

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-CP-23-03381

Shane K. Young, #001310

Petitioner,

Vs.

State of South Carolina,

Respondent.

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SC SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

L. Whitney Thwaites
604 University Ridge
Greenville, South Carolina 29601
(p) (864) 232-8722
(f) (864) 232-9977
whitney@johnhowardlaw.com
Attorney for Petitioner

Other Counsel of Record:

Karen Ratigan
Assistant Attorney General
P.O. Box 11549/Columbia, SC 29211

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4. *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462 (2004).
5. *Holden v. State Carolina*, On Writ of Certiorari, Opinion No. 27012).
6. *Smith v. Robbins*, 528 U.S. 259 (2000).
7. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).
8. U.S. Const. amend. VI.

QUESTIONS PRESENTED

1. Did the Circuit Court err in denying Petitioner's application for post-conviction relief based on the ineffective assistance of counsel by Petitioner's trial counsel?
2. Was Petitioner's counsel for the PCR Hearing ineffective in failing to adequately communicate with Petitioner to prepare for the PCR Hearing, and in not being prepared to properly represent Petitioner at the PCR Hearing in accordance with professional norms?
3. Did the Circuit Court err in denying Petitioner's Motion for Continuing the PCR Hearing so that Petitioner could obtain new representation?

STATEMENT OF THE CASE

On November 19, 2013, Petitioner pled guilty to eight (8) counts of attempted murder, first degree burglary and murder. The Honorable Letitia H. Verdin sentenced Petitioner to consecutive sentences of thirty (30) years for each count of attempted murder, life imprisonment for first-degree burglary and life imprisonment for murder. Petitioner did not appeal; however, he did bring an action seeking post-conviction relief (PCR) on June 17, 2014, alleging ineffectiveness of counsel. A PCR Hearing took place before the Honorable Edward W. Miller on April 23, 2015. At the PCR Hearing Petitioner was represented by Attorney Brian Johnson of Greenville, South Carolina. At the call of the case for Hearing, Petitioner's Counsel informed the Court that Petitioner had a desire to retain new representation for the PCR Hearing, and Attorney L. Whitney Thwaites was present to inform the Court of the Petitioner's request, and to move the Court for a continuance in order to give her adequate time to prepare for the Hearing. Judge Miller denied Ms. Thwaites's Motion, and Ordered that Mr. Johnson continue to represent Petitioner at the PCR Hearing.

At the Hearing, Petitioner alleged that after his sentencing, he did not waive his right to a directed appeal of a guilty plea, and therefore his trial counsel, which consisted of Attorney John Mauldin and Joey Maxwell of Greenville County, was ineffective and he was prejudiced by not having the right to appeal. (App. D at 7-8). Petitioner also alleged that his guilty plea was not given knowingly and voluntarily, in that he had suffered from head-related trauma in the past, and he wanted this head trauma explored and analyzed before pleading guilty. (App. D at 9-11). Petitioner also alleged that his trial counsel did not present him with all of the discovery documents, including witness statements, and

that had he been presented with such documents, he would have been able to make an informed, voluntary decision as to whether to plead guilty. (App. D at 9-11).

At the PCR Hearing, Petitioner testified as to the allegations of ineffective counsel discussed above, and he was questioned by his attorney, Mr. Johnson, by the Assistant Attorney General and by Judge Miller. Additionally, Mr. Mauldin and Mr. Maxwell testified and were questioned by the Assistant Attorney General, by Mr. Johnson and by Judge Miller.

The Circuit Court denied Petitioner's application for post-conviction relief immediately following testimony at the PCR Hearing. A Notice of Appeal was served on June 22, 2015, and Petitioner now seeks a writ of certiorari to review this denial.

ARGUMENT

1. THE CIRCUIT COURT ERRED IN DENYING PETIONER'S APPLICATION FOR POST-CONVICTION RELIEF BASED ON THE INEFFECTIVE USE OF COUNSEL BY PETIONER'S TRIAL COUNSEL.

