argue [the] position, which is that [Petitioner] has no ownership, control" over the trailer in question. (App. p. 34 ll. 11-21). Judge Kinard instructs Counsel that he "can't have it both ways," meaning that Counsel should not challenge a search warrant if his entire defense strategy hinges on the fact that Petitioner was

completely disassociated and disconnected to the trailer.¹ (App. p. 34 ll. 22-23). Counsel then stated to the court that although he might be able to predict what will transpire during the trial, "I am certainly not going to jeopardize my client's position concerning our contention that he has no control." (App. p. 35 l. 23 – p. 36 l. 1). Essentially Counsel's entire defense strategy was to show that Petitioner had absolutely nothing to do with what was going on inside the trailer, except that he was simply stopping by to buy some marijuana and was in the wrong place at the wrong time. (App. p. 300, l. 18).

At the PCR hearing, Counsel reiterated that his defense strategy was to show that Petitioner "was not a part of any of the drug conspiracy that appeared to be going on" but instead was merely present because he was "there to buy weed from his brother." (App. p. 401, ll. 13-16). When asked about his decision not to challenge the search warrant, Counsel testified, "I felt like I was making a decision where I may be jeopardizing my entire trial strategy by challenging this -- at least that's how it seemed to me." (App. p. 405, ll. 3-5). In formulating this strategy, Counsel agreed that he researched the law on the reasonable expectation of privacy.² Counsel again reiterated his rationale in not moving to suppress the search warrant, by stating "I was afraid that I was getting ready to box myself in on what I thought was our absolute best defense under the circumstances, given the lack of physical evidence or other information." (App. p. 410, ll. 20-23). Counsel testified that essentially, he did not want to negatively "affect the way the judge viewed the information" that might affect his future rulings when a directed verdict seemed like a possibility in the case. (App. p. 412, ll. 8-9).

¹ It is important to note that the trial judge did not make a "ruling" on this issue as it was not formally raised.

² Despite using the term "standing" in the trial, Counsel agreed with Petitioner's PCR counsel that "they really don't say standing anymore" to describe when "somebody has a reasonable expectation of privacy in the premises." (App. p. 407, ll. 7-10). Despite any confusion surrounding the word, Respondent contends that Counsel was well-versed on the correct law and only used the word "standing" because, as Counsel stated, "[s]tanding is just sort of a word you use" to describe the reasonable expectation of privacy. (App. p. 407, ll. 11-12)

The PCR Court seemed to agree with Counsel, stating,

I'm just saying that strategically, hindsight being twenty-twenty, I think it's very easy for us to say one thing now . . . But, strategically, I don't know that it was an unreasonable posture, especially in light of the Court's comments to him that from his perspective of the law, that they were inapposite positions factually. I don't know that you can say, I was merely present, and then say, oh, by the way, I have an expectation of privacy and I have dominion and control of this residence, at least this little part that I was on.

(App. p. 525, ll. 2-15).

Doubting that Counsel was ineffective, the PCR Court discussed Counsel's strategy, stating,

I don't know that is was an inappropriate strategic decision to decide between whether, my client was merely present or whether he had some standing, in other words, some expectation of privacy in this residence to challenge this warrant.

(App. p. 553, ll. 14-18).

The PCR Court next called into question whether any prejudice resulted from not challenging the search warrant by stating, "I'm just not certain that there would have been any appreciable difference." (App. p. 553, ll. 24-25).

In its Order of Dismissal, the PCR Court found Counsel'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 Counsel was not ineffective for failing to challenge the search warrant, finding his decision was "based on a valid trial strategy." (App. p. 577). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. See Edwards. Additionally, the PCR Court properly found that Petitioner failed to carry his burden of proving that any prejudice resulted from Counsel's failure to challenge the search warrant, finding that Counsel provided credible testimony that challenging the warrant would not have been successful. (App. p. 578). Given the totality of the evidence presented at trial, and the strategic decisions made at the time of trial, the result of Petitioner's trial would not have been different had Counsel moved to suppress the search warrant. See Cherry.

Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Id.

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,

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Assistant Attorney General
S.C. Bar # 101254

By:



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June 8, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
The Honorable Deadra L. Jefferson, Circuit Court Judge

TURUK SAUNDERS, #199803,

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:

Robert M. Dudek, Esq.
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 8th day of June, 2015



ELIZABETH MCLELLAN
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

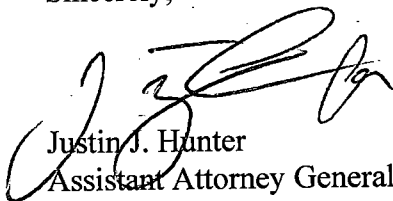
The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Turuk Saunders #199803 v. State of South Carolina
Appellate Case No. 2014-001240
Lower Court Case No. 2012-CP-07-4095

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
SC Bar No. 101254

JJH/em
Enclosures

cc: Robert M. Dudek, Appellate Defender