

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SEP 10 2015

The Honorable Kristi Lea Harrington, Circuit Court Judge, **Supreme Court**

Appellate Case No. 2015-000021

Nelson H. Castro, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the post-conviction relief judge properly find Petitioner failed to demonstrate trial counsel ineffective in failing to object to Petitioner's sentence where Petitioner conceded at trial the record does not contain any evidence the trial judge's sentence was retaliatory; where trial counsel articulated valid reasoning for not finding the sentence objectionable; and where the record indicates the trial judge based his sentence on several other serious factors?

STATEMENT OF THE CASE

For the purposes of this return, Respondent adopts Petitioner's statement of the case.

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding trial counsel was not ineffective for failing to object to Petitioner's sentence.

Petitioner asserts the post-conviction relief judge erred in finding trial counsel was not ineffective for “not objecting to the trial judge’s retaliatory sentence[.]” (Pet. for Writ of Cert. p. 8). However, this argument overlooks the fact the trial judge articulated several factors he considered in issuing his sentence. It also overlooks the fact trial counsel, who was in a better position make this determination, did not believe the trial judge issued a retaliatory sentence. Accordingly, the post-conviction relief judge did not err in denying relief.

In this post-conviction relief action, Petitioner bears the burden of proof. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). This Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, Petitioner must prove trial counsel’s performance was deficient. Id. Under this prong, the Court measures trial counsel’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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.” Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

Initially, Respondent submits Petitioner's arguments are not preserved for appeal. Petitioner argues various statements by the trial judge indicate he punished Petitioner for exercising his right to a jury trial. (Pet. for Writ of Cert. p. 6; p. 7). However, when asked to identify "any statement or anything in the transcript [...] that would indicate [the trial judge] was punishing [Petitioner] for exercising his constitutional rights[.]" Petitioner failed to direct the post-conviction relief judge to any specific parts of the transcript to support his argument. (App. p. 346, line 23-p. 347, line 3). Because Petitioner failed to articulate at the evidentiary hearing any of the arguments forwarded in the petition, those arguments are not properly before this Court. See, e.g., CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011) ("A litigant cannot concede an issue at trial and then raise it on appeal." (citing Southern Ry. v. Routh, 161 S.C. 328, 333, 159 S.E. 640, 642 (1930)); Kinard v. Crosby, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993) (party cannot argue evidentiary issues on appeal that were conceded at trial)).

Regardless, the post-conviction relief judge properly found trial counsel articulated a valid strategic reason for not objecting to Petitioner's sentence. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Trial counsel testified he did not believe the trial judge was punishing

Petitioner for exercising his right to a jury trial. (App. p. 342, lines 5-7). He articulated that the trial judge's comments at the arraignment were apparently a warning that developments at trial may necessitate a harsher sentence. (App. p. 342, lines 7-15). Trial counsel also testified he would have objected if he sensed the trial judge was punishing Petitioner for going to trial. (App. p. 343, line 14-p. 344, line 21). Trial counsel was present throughout the entire proceedings and was in the best position to observe the trial judge's demeanor and tone. Petitioner cites approximately sixty-eight¹ lines from the entire record to demonstrate it is "patently obvious" the trial judge was "miffed and perturbed" at Petitioner. (Pet. for Writ of Cert. p. 6-7). However, these isolated references cannot overcome trial counsel's judgment that the trial judge was not punishing Petitioner. See United States v. Mullins, 446 F.3d 750, 758 (8th Cir. 2006) (isolated errors "should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers."). Trial counsel clearly did not believe the sentence was retaliatory in any sense, and the post-conviction relief judge properly credited trial counsel's judgment.

The post-conviction relief judge also properly found Petitioner failed to demonstrate he would have received a different sentence if such an objection had been made. Petitioner seizes upon trial counsel's admission that an objection would have preserved the error for review as evidence of ineffectiveness. (Pet. for Writ of Cert. p. 5-6). However, failure to preserve an issue is not grounds for a new sentencing hearing in and of itself. Petitioner must also show the appellate court would have reversed the sentence. See McHam v. State, 404 S.C. 465, 481-82, 746 S.E.2d 41, 50 (2013)

¹ Respondent submits only seven lines (App. p. 276, lines 11-13; Supp. App. p. 14, lines 20-23) of a 294 page trial record even remotely resemble the offending statements made in Davis v. State, 336 S.C. 329, 332, 520 S.E.2d 801, 802 (1999), and State v. Hazel, 317 S.C. 368, 369, 453 S.E.2d 879, 879 (1995).

