



ALAN WILSON
ATTORNEY GENERAL

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JAN - 5 2016

SC SUPREME COURT

January 6, 2016

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

**Re: Jaques Jamar Sullivan v. State
Appellate Case No. 2014-002008**

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: Jeremy A. Thompson, Esquire

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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The Honorable D. Garrison Hill, Circuit Court Judge

JAN - 6 2016

SC SUPREME COURT

Appellate Case No. 2014-002008

Jaques Jamar Sullivan, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

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

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the March 2009 term of General Sessions for trafficking cocaine (2008-GS-23-7026, count 1), possession of a weapon during the commission of a violent crime (2008-GS-23-7026, count 2) and possession of marijuana (2009-GS-23-7027). (App.pp.270-73; pp.275-77). Daniel J. Farnsworth, Sr., Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. (App.p.211). On July 15, 2009, the Honorable Edward W. Miller sentenced Petitioner to concurrent terms of 25 years for trafficking cocaine, 5 years for possession of a weapon during the commission of a violent crime, and time-served for possession of marijuana, second offense. Judge Miller also levied a consecutive sentence of 6 months for criminal contempt. (App.pp.213-14; pp.216-17).

A notice of appeal was filed at the South Carolina Court of Appeals. J. Falkner Wilkes, Esquire represented Petitioner on appeal. (App.pp.218-44). The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Sullivan, Op. No. 2011-UP-446 (S.C. Ct. App. filed Oct. 11, 2011). (App.pp.259-60).

Petitioner filed an application for post-conviction relief (PCR) on October 1, 2012 (2012-CP-23-6281). (App.pp.261-67). A hearing was held at the Greenville County Courthouse on April 22, 2014. (App.pp.288-345). Petitioner was present and represented by J. Bradley Bennett, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable D. Garrison Hill denied relief in an order filed August 14, 2014. (App.pp.347-55).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel had a conflict of interest.

Petitioner argues trial counsel had a conflict of interest because he had previously represented an individual who may have had a connection to his case. This argument is without merit.

A.

At trial, Investigator Branham testified they received information from a confidential informant (Roddric Ingram) “with regards to purchasing cocaine from [Petitioner].” (App.pp.67-68). Investigator Branham testified she and another undercover agent observed Petitioner arrive at the transaction location to meet the informant on April 3, 2008. (App.pp.68-73). Investigator Branham testified marijuana, cocaine, a pipe, and approximately \$685 in cash was retrieved from Petitioner and/or his vehicle when he was arrested at the location right after the transaction. (App.pp.73-78). Investigator Branham testified cocaine, marijuana, digital scales, approximately \$20,000-\$30,000 in cash, and several other items were retrieved when law enforcement executed a

search warrant of Petitioner's residence. (App.pp.79-90).

Officer Ben Ford testified he observed an individual matching Petitioner's description leave a residence and drive his vehicle to the pre-arranged meeting location for the drug transaction. (App.pp.131-33). Officer Ford testified he assisted in arresting Petitioner at the transaction location and later participated in the execution of the search warrant at Petitioner's residence. (App.pp.134-36).

Senior Agent Brunson Asbill testified he accompanied Officer Ford to surveil the residence and follow the vehicle to the pre-arranged meeting location. When Petitioner was arrested, Agent Asbill removed cash and a bag containing cocaine and marijuana from Petitioner's person. (App.pp.145-47).

Ingram, the confidential informant, confirmed he made several calls to Petitioner on April 3, 2008 in order to purchase four ounces of cocaine. (App.pp.97-104).

Angil Landrum, a forensic chemist at the State Law Enforcement Division, testified 8.48 grams of marijuana and 211.53 grams of cocaine were recovered in this case. (App.pp.164-69).

B.

At the PCR hearing, Petitioner stated that he received a copy of his file from trial counsel after he was incarcerated and noticed it contained a letter¹ from the solicitor's office with the name "Julia Anderson" written on it. (App.pp.297-99; p.356). Petitioner stated he heard this name mentioned at a meeting at trial counsel's office – at the end of June 2009 – when counsel said "all of this had started with Julia Marie Anderson."

¹ Entered as Applicant's Exhibit 1 at the PCR hearing. (App.p.295; p.356).

(App.pp.299-300; p.311). Petitioner stated Julia Anderson and the confidential informant in his case (Ingram) were in business together and he had engaged in drug transactions with both of them. (App.pp.301-02). Petitioner stated his girlfriend retrieved some documents² – in March 2012 – indicating trial counsel represented Julia Anderson at the same time and argued trial counsel never told him about this. (App.pp.303-06).

Pamela Stewart, Petitioner's girlfriend, stated she accompanied Petitioner to several meetings at trial counsel's office. (App.pp.291-92). Stewart stated that, during one of these meetings, she overheard trial counsel tell Petitioner "[y]ou want to know where all this started? This is stemming from Julia Marie Anderson, her case." (App.p.292).

The assistant solicitor who prosecuted this case, Allen Fretwell, confirmed he had a copy of Exhibit 1 in his file (the letter with the notation of "Julia Anderson" handwritten at the top) that did not have notations on it. (App.p.337). Fretwell testified this was not his handwriting and he did not recognize this handwriting. (App.p.337). Fretwell testified Julia Anderson was not at all involved in Petitioner's case. (App.p.337).

