ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

John C. Hayes, III, Circuit Court Judge

LORENZO CROSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000022

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to move for a continuance when Petitioner did not appear for his trial for allegedly trafficking in cocaine base, since Petitioner had accepted the State's plea offer of seven years for pleading to a lesser-included offense, Petitioner had been in fear for his life because of his work with police as a confidential informant, and Petitioner was found guilty in his absence and sentenced to twenty-five years' imprisonment?

STATEMENT OF THE FACTS

On May 15, 2008, Petitioner was indicted by the Horry County Grand Jury for trafficking in cocaine base, more than twenty-eight grams but less than 100 grams. App. 174. On April 13, 2009, Petitioner's case proceeded to a jury trial before the Honorable Steven H. John. App. 1. Kia T. Wilson represented Petitioner. Jimmy A. Richardson, II represented the State. App. 1. Petitioner did not appear for his trial.

Petitioner was found guilty. App. 93. Judge John sealed Petitioner's sentence. App. 101. On May 19, 2010, Petitioner was brought before Judge John for sentencing. App. 103. The judge sentenced Petitioner to twenty-five years' imprisonment. App. 106. Petitioner appealed his conviction and sentence.

On direct appeal, a brief was filed by LaNelle Cantey DuRant pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967). See State v. Cross, Op. No. 2012-UP-370 (S.C. Ct. App. filed June 20, 2012). Petitioner's conviction and sentence were affirmed, and counsel was relieved pursuant to Anders.

On June 6, 2013, Petitioner filed a PCR application. App. 108. On February 27, 2014, Respondent filed its return requesting an evidentiary hearing. App. 122. On October 27, 2014, a PCR hearing was held before the Honorable John C. Hayes. App. 128. Daniel Selwa represented Petitioner. Joshua Thomas represented the State. App. 128.

On November 16, 2014, the judge issued an order of dismissal. App. 167. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to move for a continuance when Petitioner did not appear for his trial for allegedly trafficking in cocaine base, since Petitioner had accepted the State's plea offer of seven years for pleading to a lesser-included offense, Petitioner had been in fear for his life because of his work with police as a confidential informant, and Petitioner was found guilty in his absence and sentenced to twenty-five years' imprisonment.

Trial in Absence

Prior to trial, the solicitor made a motion to try Petitioner in his absence. App. 25, lines 6 – 7. The solicitor explained to the judge that Petitioner had appeared in court on April 11, 2008 and May 16, 2008 for hearings. As a result of Petitioner's cooperation in the past, the State extended a plea offer to him. App. 23, line 23 – App. 24, line 1.

On February 4, 2009, Petitioner "actually signed up to plead guilty, signed the paperwork." App. 24, lines 1 – 4. In exchange for Petitioner's guilty plea to trafficking in cocaine base, the State would reduce the charge to a second offense and recommend a seven year sentence. App. 24, lines 5 – 7. Petitioner told the solicitor and defense counsel that he would return to court that afternoon, but he did not return. App. 24, lines 7 – 9. The solicitor subpoenaed Petitioner to appear in court in April 2009, but he did not appear.

Defense counsel explained to the judge that she had tried to contact Petitioner but was unable to reach or locate him. App. 25, line 9 – App. 26, line 3. Counsel also expressed a concern that "some harm may have befallen him." App. 26, line 1. However, counsel did not move for a continuance.

Facts at Trial

On January 30, 2008, the Fifteenth Circuit Drug Enforcement Unit set up surveillance to investigate alleged drug activity at 1417 Racepath Avenue in Horry County. App. 38 – 29. According to Officer Crystal Garcia, officers received information from a confidential informant that Petitioner, under the name of Florida Kevin, was selling drugs from the residence. App. 40, lines 5 – 7. The police "attached an audio recording system" to the informant's person and sent him to the Horry County residence to purchase drugs. App. 40, lines 18 – 22. After the informant completed the drug transaction and gave the purchased drugs to police, Officer Garcia obtained a search warrant for 1417 Racepath Avenue. App. 41, line 18 – App. 42, line 8.

On February 11, 2014, ten days later, Garcia executed the search warrant at the residence. App. 43, lines 23 – 24. When officers arrived, Petitioner and three females were inside the home. App. 44, lines 16 – 19. Petitioner was placed into handcuffs, but "was very cooperative." App. 45, line 11. He allegedly told Officer Garcia that what she was looking for was in his "right pocket." Garcia retrieved "four different separate baggies of suspected crack cocaine" from the pocket. App. 45, lines 7 – 9. The drugs tested positive for crack cocaine and weighed 5.01 grams. App. 64, line 13 – App. 65, line 12.

Next, according to Garcia, Petitioner guided her to a back bedroom and "said that there was a bag of crack cocaine in his jacket pocket" which was in the closet. App. 45, lines 15 – 18. Garcia retrieved a clear bag containing crack cocaine from the jacket. App. 45, lines 19 – 21. The substance tested positive for crack cocaine and weighed 41.66 grams. App. 66, lines 3 – 10.

During mitigation prior to sentencing at the trial in absence, defense counsel informed the judge that Petitioner wanted to plead guilty and if he had appeared in court, the case would have been a guilty plea. App. 100, lines 1 – 2. Counsel also contended that Petitioner's absence

"probably played heavily in the jury (sic) eyes as far as to their decision in the case." App. 97, lines 13 – 14.

