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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

The Honorable Deadra L. Jefferson, Circuit Court Judge

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Appellate Case No.: 2014-001581

ERIC SUMTER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

QUESTION PRESENTED .....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW .....5

ARGUMENT

    There is evidence of probative value to support the post-conviction  
    relief court's ruling that trial counsel was not ineffective regarding  
    his strategy during closing argument at trial.....6

CONCLUSION.....10

### **PETITIONER'S QUESTION PRESENTED**

Whether trial counsel was ineffective for telling the jury in closing argument that Petitioner "bought some drugs from a big-time place," where Petitioner did not give counsel permission to concede that Petitioner possessed the drugs and Petitioner's defense at trial was that the drugs belonged to his co-defendant, Tiffany Deas?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Petitioner was indicted at the October 2008 term of the Charleston County Grand Jury for trafficking cocaine, 100-200 grams (2010-GS-10-7492). He was represented by William L. Runyon, Jr., Esquire.

Petitioner proceeded to trial and was found guilty as indicted. On October 19, 2010, Petitioner was sentenced by the Honorable Kristi L. Harrington to a term of imprisonment for twenty-five years and a \$50,000 fine.

A Notice of Appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. Susan Hackett, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Sumter, Op. No. 2012-UP-554 (S.C. Ct. App. October 10, 2012).

On January 3, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on November 1, 2013, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on May 20, 2014 in Charleston County before the Honorable Deadra L. Jefferson. Charles T. Brooks, III, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented Respondent. By an Order of Dismissal signed July 15, 2014 and filed July 16, 2014, the PCR Court 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

**There is evidence of probative value to support the post-conviction relief court's ruling that trial counsel was not ineffective regarding his strategy during closing argument at trial.**

Petitioner asserts that his trial counsel erred by conceding guilt during his closing argument without Petitioner's permission. 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)).

Petitioner alleges that Counsel conceded his guilt during his closing argument. The relevant portion of the closing argument concerns Counsel's comment on the State's characterization of the evidence:

And so when the State got up here and said in their opening argument to you, got a contract with you, we're going to show you about some big-time stuff here, promised you that — and what did they do? They gave you two people, two wretched people, who bought some drugs from a big-time place and now they want the penalty and the verdict of guilty of that and that the problem of this is all you're going to have to decide is trafficking or nothing, you know.

(App. p. 264 ll. 19-25 to p. 265 ll. 1-2).

Counsel is concerned with the State's evidence because the State's own expert testified that the amount of drugs found could be for personal use. (App. p. 73 ll. 10-13). In his closing, Counsel highlights this fact (App. p. 265 ll. 9-12) in an attempt to show that Appellant should not be found guilty of trafficking.

Counsel continues to question the State's evidence in his closing argument, stating,

They promised in opening argument, we're going to show you how we go after the big people. And what have they got? They've got two people in a red car, stopped on the side of the highway, and who went to that

apartment one time. Remember they had the surveillance or what-have-you? One time. And, unfortunately, you're not going to be given the choice of other charges that could fall in this case. You're only going to have to decide the one charge of trafficking.

(App. p. 266 ll. 7-14).

Counsel further argues to the jury to find Appellant not guilty of trafficking, stating,

And I'm going to ask you to find Mr. Sumter not guilty of trafficking, because they didn't show you that this was some sort of big old operation. Just some wretched soul who had some cocaine and his girlfriend is trying to keep her head above water...and ask you to find Mr. Sumter not guilty of trafficking, because one thing which they haven't shown with all this other good stuff is, the intent to be a trafficker.

(App. p. 267 ll. 10-25).

At the PCR hearing, Counsel explained his closing argument strategy, testifying that his decision was to argue to the jury that if they found that Appellant was in possession, "that it was for his own use" (App. p. 246 l. 21) and not for trafficking since the State's expert testified at trial that the quantity of cocaine found was "a smaller enough quantity for someone who is a user." (App. p. 346 ll. 18-19). Counsel testified that he wanted to show the jury that they would have to find Petitioner not guilty of trafficking if they believed that the drugs found were for personal use (App. p. 346 ll. 19 to p. 347 l. 1). The PCR Court found Counsel's testimony to be credible and found Petitioner's testimony was not credible. (App. p. 372). 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 was ineffective for the statements made during closing argument. The PCR Court found that Counsel was not deficient and did not concede Applicant's guilt at trial. (App. p. 378).

The PCR Court found that

Counsel's statements during closing were not a concession of guilt, but an attempt by Counsel to minimize the deficits in the Applicant's defense and argue an alternate finding if the jury concluded that the State failed to meet its burden of proof on the Trafficking offense.

(App. p. 378-379). The PCR Court further found that Counsel's strategy was "not prejudicial" but was actually "helpful to [Petitioner's] defense" as Counsel attempted "to provide the jury with an alternative to trafficking that would not result in a guilty verdict." (App. p. 379). The PCR Court properly found that Counsel employed a valid strategy and argument, especially "in light of testimony the defense elicited from Officer Euper on cross-examination that 100 grams could be one month's supply of cocaine for one person." (App. p. 379). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. See Edwards. Given the totality of the evidence presented at trial, the result of Petitioner's trial would not have been different had Counsel employed a different strategy during his closing argument. 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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By:

  
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July 1, 2015

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**CERTIFICATE OF SERVICE**

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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:

**Tiffany L. Butler, Esq.**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
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This 1<sup>st</sup> day of July, 2015

  
ELIZABETH MCELLELLAN  
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