

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO ORANGEBURG COUNTY  
Court of Common Pleas  
Maité Murphy, Circuit Court Judge

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**RECEIVED**

JUL 17 2015

Appellate Case No. 2014-002472

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**S.C. Supreme Court**

DIDIER VAN SELLNER,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **ISSUE PRESENTED**

Is there evidence of probative value to support the post-conviction relief court's finding that plea counsel was not ineffective in advising Petitioner to plead guilty to armed robbery, where Petitioner presented an elderly bank teller with a note indicating that he had a gun and would shoot her if she did not comply with his demands, causing her to reasonably fear for her life, and Petitioner failed to meet his burden of proof of showing his conduct did not comport with the armed robbery statute?

## STATEMENT OF THE CASE

On September 8, 2011, Petitioner entered an Orangeburg branch of the South Carolina Bank and Trust and handed Ms. Hildebrant, an elderly teller, a note that he had a gun and would shoot her if she did not give him three thousand dollars. Ms. Hildebrant gave Petitioner approximately four hundred and ninety-two dollars before Petitioner grew impatient and fled the scene. Shortly thereafter, law enforcement located Petitioner nearby at local motel still wearing the same clothing. Petitioner was placed under arrest for armed robbery and gave statements admitting his guilt.

Margaret E. Hinds, Esquire, of the Orangeburg County Public Defenders Office was appointed to represent Petitioner. On March 6, 2012, Petitioner appeared before the Honorable Edgar W. Dickson, where he waived presentment to the Orangeburg County Grand Jury and pled guilty to armed robbery (2011-GS-38-1984). Judge Dickson sentenced Petitioner to twelve years imprisonment. Petitioner did not appeal his conviction or his sentence.

On February 11, 2013, Petitioner filed a timely application for post-conviction relief. In his application, Petitioner alleged he was being held in custody unlawfully based on the following allegations:

1. "Ineffective unprofessional counsel;"
  - a. Counsel failed to explain all the elements of the charge in detail.
2. Involuntary Guilty Plea; and
  - a. Counsel "pressured me to accept plea."
3. "I was never armed, nor possessed any object or device that could be considered a weapon . . . So this bank robbery could not be in any way, shape, form, or action be considered a [sic] armed robbery."

Respondent made its Return on April 24, 2013, requesting an evidentiary hearing be held.

An evidentiary hearing on Petitioner's application was held May 29, 2013, at the Dorchester County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing alongside his counsel, Michael R. Culler, Jr., Esquire. Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office represented Respondent. Petitioner testified on his own behalf and presented testimony from plea counsel, Margaret E. Hinds, Esquire. After a review of all materials presented, post-conviction relief court denied and dismissed Petitioner's application by written order signed September 29, 2014.

Petitioner filed a Notice of Appeal on November 18, 2014. Thereafter, Petitioner filed a Petition for Writ of Certiorari on May 12, 2015. This Return follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action 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) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant 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 applicant 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 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an 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, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant 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, at 688. Second, counsel's deficient performance must have prejudiced the applicant 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

## ARGUMENT

**There is evidence of probative value to support the post-conviction relief court's finding that plea counsel was not ineffective in advising Petitioner to plead guilty to armed robbery, where Petitioner presented an elderly bank teller with a note indicating that he had a gun and would shoot her if she did not comply with his demands, causing her to reasonably fear for her life, and Petitioner failed to meet his burden of proof of showing his conduct did not comport with the armed robbery statute.**

On September 8, 2011, Petitioner entered the South Carolina Bank and Trust and handed Ms. Hildebrandt, an elderly teller at the bank, a note that he had a gun and demanding that she requesting three thousand dollars in used bills without any dye packs, or he would shoot her. (App. pp. 13, 46, 56). Specifically, Petitioner handed Ms. Hildebrandt a note stating, "freeze this is [a] stick up, *I have a gun*. Please give me three thousand dollars in large, loose bills. No games or *I'll shoot*." (App. p. 56) (emphasis added)<sup>1</sup>. Ms. Hildebrandt gave Petitioner four hundred and ninety-two dollars before Petitioner became impatient and fled the bank. (App. pp. 13-14, 17). A short time later, law enforcement located Petitioner at a local motel, wearing the same clothing as when he committed the robbery. (App. p. 14). Petitioner was arrested and gave statements to law enforcement admitting his guilt. (App. p. 14). Petitioner further admitted his involvement to other local enforcement officials and FBI agents. (App. p. 14)

Prior to this incident, Petitioner had been convicted in New York for various robbery and drug-related offenses. (App. pp. 14, 57). Additionally, Petitioner served eight