PCR Hearing

During the PCR hearing, Petitioner explained that there was a plea agreement in place. He stated that the State had offered him seven years' imprisonment in exchange for pleading guilty to trafficking in cocaine. App. 131, lines 19 – 21. Petitioner indicated that he "signed the plea agreement" on February 4, 2009 at the courthouse. App. 131 – 134. After leaving the courthouse for lunch, he "learned about" a threat on his life made by someone he helped the police arrest while working as a confidential informant. App. 132 – 133. Because he was in fear for his life, Petitioner did not return to the courthouse. Instead, he sought refuge in West Columbia, Lexington County. App. 135.

Petitioner stated that he contacted Officer Garcia, with whom he worked with as an informant. Petitioner planned to return to court to plead guilty when "things die down." App. 137, lines 8 – 22. App. 137. He received no notice of trial. App. 138, lines 6 – 13. Had Petitioner known he would be tried in his absence, he would have made himself available "to get the seven years." App. 138, line 25 – App. 139, line 6. Petitioner contended that defense counsel's failure to move for a continuance prior to trial prejudiced his case. App. 141, lines 9 – 13. If counsel had moved for and been granted a continuance, Petitioner would have contacted her before he was tried in his absence. App. 142, lines 13 – 17.

Defense counsel explained that Petitioner always appeared when required and could not "recall a time when he did not come in." App. 152. Petitioner appeared in court on February 4, 2009, to sign up to plead guilty and was supposed to appear on February 13, 2009 to actually plead

guilty. App. 152, lines 6 – 15. According to counsel, Petitioner left "without permission." App. 152, lines 16 – 17.

Counsel also acknowledged that Petitioner had informed her of his work as a confidential informant and that "he felt very unsafe." App. 154, lines 2 – 6. Petitioner indicated to defense counsel "that he had been either threatened or that he was fearful for his life because of some work he did for the [Drug Enforcement Unit]." App. 154, lines 6 – 8. Counsel stated that she "was concerned that something had happen[ed] given the fact he was fearful for his safety." App. 154, lines 22 – 23. The solicitor informed counsel that Petitioner's trial would be held on April 9, 2009. Counsel contended that she tried to call Petitioner and had sent an investigator to track him down. App. 155.

On the day of trial, defense counsel did not move for a continuance. App. 158, lines 11 – 16. However, counsel indicated that she thought if she had been given extra time, Petitioner may have contacted her office eventually. App. 161, lines 3 – 4. Counsel explained that Petitioner's case was always going to be a plea. If Petitioner had been found or had made contact with her, he would have appeared in court to plead guilty. App. 162, lines 1 – 12.

Order of Dismissal

The PCR judge dismissed Petitioner's application. App. 167 – 172. The judge wrote that "[u]nder the facts of this case, it is doubtful that a continuance would have been granted if requested." App. 171. The judge opined that a continuance "would not have been justified under the facts of Applicant's case." App. 171. He found defense counsel's representation effective and "even if . . . counsel was ineffective such would not have prejudiced Applicant." App. 172.

Discussion

The PCR judge erred by finding trial counsel provided effective representation where counsel failed to move for a continuance when Petitioner did not appear for trial for allegedly trafficking in cocaine base. Petitioner had already accepted the State's plea offer of seven years for pleading to a lesser-included offense. Petitioner had also been in fear for his life because of his work with police as a confidential informant. Because Petitioner was found guilty in his absence and sentenced to twenty-five years' imprisonment, he was unduly prejudiced.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. Id. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, counsel was ineffective or failing to move for a continuance prior to trial. Counsel was aware that Petitioner wanted to plead guilty and never wanted a trial. In fact, the solicitor informed the judge that Petitioner had already signed the sentence sheet to plead guilty. Counsel was also aware that Petitioner's life had been threatened and there was a possibility that he was harmed. While defense counsel made the judge aware that Petitioner always appeared for court and appointments and was, in fact, in fear for his life, she did not request **any** additional time to locate Petitioner.

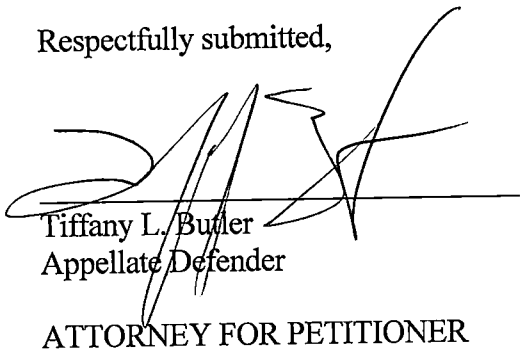
During the PCR hearing, counsel conceded that she did not contact any agency which investigated missing persons even though she "thought maybe he was dead, honestly." App. 159, lines 1 – 5. Counsel even stated that Petitioner would have eventually contacted her if she had been given more time. Because counsel did not move for a continuance on the record, the Court of Appeals could not even consider the issue of whether a continuance should have been granted as it was not preserved for appellate review.

There was simply **no** logical reason not to move for a continuance in this case given that Petitioner had already signed up to plead guilty and counsel had explained to the judge the danger that Petitioner faced. Had defense counsel requested and been granted a continuance, she would have had more time to locate Petitioner. Petitioner would have appeared in court to accept the State's offer and plead guilty to trafficking in cocaine base, second offense. Consequently, Petitioner would be serving a seven-year prison sentence instead of twenty-five years.

CONCLUSION

For the reasons argued above, Petitioner Lorenzo Cross respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of July, 2015.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 1st day of July, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of July, 2015.

Barbara Wolfe (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.