

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-002008
Lower Court Case No. 2012-CP-23-6281

JAQUES J. SULLIVAN, #335849,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX.....1

QUESTION PRESENTED.....2

STATEMENT OF THE CASE3

ARGUMENT.....5

CONCLUSION.....12

QUESTION PRESENTED

I.

Whether the PCR court erred in finding that defense counsel did not have an actual conflict of interest when he represented the Petitioner?

STATEMENT OF THE CASE

The Petitioner, Jaques Jamar Sullivan, was charged in Greenville County with trafficking 100-200 grams of cocaine, possession of marijuana, and possession of a weapon during the commission of a violent crime. On July¹ 14-15, 2009, the Petitioner proceeded to trial by jury on these charges. The Petitioner was represented at this proceeding by Daniel J. Farnsworth, Esquire. At the conclusion of the trial, the jury found the Petitioner guilty as charged. The Honorable Edward W. Miller, presiding circuit judge, sentenced the Petitioner to twenty-five years' imprisonment on the trafficking charge, five years' imprisonment on the firearms charge, and a time served sentence on the marijuana charge, with the sentences to run concurrently. Judge Miller also sentenced the Petitioner to a consecutive six-month prison term for criminal contempt. See App. pp. 216-217.

The Petitioner timely appealed his convictions and sentences. The Petitioner was represented on appeal by J. Falkner Wilkes, Esquire. On October 11, 2011, the South Carolina Court of Appeals issued an unpublished opinion affirming the Petitioner's convictions and sentences. State v. Sullivan, Op. No. 2011-UP-446 (S.C. Ct. App. filed October 11, 2011). The Petitioner did not appeal to this Court.

On October 1, 2012, the Petitioner filed an Application for Post-Conviction Relief with the Greenville County Clerk of Court. The State served its Return on May 2, 2013. An evidentiary hearing into the matter was convened on April 25, 2014, before the Honorable D. Garrison Hill, presiding circuit judge. The Petitioner was represented at this proceeding by J. Bradley Bennett,

¹ The trial transcript mistakenly states that the trial occurred in January. See App. p. 1. The trial actually occurred in July, as the court reporter's certification correctly notes. See App. p. 215. Numerous filings in the case refer to the trial occurring in January. See App. p. 223 (Brief of Appellant); p. 261 (Application for Post-Conviction Relief).

Esquire. On August 14, 2014, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

ARGUMENT

I. The PCR court erred in denying relief to the Petitioner based on its incorrect finding that defense counsel did not have an actual conflict of interest when he represented the Petitioner.

A. How the Issue Arose Below

The charges in this case arose out of a controlled purchase of narcotics from the Petitioner. On April 3, 2008, investigators set up the controlled purchase using an informant named Roddrick Ingram. Ingram contacted the Petitioner and he agreed to purchase four ounces of cocaine from the Petitioner. The Petitioner then left his residence and traveled to a nearby Burger King. When he arrived at the Burger King, officers arrested him at the scene. He had 127.42 grams of cocaine and 8.48 grams of marijuana on his person. A firearm and an additional 84.11 grams of cocaine were recovered from the Petitioner's home that was searched pursuant to a search warrant. See App. pp. 65-90 (testimony of SLED agent Shannon Branham); pp. 160-169 (testimony of forensic chemist Angil Landrum).

The Petitioner did not present a defense. Defense counsel's closing argument consisted of 78 lines of text and essentially amounted to a jury nullification argument based on the fact that Ingram would receive leniency for his cooperation whereas the Petitioner would receive a life sentence if convicted.² See App. p. 191, line 24-p. 195, line 1.

At the Petitioner's PCR hearing, he presented one allegation: ineffective assistance of counsel due to defense counsel's conflict of interest. The Petitioner testified that defense counsel advised him that the charges began with an individual named Julia Anderson. App. p. 299, line 17-p. 300, line 7. The Petitioner's girlfriend, Pamela Stewart, also testified that she overheard this conversation and that Julia Anderson's name was specifically mentioned. App. p. 292, lines 10-

² The Petitioner could not receive a life sentence if convicted.

21. The Petitioner further testified that Anderson and Ingram were engaged in an intimate relationship and that they sold drugs together. App .p. 301, line 17-p. 302, line 18.

Defense counsel was listed as counsel for Anderson on a February 2, 2008 drug charge that was not disposed of until 2010. See App. p. 359. Defense counsel was also listed as counsel for Anderson on a 2010 drug charge. See App. p. 362. Both charges were *not proessed* on October 15, 2010. Additionally, the Petitioner introduced a discovery cover letter that had been sent from Allen Fretwell, who was the prosecutor that handled the Petitioner's trial, to defense counsel on June 12, 2009, which had the Petitioner's name as the case caption but had the words "Julia Anderson" written on them. App. p. 356. The letter listed several documents that were enclosed with the letter. App. p. 356. Many of these documents referred to an incident that occurred on February 2, 2008—the date of Anderson's arrest—and three drug analysis reports that were all completed prior to the April 3, 2008, incident involving the Petitioner. App. p. 356. None of the documents referred to matters that occurred during or after the Petitioner's arrest. App. p. 356.