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<sup>1</sup> Respondent cites to this page in support of his position that he "had nothing in his hand and did not stick his hands in his pockets or make any other action to indicate that he had a weapon." (PWC pp. 6-7). This is a mischaracterization of the testimony presented at the evidentiary hearing. Petitioner made no mention of the location of his hands or any indication that he had a weapon; rather Petitioner testified that he made threats to shoot if the bank teller gave him a dye pack. (App. p. 56). Additionally, Petitioner cites to page forty-three of the record several times to further support his position. Respondent interprets this as a Scrivener's error, as page forty-three of the record is the index of the proceedings for the PCR hearing. (App. p. 43)

and a half years in New Jersey for attempted murder. (App. p. 59). It is uncontroverted that Petitioner's prior record made him eligible for an enhanced life without parole sentence pursuant to S.C. Code Ann. § 17-25-45.

On March 6, 2012, Petitioner waived presentment to the grand jury and pled guilty to armed robbery. (App. p. 13). Although Petitioner denied having a weapon during the robbery, he never denied that he made the bank teller believe that he had a weapon. (App. pp. 11, 18-19). Petitioner also fully acknowledged that he was guilty of the facts giving rise to the charge. (App. pp. 17-18). Counsel testified similarly, stating that Petitioner "never denied any responsibility for his actions . . . He has admitted it from day one." (App. p. 18). Counsel further testified that Petitioner did not have a weapon, although he led Ms. Hildebrandt to believe that he did indeed have a weapon. (App. p. 18). Counsel further noted that it was not Petitioner's intent to harm anyone, but he had gotten into a situation where he needed to come into some money quickly to pay back a debt and avoid harm to him or his wife. (App. pp. 18-19). Petitioner never testified as to the location of his hands, whether his clothing had any bulges during the robbery, or whether there were any physical representations to make Ms. Hildebrandt reasonably believe Petitioner was armed. Rather, Petitioner states that he had "nothing in [his] hand." (App. p. 54). The investigator for the bank testified that this robbery was a traumatic event for Ms. Hildebrandt, who has since retired from the bank, and that Petitioner showed neither Ms. Hildebrandt nor the other employees any mercy. (App. pp. 13, 15).

Petitioner now asserts that counsel was ineffective for advising him to plead guilty to armed robbery, arguing that his conduct did not satisfy the statutory requirements for armed robbery. Petitioner alleges counsel was ineffective for failing to

explain the elements of armed robbery in detail and for informing him that his conduct comported with the armed robbery statute. (App. p. 30). Petitioner also alleges counsel was ineffective for “pressur[ing] [Petitioner] to accept plea . . . because of [a] ten year prison sentence from third-degree robbery in New York State.” (App. pp. 30-31). Petitioner contends the post-conviction relief court erred in finding that plea counsel was not ineffective and asserts this Court should reverse the lower court.

In its Order of Dismissal, the post-conviction relief court found Petitioner failed to satisfy his burden of proof establishing any deficiency on the part of plea counsel in advising Petitioner to plead guilty to armed robbery. (App. p. 81). The post-conviction relief court also noted that Petitioner readily concedes that he entered the bank and passed the teller a note demanding money and threatened to shoot her. (App. p. 81). The post-conviction relief court found Petitioner’s conduct comported to the armed robbery statute by alleging that he was armed with a deadly weapon. (App. p. 81). The post-conviction relief court found that Petitioner failed to establish either deficiency of plea counsel or any resulting prejudice and denied relief. (App. pp. 81-82). These findings are supported by ample evidence in the record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

At the evidentiary hearing, counsel testified that prior to her appointment, Petitioner had already given multiple statements admitting to the conduct giving rise to the charge. (App. p. 65). Because of these freely given and voluntary statements, counsel testified that she attempted to negotiate a favorable plea offer with the State to avoid a hefty term of imprisonment, including a sentence of life without parole based on Petitioner’s prior record. (App. p. 65). She further testified that she discussed the

elements of armed robbery with Petitioner and that the representation of a weapon was satisfied through his conduct that twice referenced his possession of a weapon.<sup>2</sup> (App. pp. 66, 69, 70). Additionally, Petitioner testified he was aware that if he did not plead guilty, the State could seek life without parole based on his prior convictions and that he discussed this with counsel. (App. pp. 47-48, 57). Petitioner did not testify that his hands were not in his pockets or behind his back, that he did not have any bulges in his clothing, that he was not reaching inside of a coat pocket, or that there was no physical representation to make Ms. Hildebrandt believe he had a weapon. He merely alleged that he did not have a weapon. Petitioner failed to establish that there was no physical representation causing Ms. Hildebrandt to reasonably believe that Petitioner was armed. Petitioner failed to meet his requisite burden of proof necessary for post-conviction relief.

