

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: ~~2015-000137~~

2014-002758

RECEIVED

DEC 14 2015

S.C. Supreme Court

TYRONE MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
SC Bar # 101254

P.O. Box 11549
Columbia, SC 29211
(803) 734-4124

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S ISSUE PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW6

ARGUMENT7

 There is evidence of probative value to support the post-conviction relief court's ruling that Petitioner did not meet his burden of proving that plea counsel was ineffective for failing to obtain a ruling on whether the State could introduce Petitioner's prior convictions to impeach his credibility at trial8

CONCLUSION.....13

PETITIONER'S QUESTION PRESENTED

- I. Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to seek a ruling from the trial judge on whether the State could introduce Petitioner's prior convictions for lewd act upon a minor and criminal sexual conduct with a minor to impeach his credibility, Petitioner did not testify at trial because counsel advised him that the State could use his prior criminal record to impeach his credibility, and if Petitioner had testified at trial, he would have explained that the allegations against him were not true?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Berkeley County Clerk of Court. Petitioner was indicted at the May 2008 term of the Berkeley County Grand Jury for two counts of lewd act on a minor (2008-GS-08-1020, -1021). He was represented by Eduardo Curry, Esquire.

Petitioner proceeded to trial and was found guilty by a jury. On July 29, 2009, the Honorable R. Markley Dennis sentenced Petitioner to confinement for fifteen (15) years on each count of lewd act on a minor. The sentences are to be served consecutively for a total confinement of thirty (30) years.

A timely Notice of Appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. Eduardo Curry, Esquire, also represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Moore, Up. Op. No. 2012-UP-344 (S.C. Ct. App. June 6, 2012).

On January 18, 2012, Petitioner filed an application for post-conviction relief. Respondent made its Return, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on September 8, 2014, in Charleston County before the Honorable G. Thomas Cooper. Rodney Davis, Esquire, represented Petitioner at the hearing. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General, represented Respondent. At the hearing, Petitioner proceeded solely on the allegations of ineffective assistance of counsel for counsel's failure to properly advise the Applicant regarding his right to testify at trial and counsel's failure to preserve for appeal the issue regarding his cross-examination of a law enforcement officer. Petitioner's trial counsel testified at the hearing. By an Order of Dismissal

signed December 11, 2014 and filed December 15, 2014, the PCR Court denied and dismissed Petitioner's application with prejudice.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's 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 their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Petitioner's trial counsel (hereinafter "Counsel") ineffective where Counsel allegedly failed to seek a ruling from the trial judge on whether the State could introduce Petitioner's prior convictions for lewd act upon a minor and criminal sexual conduct with a minor to impeach his credibility. For the following reasons, Respondent contends that these arguments are without merit.

Relevant Law

In a PCR action, 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). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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, 104 S.Ct. 2052, 2064 (1984); Butler, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. Second, counsel's deficient performance must have prejudiced the

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.

I. There is evidence of probative value to support the post-conviction relief court's ruling that Petitioner did not meet his burden of proving that plea counsel was ineffective for failing to obtain a ruling on whether the State could introduce Petitioner's prior convictions to impeach his credibility at trial.

Petitioner argues that Counsel was ineffective for failing to seek a ruling from the trial judge on whether the State could introduce Petitioner's prior convictions for lewd act upon a minor and criminal sexual conduct with a minor to impeach his credibility. Respondent submits that the PCR Court correctly found that Petitioner was fully advised by Counsel and the trial court concerning his right to testify and that Petitioner failed to carry his burden of proving that counsel was ineffective for failing to adequately advise him of his right to testify at trial.

How the Issue Was Raised

At trial, Counsel informed the court that "after consultation with [Petitioner] and his wife, particularly my client, [Petitioner] he elects not to testify and the defense rests." (App. 237, ll. 3-6). Next, Petitioner agreed that this was correct and the trial court undertook a colloquy to inform Petitioner of his right to testify. (App. 237, ll. 12-13). The trial court asked Petitioner if he had sufficient time to make his decision concerning the right to testify and Petitioner answered affirmatively. (App. 237, ll. 14-17). The trial court next asked Petitioner if he made a conscious decision for himself, after discussing the matter with Counsel and family members, to which Petitioner answered affirmatively. (App. 237, ll. 18-24). The trial court next instructed Petitioner that he does not have to present any evidence and that the jury cannot consider this fact. The trial court asked if Counsel advised Petitioner of this right and Petitioner agreed. (App. 238, ll. 1-9). Continuing the colloquy, Petitioner agreed with the trial court that he would be subject to cross

examination if he chooses to testify (App. 238, ll. 10-15), that he was not under the influence of any drugs or alcohol that would affect his decision (App. 238, ll. 16-21), and that there was nothing forcing him to make this decision (App. 239, ll. 3-6). Lastly, Petitioner stated that he was satisfied with the manner in which Counsel advised him of his right to testify. (App. 239, 9-13). At the end of the colloquy, the trial court found that Petitioner's conscious decision not to testify was made freely, voluntarily, knowingly, and intelligently with the advice of competent counsel. (App. 239, ll. 15-22).