(applicant must still show prejudice from failure to object at trial (citing Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999))).

Petitioner essentially argues the trial judge's sentence was retaliatory because he told Petitioner he would issue a seven year sentence at arraignment, but instead issued a fifteen year sentence after trial.² However, the fact a defendant receives a harsher sentence after trial is not a *per se* abuse of discretion. See State v. Brouwer, 346 S.C. 375, 391, 550 S.E.2d 915, 924 (Ct. App. 2001) (Anderson, J., dissenting) ("The defendant who opts to go to trial rather than negotiating a plea runs the risk of a harsher sentence than he would have received by pleading guilty. (citing United States v. Quejada-Zurique, 708 F.2d 857 (1st Cir. 1983))). The trial judge's statements at the arraignment were part of his colloquy with Applicant about the risks and benefits of accepting the State's plea offer.³ His indication he would issue a seven year sentence appears to have been based on only the brief recitation of the facts he received from the attorneys in chambers prior to the arraignment. However, developments at trial may have given the trial judge reason to believe a more serious sentence was appropriate. Id. at 392, 550 S.E.2d at 924 (Anderson, J., dissenting) ("A trial judge may impose a greater sentence upon a defendant after the judge has heard the evidence at trial than he might

² Interestingly, Petitioner does not even cite to the trial judge's statements that "acceptance of responsibility is, I believe, a valid consideration for the Court." (Supp. App. p. 14, lines 20-23). Because he has made no complaints about these statements, they are not properly before this Court. McCray v. State, 317 S.C. 557, 559 n.1, 455 S.E.2d 686, 687 n.1 (1995) (issues not raised in petition are not preserved for review).

³ These statements at arraignment should be given even less credence in evaluating Petitioner's allegation because the purpose of the arraignment was to confront Petitioner with the risks and benefits of proceeding to trial. Brouwer, 346 S.C. 375, 392, 550 S.E.2d 915, 924 (Anderson, J., dissenting) ("While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable-and permissible-attribute of any legitimate system which tolerates and encourages the negotiation of pleas." (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978))).

have imposed in conjunction with a guilty plea.” (citing West v. State, 528 S.E.2d 287 (Ga. Ct. App. 2000))).

In fact, the trial judge indicated his sentence was partially based on the overwhelming evidence of Petitioner’s guilt, including a video of Petitioner “very casual[ly]” conducting drug transactions. (Supp. App. p. 14, line 24-p. 15, line 10). The trial judge also based his sentence on the fact Petitioner faced multiple other charges, which indicated Petitioner was engaged in a continuing course of conduct as a drug dealer. (Supp. App. p. 14, lines 12-19). The trial judge also took into consideration Petitioner’s immigration status. (Supp. App. p. 15, lines 23-24). Because the record reflects the trial judge based his sentence on several serious factors other than Petitioner’s decision to proceed to trial, he did not abuse his discretion. See, e.g., State v. Follin, 352 S.C. 235, 257, 573 S.E.2d 812, 824 (Ct. App. 2002) (“[W]hen the record clearly reflects an appropriate basis for a disparate sentence, the sentencing judge may impose a different sentence on a co-defendant in a criminal trial.”); Brouwer, 346 S.C. at 388, 550 S.E.2d at 922 (Ct. App. 2001) (consideration of defendant exercising right to trial is inappropriate where “the record fails to reflect **an otherwise appropriate basis**” for defendant’s sentence (emphasis added)). Because a properly preserved objection would not have resulted in a successful direct appeal, the post-conviction relief judge properly found Applicant was not prejudiced by trial counsel’s decision to not object to Petitioner’s sentence.

Because the record contains significant probative evidence trial counsel acted reasonably and within professional norms at Petitioner’s sentencing and that no prejudice resulted from trial counsel’s actions, the post-conviction relief judge did not err in

denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

September 10, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable Kristi Lea Harrington, Circuit Court Judge

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S.C. Supreme Court

NELSON H. CASTRO,

Petitioner,

v.

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:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 10th day of September, 2015


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

September 10, 2015

RECEIVED

SEP 10 2015

S.C. Supreme Court

VIA HAND DELIVERY

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

RE: Nelson H. Castro v. State of South Carolina
Appellate Case No: 2015-000021

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,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)