In order to prove that counsel is/was ineffective, the PCR applicant must prove that: (1) Counsel's performance was deficient; and (2) There is a reasonable probability that, but for counsel's errors, the results of the trial would have been different. (*Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000), citing *Strickland vs. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The Appellate Court shall uphold the findings of the PCR court when there is any evidence of probative value to support them, and the Court will reverse the decision of the PCR Court when it is based on an error of law. (*Suber v. State*, 640 S.E.2d 884, 886, 371 S.C. 554 (S.C., 2007), citing *Caprood*, 338 S.C. at 109-10, 525 S.E.2d at 517, and *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)). In the instant case, the PCR Judge held that Petitioner's trial counsel was not ineffective in that counsel was not deficient, and Petitioner was not prejudiced by counsel's representation. (App. E at 7). However, when applying the "*Strickland*" test as discussed above, the trial court found that counsel was not ineffective simply because the Court found that trial counsel was "credible" when he testified that the Petitioner never asked him to file an appeal.

The Court also found that "it is not believable that the Applicant-or any reasonable defendant-would have wanted to file an appeal from a negotiated guilty plea" on the charges against Petitioner. Whether trial counsel was credible or not does not, in and of itself determine that trial counsel is either effective or ineffective. (*Holden v. State Carolina*, On Writ of Certiorari, Opinion No. 27012). Also, in applying *Suber v. State*,

there is no "evidence of probative value" to support the trial judge's conclusion that "it is not believable that the Applicant-or any reasonable-defendant- would have wanted to file an appeal from a negotiated plea." (*Suber v. State* at 886.) This statement is simply the trial judge's "assumption," and is not based on "evidence of probative value." In fact, the Petitioner testified that he did want to appeal the conviction based on the guilty plea because he felt as if he was pressured to plead guilty, he was not given an opportunity to review all of the discovery materials presented to his attorneys during the trial, and he had experienced severe head trauma in the past that caused him to have difficulty making decisions freely and voluntarily. Therefore, not only did the trial judge improperly apply the *Strickland* test to the instant case, but there is also no "evidence of probative value" to support the trial judge's decision that trial counsel was not ineffective in failing to make a timely appeal after Petitioner's guilty plea. As a result, certiorari should be granted to review this issue.

2. COUNSEL FOR THE PCR HEARING WAS INEFFECTIVE IN FAILING TO ADEQUATELY COMMUNICATE WITH PETITIONER TO PREPARE FOR THE HEARING, AND IN NOT BEING PREPARED TO PROPERLY REPRESENT PETITIONER AT THE PCR HEARING IN ACCORDANCE WITH PROFESSIONAL NORMS.

In order to determine the ineffective assistance of appellate counsel, the Supreme Court applies the same test from *Strickland v. State* that is used to determine the ineffective assistance of trial counsel. (*Smith v. Robbins*, 528 U.S. 259, 284 (2000)). Therefore, in the instant case, Petitioner maintains that: 1) His counsel's performance at the PCR hearing was deficient, and 2) He was prejudiced by his counsel's deficient performance at the PCR hearing.

Prior to the PCR hearing, Petitioner's attorney had never met with him personally to discuss his case. Petitioner was unaware of the arguments his attorney would present at the PCR hearing, and he was never advised as to how the proceedings at the PCR hearing would take place. Additionally, Petitioner attempted to contact his attorney several times prior to the hearing, either by mailing letters or by having his father call his attorney. Despite his efforts, Petitioner was still only able to communicate with his attorney one or two times. At the hearing, Petitioner was unaware of the questions that would be asked, the evidence that would be presented, and the arguments that would be made. Petitioner asked his attorney to interview his former psychiatrist before the hearing such that counsel could introduce evidence that he had experienced severe head trauma which led to blackouts and extreme rage. Had this evidence been introduced at the PCR hearing, there is a "reasonable probability" that the trial judge would have granted the request new trial. (See *Cherry v. State*, 300 S.C.115, 117-18, 386 S.E.2d 624, 625 (1989)).