At the PCR hearing, Counsel testified that he had a conversation with Petitioner and his wife about the perils of testifying or not testifying and that the determination concerning testifying ultimately rests with Petitioner. (App. 364, ll. 16-17, 20-23). He also testified that he was aware of Petitioner's prior convictions and covered them in his discussions with Petitioner. (App. 365, ll. 9-10). Counsel testified that his usual course of action concerning asking the trial judge to make a ruling on prior convictions is as follows:

If in fact my client was going to testify, then I would've gotten a ruling from the Judge to see whether or not they would be able to use his prior criminal record to impeach.

If he's not going to testify, I wouldn't need a ruling from the judge in order to do that because I won't be exposing him to the potential liability.

(App. 366, ll. 3-9).

Counsel further testified that he did not affirmatively advise Petitioner that he should not testify. (App. 399, ll. 12-16). When questioned by the PCR Judge as to why he did not ask the trial judge whether Petitioner's prior convictions were impeachable, Counsel testified,

Because [Petitioner] was adamant, up front, as we started to talk about it that he didn't want to testify. And so when [Petitioner] said that then I don't have to go in front of a judge to find out whether or not it's there.

(App. 406, ll. 16-19).

Counsel testified that he had the understanding that Petitioner was concerned with more factors than just his prior record when determining whether or not to testify (App. 47, ll. 17), including Petitioner's concern with how he was going to come across to the jury as being a pastor of a church accused of molesting parishioners (App. 408, ll. 3-12).

Petitioner acknowledged during the PCR hearing that Counsel did inform him that his prior convictions could be used against him at trial. (App. 396, ll. 22-24).

In the Order of Dismissal, the PCR Court found Petitioner's testimony not credible, while also finding Counsel's testimony to be credible. The PCR Court found that Petitioner was fully advised by the trial court and Counsel concerning his right to testify. (App. 431). The PCR Court also found that Petitioner was fully advised that his prior record could be used by the State to impeach him if he chose to testify at trial. (App. 432). The PCR Court further found that Counsel's advice to Petitioner on the use of his prior convictions was proper, further pointing out that Petitioner has a prior conviction for criminal sexual conduct with a minor that could have been used to impeach him, since he was released from that sentence within the ten year time period outlined in Rule 609, SCRE. (App. 432).

Analysis

Petitioner's argument is without merit. First, the PCR Court found Petitioner to be not credible and found that Counsel provided credible testimony. This Court must give great deference to the PCR judge's determinations of witness credibility. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n. Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks

the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

There is no question that Petitioner was well aware of his right to testify given the colloquy with the trial judge and Counsel's testimony that he and Petitioner had significant conversations about whether or not Petitioner would testify. Concerning Petitioner's prior convictions, Counsel provided credible testimony that he discussed this issue with Petitioner and he did not ask the trial judge to make a ruling concerning his priors because Petitioner was so adamant about not testifying. He explained that Petitioner had other concerns independent of his prior record that kept him from testifying, including how Petitioner would be perceived by the jury as a pastor accused of committing lewd acts on his parishioners. Additionally, as the PCR Court correctly found, Petitioner's prior criminal sexual conduct with a minor conviction could have been used to impeach because he was released from that sentence within the ten year time period.

Respondent contends that the PCR Court was correct in finding that Counsel was not ineffective, because Counsel's advice was correct. Counsel's advice that the prior conviction *could* be used to impeach is correct, given that Petitioner was convicted of criminal sexual conduct against a minor and Petitioner was released from his sentence within the ten year period. Rule 609, SCRE. Counsel's failure to ask the judge to make a ruling is certainly reasonable under the professional norms because he fully advised Petitioner concerning his right to testify and his prior convictions, he was correct in that Petitioner's prior conviction could be used to impeach, and there were other factors affecting Petitioner's desire to testify.

Assuming *arguendo* that Counsel was deficient, Petitioner fails to show that the outcome of the trial would have been different. It was ultimately Petitioner's decision whether or not to

testify, and it was made after a lengthy colloquy with the trial judge and after discussions with Counsel and his family. Petitioner was well aware that his prior conviction could be used to impeach him. Despite Petitioner's non-credible testimony from the PCR hearing that he would have chosen to testify had the trial judge ruled on whether his prior conviction could be used, Counsel testified that Petitioner was adamant about not testifying and that there were more factors than just his criminal history in making that determination.

Accordingly, Petitioner has failed to prove both prongs of the Strickland test – that his plea counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By:


ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

December 14 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County
The Honorable G. Thomas Cooper, Circuit Court Judge

RECEIVED
DEC 14 2015
S.C. Supreme Court

TYRONE MOORE,

PETITIONER,

v.

THE 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:

**Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201**

This 14th day of December, 2015.



ELIZABETH MCLEAN
LEGAL ASSISTANT



RECEIVED

DEC 14 2015

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

December 14, 2015

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Tyrone Moore v. State of South Carolina
Appellate Case No. 2014-002758
Lower Court Case No. 2013-CP-08-0164

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,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/em
Enclosures

cc: Tiffany L. Butler, Esquire
Trisha Allen, Victim Services