In support of his argument, Petitioner cites to State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002). In Muldrow, the defendant entered a convenience store to purchase a pack of cigarettes and handed the clerk a note, stating that he would shoot her if she did not give him all of the money in the register. Id. at 267, 559 S.E.2d at 848-49. The clerk asked the defendant if he was serious, and he replied “yes” and once again threatened to shoot her. Id. at 267, 559 S.E.2d at 849. The defendant was indicted for armed robbery and proceeded to trial. Id. at 266, 559 S.E.2d at 848. After the State’s case, the defendant moved for a directed verdict, arguing that there was no evidence that he was armed with a deadly weapon or that he used a representation of a deadly weapon

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<sup>2</sup> Petitioner argues that plea counsel “confirmed that there was no allegation that [Petitioner] actually had a weapon or made any motion to make anyone believe that he had a weapon.” (PWC p. 13). In support of this position, Petitioner cites to page sixty-nine, lines five through eight of the record. The testimony presented at the evidentiary hearing indicated that the representation made by Petitioner to make Ms. Hildebrandt believe that he had a weapon was his note threatening to shoot her if his demands were not met. (App. p. 69).

as required under the statute. Id. at 266, 559 S.E.2d at 849. The trial court denied his motion for a directed verdict, but agreed to charge the lesser included offense of strong arm robbery. Id. The jury convicted the defendant of armed robbery. Id. at 267, 559 S.E.2d at 848. On appeal, the defendant argued his motion for a directed verdict should have been granted because there was no evidence he was armed with a deadly weapon or that he used a representation of a deadly weapon as required by the statute. Id. at 266, 559 S.E.2d at 849. Based on these facts, this Court held that words alone were not sufficient under S.C. Code Ann. § 16-11-330(A) and in order to establish armed robbery, the State must show evidence corroborating the allegation of being armed, for example a physical representation of a deadly weapon. Id. at 269, 559 S.E.2d at 849-50.

Petitioner's case is distinguishable from Muldrow, as Petitioner knowingly pled guilty to armed robbery and specified in his note that he actually had a weapon. (App. pp. 12-13, 56). Specifically, Petitioner testified that his note said: "Freeze this is [a] stick up, **I have a gun.** Please give me three thousand dollars in large, loose bills. No games or **I'll shoot.**" (App. p. 56) (emphasis added). Furthermore, Petitioner never denied that he made Ms. Hildebrandt believe that he had a weapon. (App. p. 18). Petitioner never testified that there was no physical representation of a weapon. The record is silent as to the placement of Petitioner's hands, whether his pockets were bulging, or whether Petitioner reached inside a coat pocket for something, all which could reasonably make Ms. Hildebrandt believe he had a weapon. Additionally, Petitioner never presented any evidence that he made no action to indicate he had a weapon at the time of the robbery, such as that his hands were visible or he had no bulges in his clothing, other than

asserting he made no such action after he had already pled guilty to armed robbery.<sup>3</sup> (App. p. 54). See State v. Bennett (S.C. 1997) 328 S.C. 251, 493 S.E.2d 845, appeal after new sentencing hearing 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 166 L.Ed.2d 530 (finding that a hand or fist may be “deadly weapon” for purposes of armed robbery and whether defendant's hand or fist was deadly weapon was question of fact in armed robbery prosecution given disparity in size between victim and defendant). Similarly, Petitioner did not present evidence to assert his allegation that no one felt that he was armed at the time of the robbery. (App. p. 54). It is Petitioner's burden to establish that he is entitled to relief, and as articulated above, he has failed to do so.

Based on the foregoing, Petitioner failed to establish that he is entitled to post-conviction relief. The lower court properly denied Petitioner relief.

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<sup>3</sup> Petitioner cites to page thirteen of the record that “the evidence indicated that [Petitioner] presented a note that threatened to shoot the teller but had no physical representation of a deadly weapon or any object which a person might reasonably believe to be a deadly weapon.” (PWC p. 13). The testimony at the plea hearing did indicate that Petitioner presented a threatening note to the bank teller but made **no mention** of whether or not there were any physical representation that might have lead Ms. Hildebrandt to reasonably believe that Petitioner was armed. As this was a guilty plea, no testimony was presented from Ms. Hildebrandt or any other witnesses present during the robbery.

**CONCLUSION**

For the foregoing reasons, this Court should deny this Petition. 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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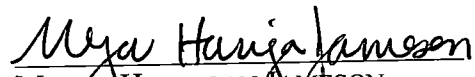
**PROOF OF SERVICE**

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Laura A. Baer, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-11589

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

This 17<sup>th</sup> day of July, 2015

  
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