In an affidavit filed after the PCR hearing was held, defense counsel admitted to representing Anderson on the 2008 and 2010 charges, but stated that his files had been lost or destroyed. See App. p. 355. Defense counsel testified at the PCR hearing that he could not recall having a conversation with the Petitioner about Anderson, but that he didn't think that he would "have had a conversation about one of my clients with another client." App. p. 322, lines 10-19. He further testified that he did not believe that Anderson was involved in the charges that led to the Petitioner's trial. App. p. 322, lines 20-22. The Petitioner's prosecutor, Allen Fretwell, also testified at the PCR hearing that Anderson was not involved in the charges that led to the Petitioner's trial. App. p. 337, lines 19-23.

The PCR court denied relief on the Petitioner's claim. The PCR made only one credibility finding: it concluded that defense counsel was credible "in his assertion that he did not recall discussing Anderson with the Applicant and that he would not discuss one client with another." App. p. 352. The PCR court further concluded that the Petitioner "failed to present any evidence that" defense counsel's representation of Anderson "occurred either before or during trial counsel's representation of the Applicant." App. p. 352. The PCR court cited assistant solicitor Fretwell's testimony that Anderson was not involved in the case and stated that "the Applicant failed to present any evidence to the contrary." App. p. 352. Finally, the PCR court found that "the Applicant has failed to demonstrate that there was an actual conflict of interest in this case or that it affected trial counsel's representation of the Applicant." App. p. 352 (footnote omitted). In a footnote, the PCR court found that "[i]t is especially difficult to demonstrate how the Applicant could have suffered any prejudice, as the State presented overwhelming evidence of the Applicant's guilt." App. p. 352 (footnote 3).

The Petitioner now argues that the PCR court's findings regarding performance are unsupported by any probative evidence and that the PCR court's findings regarding prejudice are controlled by an error of law. Therefore, this Court should grant certiorari.

B. Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was

deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different.

Id.

The calculus changes when a criminal defendant alleges that his attorney's representation suffered from an actual conflict of interest. An actual conflict of interest occurs when "a defense attorney owes duties to a party whose interests are adverse to those of the defendant." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). Unlike other claims of ineffective assistance of counsel, "prejudice is presumed when counsel is burdened by an actual conflict of interest." Strickland, supra, 466 U.S. at 692.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

C. Discussion

Initially, the Petitioner would note that while the PCR court stated that it "had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility," see App. p. 349, the only explicit finding regarding credibility made by the PCR court was its conclusion that trial counsel was "credible in his assertion that he did not recall discussing Anderson with the Applicant and that he would not discuss one client with another." App. p. 352.

These lack of findings regarding credibility form an important backdrop to the PCR court's other factual findings because the PCR court denied relief on the basis that: (1) "the Applicant failed to present any evidence that [defense counsel's representation of Anderson] occurred either before or during trial counsel's representation of the Applicant"; and (2) "[a]ssistant solicitor Fretwell testified Anderson was not involved in this case, and the Applicant failed to present any evidence to the contrary." App. p. 352. These dual findings, which formed the bases for the PCR court's ultimate ruling that the Petitioner had not demonstrated an actual conflict of interest, were directly refuted by the Petitioner's testimony and other evidence presented at the PCR hearing.

Beginning with the timing of defense counsel's representation of Anderson, both the Petitioner and his girlfriend Pamela Stewart testified that defense counsel discussed Anderson with him during a meeting at defense counsel's office. See App. p. 292, lines 10-21 (Stewart); p. 299, line 17-p. 300, line 7 (Petitioner). While defense counsel didn't recall having the conversation, he also testified that he was "not saying he's making it up."³ App. p. 322, lines 15-17. If defense counsel had a conversation with the Petitioner regarding Anderson prior to the Petitioner's trial, it stands to reason that he represented Anderson at the same time. Consequently, the Petitioner's testimony is certainly evidence that he presented that defense counsel represented Anderson at the same time he represented the Petitioner. The PCR court's finding that the Petitioner presented "no evidence" to that effect is unsupported by any probative evidence in the record.

In addition to the testimony regarding the Petitioner's conversation with defense counsel, the Petitioner presented significant evidence that defense counsel actually represented Anderson on a 2008 drug charge. While the record does not reflect the exact date defense counsel began representing Anderson, it is extremely likely that he began doing so prior to the Petitioner's trial.

³ Defense counsel testified that he had been diagnosed with dementia and that he took medication for his condition on a daily basis, including the day of the Petitioner's PCR hearing. App. p. 324, line 18-p. 325, line 19.

Anderson was indicted on August 19, 2008, so it is highly likely that Anderson had counsel by that point. See App. p. 358. Additionally, the Petitioner presented a letter that was sent from Allen Fretwell to defense counsel that had the words “Julia Anderson” written on it and which refer to a February 2, 2008, arrest date, which is the date of Anderson’s arrest on her 2008 charge.⁴ See App. p. 356. This is further evidence that defense counsel represented Anderson and the Petitioner concurrently.