Additionally, according to *Cherry v. State*, the South Carolina Supreme Court found that in order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. (*Id.* at 625). In the instant case, not only did Petitioner's attorney never meet with him to discuss his case, he also never prepared him to testify at the hearing, only communicated with Petitioner less than a handful of times, nor did he present any evidence other than the Petitioner's own testimony to prove that Petitioner's trial counsel was ineffective (even when such evidence exists). Clearly, the lack of communication, lack of hearing preparation and lack of production of any evidence other

than testimony, (when such evidence exist), does not comply with "prevailing professional norms." (*Id.* at 625). Therefore, as a result of clearly ineffective assistance of appellate counsel, the PCR judge's decision to deny Petitioner's application for post conviction relief should be reversed, and a new trial for Petitioner should be granted. In the instant case, certiorari should clearly be granted to review this issue.

3. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION TO CONTINUE THE PCR HEARING SO THAT PETITIONER COULD OBTAIN NEW REPRESENTATION.

The Sixth Amendment to the United States Constitution grants all defendants the right to effective assistance of counsel. U.S. Const. amend. VI, *Strickland v. Washington*, 466 U.S. 668 (1984). The Petitioner in the instant case was unhappy with the lack of communication and lack of preparedness of his appointed counsel for his PCR Hearing. His PCR counsel never visited him in person, and he only spoke with him on the phone one or two times. Prior to the PCR evidentiary hearing, Petitioner's father contacted another attorney to represent Petitioner at his PCR hearing. Unfortunately, the new attorney was retained right before the hearing, giving her very little, if any time to prepare. Therefore Petitioner's recently retained counsel filed a Motion for Continuance prior to the hearing, and orally at the hearing. The PCR judge denied Petitioner's new counsel's Motion, and required that Petitioner's old attorney go forward with the hearing.

As stated previously, Petitioner had a right to the effective assistance of counsel. (See *Strickland* at 668). After realizing that his court-appointed counsel was not preparing and not communicating with Petitioner, Petitioner did all that he could to obtain new counsel. By denying Petitioner's new attorney's Motion for Continuance, the PCR judge

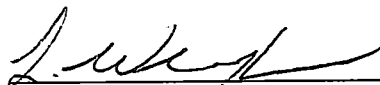
did not allow for Petitioner's chosen counsel to have enough time to prepare to represent Petitioner effectively at the PCR hearing, and instead required ineffective counsel to move forward. As a result, Petitioner was prejudiced by the ineffective assistance of counsel, and his Sixth Amendment rights were violated. Therefore, the Court should grant certiorari to review this issue.

Conclusion

For the reasons stated, Petitioner asks this Court to grant the petitioner for a writ of certiorari.

November 2, 2015

Respectfully submitted,



L. Whitney Thwaites
Attorney for Petitioner
SC Bar: 78757
604 University Ridge
Greenville, SC 29601
(864) 232-8722 (864) 232-9977

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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HONORABLE Edward W. Miller

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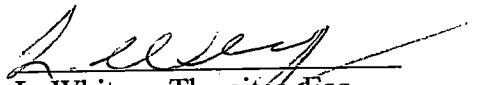
Case No.: 2014CP233381

SHANE KELLY YOUNG,)
)
PETITIONER,)
)
vs.)
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

PROOF OF SERVICE

I, L. Whitney Thwaites, Esq., certify that I have today served the Petition for a Writ of Certiorari and Appendix the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549, Columbia, SC 29211.

Respectfully submitted,


L. Whitney Thwaites, Esq.
SC Bar # 78757
601 University Ridge
Greenville, SC 29601
(p): 864 232-8722 (f): 864-232-9977
Attorney for Petitioner

Greenville, SC
November 2, 2015