Trial counsel identified Exhibit 1 as a cover letter from the assistant solicitor "itemizing the discovery that he had mailed to me on June 12th, 2009." (App.pp.321-22). Trial counsel testified the handwritten notation of "Julia Anderson" at the top was not his handwriting and he did not recognize this handwriting. (App.p.322). Trial counsel testified he did not recall mentioning Julia Anderson to Petitioner and that he doubted he

² Entered as Applicant's Exhibits 2 and 3 at the PCR hearing. (App.p.306; pp.357-63).

would have discussed one client with another. (App.p.322). Trial counsel testified that, according to Exhibits 2 and 3, it appeared he represented Julia Anderson in October 2010 but that he did not remember when his representation of her began. (App.p.323; p.333). Trial counsel testified he had no knowledge of having mentioned Julia Anderson to the solicitor's office in discussing Petitioner's case. (App.p.324).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to meet his burden of proving trial counsel had a conflict of interest. The PCR judge found credible trial counsel's testimony that he did not recall discussing Julia Anderson with Petitioner and would not have discussed one client with another. The PCR judge found Petitioner failed to demonstrate he was prejudiced by trial counsel's representation and noted the State presented overwhelming evidence of his guilt. (App.pp.351-52). The PCR judge also noted the record was kept open for trial counsel to determine if he still had a file for Julia Anderson but that counsel submitted an affidavit that he was unable to locate this file. (App.pp.347-48; p.355).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v.

State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

Deficiency

The PCR judge did not err in finding Petitioner failed to meet his burden of proving trial counsel had a conflict of interest in representing him in this case. Petitioner failed to prove the first prong of the Strickland test – that trial counsel was deficient. Petitioner failed to present any credible evidence or testimony that trial counsel represented both Julia Anderson and Petitioner at the same time and that there was an actual conflict of interest in Petitioner’s case. The only “evidence” presented by Petitioner to support his contention are the exhibits he entered into evidence at the PCR hearing. Exhibit 1, however, merely has the name Julia Anderson written across the top of the page. Neither trial counsel nor assistant solicitor Fretwell could identify this handwriting. Exhibits 2 and 3 are similarly not helpful to Petitioner’s case, as the mere fact that trial counsel represented Julia Anderson on charges in October 2010 – more than one year after Petitioner’s trial in July 2009 – does not prove trial counsel represented Anderson at the same time he was representing Petitioner on these charges.

Trial counsel testified he did not remember the time period that he represented Julia Anderson and had no knowledge of discussing Anderson with the assistant solicitor during the pendency of Petitioner’s case. More importantly, trial counsel testified he did

not recall mentioning Julia Anderson to Petitioner and that he would not have discussed one client with another. The PCR judge specifically found this testimony was credible. (App.p.352). As such, this Court must give this finding great deference. 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."). Trial counsel's testimony is supported by that of assistant solicitor Fretwell. Fretwell testified he did not recognize the handwritten notation of "Julia Anderson" at the top of Exhibit 1, that such notation was not on the copy in his file, and that Julia Anderson was not involved in Petitioner's case.

Regardless of the credible testimony from trial counsel and assistant solicitor Fretwell, Petitioner cannot demonstrate trial counsel was ineffective because of a conflict of interest. An applicant alleging his conviction was unlawful due to a conflict of interest from counsel's representation bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel's performance. See Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)); Padgett v. State, 324 S.C. 22, 27, 484 S.E.2d 101, 103 (1997). Petitioner failed to meet this burden. Petitioner cannot demonstrate trial counsel represented him at the same time that he represented Julia Anderson. Petitioner failed to demonstrate Julia Anderson was in any way involved

in the facts or background of Petitioner's case. Petitioner cannot prove Julia Anderson's interests were adverse to his own and that trial counsel had an actual conflict of interest. See Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." (quoting Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007))).

Prejudice

Petitioner failed to prove the second prong of the Strickland case – that trial counsel's performance prejudiced his case. "[P]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008) (quoting Strickland v. Washington, 466 U.S. at 692, 104 S. Ct. at 2067). As noted supra, Petitioner failed to demonstrate trial counsel had an actual conflict of interest and that he rendered deficient performance as a result. Julia Anderson has not been linked to Petitioner's case by any compelling evidence. Mere speculation of a link between these two persons is not sufficient to demonstrate either a conflict of interest or that Petitioner was prejudiced by trial counsel's representation.

Further, Petitioner cannot demonstrate prejudice in this case because the State presented overwhelming evidence of his guilt. Petitioner's charges resulted from a controlled buy of cocaine made by a confidential informant. The informant recorded the phone calls with Petitioner that were made to set up this transaction. Petitioner was arrested immediately after the transaction and drugs were found both on his person and in

his vehicle. A subsequent search of his residence yielded even more narcotics. Petitioner cannot show he was prejudiced by trial counsel's representation because the State presented overwhelming evidence of his guilt. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the defendant's guilt); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Based upon the mountain of evidence against him, there is no reasonable probability the outcome of Petitioner's trial would have been any different if he had been able to somehow demonstrate trial counsel represented him and Julia Anderson at the same time. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735. This is especially true because, as discussed supra, Petitioner failed to present any compelling evidence to establish Anderson was involved with the charges at issue in this case or that the charges she pled guilty more than one year after Petitioner's trial were somehow linked to Petitioner.

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of trial 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 foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

January 6, 2015

STATE OF SOUTH CAROLINA
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The Honorable D. Garrison Hill, Circuit Court Judge

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SC SUPREME COURT

Jaques Jamar Sullivan, Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire
Post Office Box 12891
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 6th day of January, 2016.


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ATTORNEY FOR RESPONDENT