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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-000406

Eddie J. Pilcher, Petitioner,

v.

State of South Carolina, Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Did Petitioner fail to meet his burden of proof in establishing that an actual conflict of interest existed where Counsel represented both Petitioner and one of his co-defendants at their respective guilty plea hearings?

STATEMENT OF THE CASE

Eddie J. Pilcher, Jr. ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted by the Spartanburg County Grand Jury for armed robbery (11-GS-42-1970) and attempted burglary – 1st degree (11-GS-42-1971). James A. Cheek, Esquire represented Petitioner at his guilty plea hearing. On June 21, 2011, the Petitioner was sentenced by The Honorable Roger L. Couch to concurrent sentences of twenty-five years on each charge. The Petitioner did not appeal his conviction or sentence.

This matter comes before the Court by way of an Application for Post-Conviction Relief ("PCR") filed November 21, 2011, but received by Respondent on May 17, 2012, and amendment filed September 17, 2013. The Respondent made its Return on or about February 20, 2013. An evidentiary hearing into the matter was convened on October 1, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Petitioner testified on his own behalf. Deputy Solicitor Derrick Balsa, Esquire, Detective Dale Arterburn, J. Roger Poole, Esquire, and James A. Cheek, Esquire, also testified. Following the hearing, the Honorable J. Derham Cole denied the PCR application by written Order dated February 20, 2014.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This Court must uphold the PCR judge's findings if the record contains "any evidence of probative value" to sustain those findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **Petitioner failed to meet his burden of proof of establishing that an actual conflict of interest existed when Counsel represented both Petitioner and one of his co-defendants at their respective pleas.**

On June 21, 2011, Petitioner pleaded guilty to charges of attempted burglary – 1st degree and armed robbery. (R. p. 12). Petitioner was originally charged with three counts each of kidnapping, burglary – 1st degree, and armed robbery. (App. p. 101, lines 4-5). The State "charge bargained one scheme" allowing Petitioner to plead to "one count involving each incident" (R. p. 19, lines 1-4) and dropped the kidnapping charges (R. p. 101, lines 4-22). Roger Poole was initially appointed to represent both Petitioner and Jonathan Goss, one of Petitioner's co-defendants. (R. p. 100, lines 17-18). At some point, Goss's case was reassigned to another attorney within the Public Defender's Office. (R. p. 102, lines 23-24). After Poole negotiated the plea offer described above and Petitioner indicated he wished to accept it, Counsel assumed representation of Petitioner. (R. p. 103, lines 10-18). Counsel represented Petitioner at the plea hearing and informed the plea court that not only had Petitioner had plenty of time to speak with Counsel, but was satisfied with Counsel's representation. (R. p. 14). Several hours following Petitioner's guilty plea, Goss pleaded guilty to the same charges. (R. p. 107). Goss was sentenced to twenty years suspended to twelve with four years' probation on the burglary charge, and to twelve years on the armed robbery charge. (R. pp. 148-49).

Counsel testified that he did not believe there was a conflict in his representation of both Petitioner and Goss. (R. p. 117). Counsel testified that he informed Petitioner of the possibility of Goss entering a plea as well. (R. p. 107). However, Counsel testified that at the time, he was not sure that he would be handling the plea for Goss. (R. p. 107). Counsel testified that it was not until *after* Petitioner's plea and sentencing, that Goss decided to have Counsel represent him at his plea as well, even though another attorney at the public defender's office was going to assist Goss. (R. p. 107, lines 10-14). Counsel also testified that the only information he had regarding any alleged threat made by Petitioner to Goss, was provided to Counsel right before Goss' plea and well after Petitioner's plea and sentencing. (R. p. 117). At the PCR hearing, Petitioner argued Counsel had an actual conflict of interest because Counsel represented both Petitioner and Goss, at their respective guilty pleas. (R. p. 49, lines 12-15).

In a PCR action, Petitioner bears the burden of proving the allegations in his application. 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)). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner must prove 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the Court measures 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. The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Petitioner testified that he was not aware of Counsel’s representation of Goss until the day of his guilty plea and after receiving a copy of his plea transcript. (R. p. 50, lines 1-2). Petitioner testified that he felt betrayed by Counsel’s representation of Goss and believed Counsel must have used things Petitioner told Counsel to hurt instead of help Petitioner. (R. p. 59). Petitioner stated that he believed there was a conflict because Goss told Counsel that Petitioner had threatened Goss’ family. (R. p. 73). However, Counsel testified Goss told him that "about two minutes before we came in here to enter the plea. [Petitioner] had already been entered before the Court." (R. p. 118, lines 15-17).