Turning to the PCR court’s finding that the Petitioner did not present any evidence that Anderson was involved in this case, this finding is directly refuted by the Petitioner’s and Stewart’s testimony that defense counsel informed him that the case began with Anderson. See App. p. 292, lines 10-21 (Stewart); p. 300, lines 2-5 (Petitioner). The Petitioner’s and Stewart’s testimony on this point is certainly some evidence of Anderson’s involvement.⁵ Accordingly, the PCR court’s finding that the Petitioner presented “no evidence” regarding Anderson’s involvement is unsupported by any probative evidence in the record.

In sum, the evidence presented below demonstrated that defense counsel represented both Anderson and the Petitioner at the same time. This potential conflict of interest should have been discussed with the Petitioner, and there is no indication that defense counsel did so. Indeed, defense counsel testified that he would not have discussed one client with a different client, so it’s highly likely that defense counsel never disclosed the nature of the conflict to the Petitioner. Inasmuch as he was required to do so, defense counsel’s performance was deficient. See generally Jordan v. State, 406 S.C. 443, 450, 752 S.E.2d 538, 542 (2013) (“[T]here is simply no evidence that DePew informed Petitioner or the trial court of his dual representation of Petitioner and

⁴ The date of this letter, June 12, 2009, predates the Petitioner’s trial by approximately one month.

⁵ The Petitioner would note, again, that the PCR court made no credibility findings regarding the Petitioner or Stewart.

Summers, or that Petitioner knowingly, voluntarily, and intelligently waived any potential conflict of interest.”)

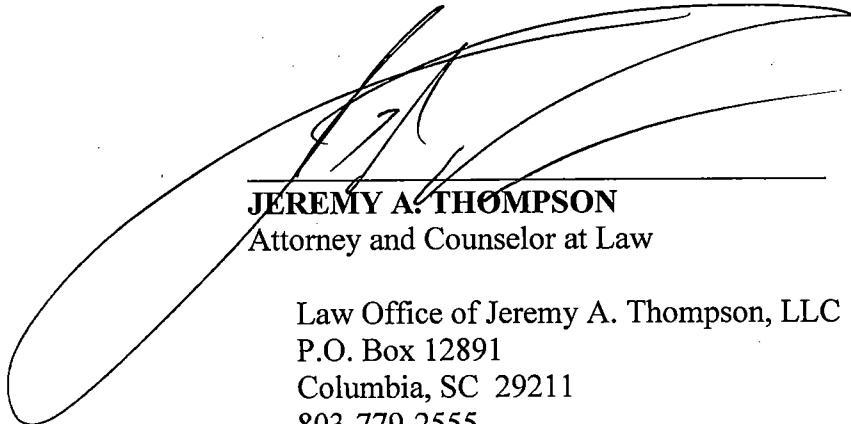
The existence of an actual conflict of interest is borne out by defense counsel’s lackluster representation of the Petitioner at trial. Defense counsel presented no defense at trial, and his closing argument to the jury amounted to an improper plea for jury nullification. While it is certainly true that the evidence against the Petitioner was strong, that does not excuse defense counsel’s failure to raise any possible arguments that could result in a not guilty verdict. It is reasonable to infer that his uninspired performance was due to his reticence to further attack Ingram—Anderson’s boyfriend and drug partner—or to explore Anderson’s involvement in the case. Accordingly, the Petitioner respectfully submits that he has shown that defense counsel acted under an actual conflict of interest when he represented the Petitioner at trial.

Finally, with regard to the question of prejudice, the PCR court’s findings are incorrect as a matter of law. The PCR court found that the Petitioner could not prove prejudice from the conflict of interest because “the State presented overwhelming evidence of the Applicant’s guilt.” App. p. 352 (footnote 3). This analysis is akin to the standard prejudice framework for an allegation of ineffective assistance of counsel set forth in Strickland. However, as Strickland noted, “prejudice is presumed when counsel is burdened by an actual conflict of interest.” 466 U.S. at 692. Consequently, it was error for the PCR court to engage in a prejudice analysis at all due to the nature of the claim raised. Inasmuch as the Petitioner has demonstrated that defense counsel represented him while he had an actual conflict of interest in doing so, prejudice is presumed. A new trial is warranted.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on this issue.

Respectfully submitted,



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This 6th day of October, 2015.

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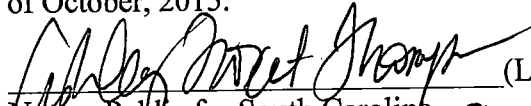
CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Petition for Writ of Certiorari and one copy of the Appendix in the above-entitled case has been served upon opposing counsel, Karen Ratigan, Senior Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 6th day of October, 2015.



JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 6th day
of October, 2015.



Notary Public for South Carolina (L.S.)
My Commission Expires: 2/28/2018