Petitioner acknowledged that he informed the court that he had a job until a "couple of days before [he] committed the crime." (R. p. 72). However, Petitioner stated that he did not specifically reference the crimes he was pleading guilty to that day because he did not say what crime he had committed. (R. p. 72). Petitioner also acknowledged that the only issue he took with the State’s recitation of the facts was the fact that Petitioner did not enter the home with a gun, but acknowledged that his co-defendants had guns and he understood the hand of one, hand of all theory. (R. p. 72). At the PCR hearing, Petitioner denied practically every statement attributed to Petitioner in the supplemental investigative report as well as statements made at the guilty plea. (R. p. 74, lines 16, 19; p. 75, lines 4, 20, 25). Further, Petitioner stated that he partially lied to the plea court during his plea, but then stated that he did not believe it was a lie because he only did what Counsel had told him to do. (R. p. 79; p. 80, lines 2-3, 8-10).

Poole testified that he recalled Petitioner's case, (R. p. 100), and that Petitioner admitted his involvement in the crimes to the investigator from the public defender's office and indicated that he wanted the best possible deal. (R. p. 101, lines 11-18). Poole testified that Petitioner wanted to plead guilty when the State dropped all of the kidnapping charges and allowed Petitioner to plead to one count of armed robbery and burglary – 1st degree. (R. p. 101, lines 19-22). Poole testified that Counsel then received the case since Petitioner indicated his desire to plead guilty and Counsel "works the cases from the jail." (R. p. 101, lines 22-25).

In Petitioner's mitigation, Counsel argued that Curtis Wilkie, the third co-defendant, "orchestrated everything" and that Wilkie "appear[ed] to be the person amendable [sic] to everyone in that community, introduced these two young men, . . . and they followed him." (R. p. 118, line 20-p. 119 line 2). Counsel pointed out that Petitioner had been released from prison about a year before the crime and had done very well up until he became involved with Wilkie. (R. pp. 21-23). Specifically, Counsel told the court that he associated with well-respected individuals in Cherokee County and was persistent in trying to get a job. (R. p. 22, lines 8-11). Counsel told the court that Wilkie "[s]aid he knew the first victim, and that she had over [\$100,000] because she was a big drug dealer . . . and they decided to go over there and peek in her door and try to get that money." (R. p. 22, lines 18-25). Counsel asked the court to "distinguish [Petitioner's] involvement, his planning, his knowledge of everything from the sentence that [Wilkie] got" and further asked the court to consider a suspended sentence on the attempted burglary charge. (R. p. 24, line 23 – R. p. 25, line 3). Counsel further informed the court that Petitioner held two jobs at one time, (R. p. 22), that he was willing to pay restitution, (R. p. 24), and that he turned himself in and cooperated with authorities before he was ever charged (R. p. 26).

Petitioner gave a statement to the court and apologized and then pointed out to the court that Goss was waiting to plead. (R. p. 25). Petitioner asked the court to be lenient on Goss and indicated that Petitioner should have stepped in and stopped Goss from participating. (R. p. 25). Petitioner had a substantial prior record, which included trespassing and disorderly conduct, false information to police, breaking into a motor vehicle, two counts of grand larceny, two counts of threatening a public employee, burglary – 2nd, burglary – 3rd degree, petit larceny, indecent exposure, assault and battery of a high and aggravated nature, and malicious injury to the jail. (R. p. 26; p. 76, lines 17-18, 23-25; p. 77, lines 1, 4-5). During sentencing, the court specifically noted that because of Petitioner's prior record, the conduct of bashing in doors and going into homes with weapons was "not out of the realm of possibilities" for Petitioner, no matter what his involvement. (R. p. 27). Additionally, during Goss' sentencing, the court specifically pointed to the fact that Goss had no prior record and the words of his prior co-defendant (Petitioner), had weighed in Goss' favor for sentencing purposes. (R. p. 148).

"[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, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "[M]ultiple representation standing alone is not violative of the Sixth Amendment." Gonzales v. State, 412 S.C. 478, 494, 772 S.E.2d 557, 565 (Ct. App. 2015) (quoting Vance v. State, 275 S.C. 162, 163, 268 S.E.2d 275, 27) (1980)). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest *adversely affected his attorney's performance*." Id. (quoting Thomas

v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)). "Prejudice is presumed *only* if the [petitioner] demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest *adversely affected his lawyer's performance.*" *Id.* (quoting *Strickland*, 446 U.S. at 692)).

The PCR judge correctly ruled that Petitioner made no such showing. The PCR court found that Petitioner's testimony was completely not credible. (R. p. 172). Counsel represented Petitioner before he represented Goss. Counsel testified he did not know for sure at that time whether Goss was going to enter a guilty plea and further that he thought another attorney with the public defender's office was going to represent him on that plea. Second, at Petitioner's plea, Petitioner told the court he did not have a gun, but that the other two individual's had guns. Goss told the court a different story—that he did not have a gun but the other two did. However, at the time of Petitioner's plea, the court was only aware of the first story. Additionally, Counsel relied on the information he received from Petitioner, which included Petitioner's admission of his participation in the two crimes to which he pled to the investigator with the public defender's office, as well as Petitioner's admission of his participation in the crimes directly to Counsel. (R. p. 101, lines 11-13; p. 104, lines 23-25; p. 105; p. 106, lines 1-9). Counsel necessarily relied on Petitioner's statements to him. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Barnes v. Thompson*, 58 F.3d 971, 979 (4th Cir. 1995) (citing *Strickland*, 466 U.S. at 690-91)). Accordingly, the PCR Court correctly held that the statements made in Goss's plea did not affect the outcome of Petitioner's plea and that therefore Petitioner failed to show Counsel actively represented conflicting interests.

The South Carolina Supreme Court has upheld a PCR judge's finding that counsel was not ineffective for representing appellant and a co-defendant in their respective guilty pleas for armed robbery and housebreaking charges where counsel testified he "envisioned no possible defense to the charges and saw no conflict in his role as counsel for both defendants." Vance v. State, 275 S.C. 162, 163, 268 S.E.2d 275, 275 (1980). Further, in that case, the Court upheld the ruling notwithstanding the co-defendant had given a statement inculcating the appellant and "would have been available as a witness" had appellant requested a jury trial. Id. Counsel testified he viewed their interests to be "entirely consistent: to plead guilty and obtain as light a sentence as possible." Id. Additionally, the appellant in Vance had also determined to plead guilty before he met with counsel and "freely admitted his guilt" to counsel. Id.

As in Vance, in this case, Petitioner freely admitted his participation in the crimes to the court at his guilty plea and to Counsel. Counsel testified he saw no conflict in representing Petitioner at his guilty plea and then representing Goss at his. In Vance the co-defendant made a statement inculcating the appellant. Likewise, in this case, Goss made a statement against Petitioner. Further, in this case, as in Vance, Petitioner had already decided to plead guilty when Counsel assumed representation of Petitioner. Because the facts of this case and the facts of Vance are substantially similar, the PCR judge made no legal error in finding Petitioner failed to satisfy his burden of showing Counsel engaged in an actual conflict of interest, and therefore, this Court should affirm the PCR judge's findings.

Petitioner argues that Counsel's representation created an actual conflict of interest because he "had a duty" to make a motion reconsider Petitioner's sentence, but that he could not have done so because it would have drawn attention to Goss's shorter sentence. (Pet'r's Br.10). This argument is without merit. First, it is not preserved. "[A]n issue cannot be raised for the first

time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (quoting Creech v. S.C. Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). No testimony was elicited at the PCR hearing regarding a potential motion to reconsider Petitioner's sentence. The court has no evidence before it in that regard and can only speculate as to the reason Counsel did not file a motion to reconsider. Therefore, this matter is not properly before the Court. Second, Petitioner has abandoned this argument. "[B]ald conclusion[s] [that] [are] not manifestly correct. . . . "[are] deemed abandoned." Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974). Petitioner cites to no authority to support the contention that Counsel had an absolute duty to ask the court to reconsider his sentence. Accordingly, this Court should consider this argument abandoned.


CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's ruling.

Respectfully submitted,

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Nov. 16th, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No: 2014-000406

EDDIE J. PILCHER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Benjamin J. Tripp, Esquire
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This 16th day of November, 2015.



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