

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 01 2016

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

SC SUPREME COURT

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No.: 2014-001425

KANDY GILLIARD,

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 REVIEW	6
ARGUMENT	7
There is evidence of probative value to support the post-conviction relief court's ruling that Petitioner did not meet her burden of proving that trial counsel was ineffective for failing to develop a mental illness defense on Petitioner's behalf to present at the trial of the case	8
CONCLUSION.....	12

PETITIONER'S ISSUES PRESENTED

- I. Trial counsel erred in failing to develop a mental illness defense on petitioner's behalf to present at the trial of the case.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. Petitioner was indicted at the April 2000 term of the Charleston County Grand Jury for murder (2000-GS-10-2467) and armed robbery (2000-GS-10-2468). He was represented by Melissa Gay, Esquire. On June 1, 2001, Petitioner proceeded to trial and was found guilty as indicted. The Honorable James Lockemy sentenced Petitioner to life imprisonment for murder and ten years imprisonment for armed robbery. The sentences are to be served concurrently.

Petitioner filed a timely Notice of Appeal. Petitioner's appellate counsel, Robert Dudek, Esquire, petitioned to be relieved as counsel and filed an Anders brief with the Court. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Gilliard, Op. No. 2004-UP-296 (S.C. Ct. App. filed May 5, 2004). Petitioner subsequently filed a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on July 8, 2004. On August 19, 2004, the South Carolina Supreme Court denied Petitioner's petition for rehearing.

On February 15, 2005, Petitioner filed an application for post-conviction relief. Respondent made its Return, requesting that an evidentiary hearing be held. An evidentiary hearing into the matter was convened on March 14, 2007 and reconvened on June 14, 2007 at the Charleston County Courthouse. Petitioner was present at the hearing and was represented by William Runyon, Esquire. Jeanette Van Ginhoven, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Honorable Roger M. Young denied and dismissed the application with prejudice by written Order filed July 23, 2007. No appeal was made from this first PCR action.

On January 17, 2012, Petitioner filed a second PCR application alleging that she was denied her right to appeal her first PCR action and alleging other allegations of ineffective assistance of counsel. On November 21, 2013, a PCR hearing was held at the Charleston County Courthouse before Judge Stephanie P. McDonald, where Respondent consented to granting Petitioner a belated appeal of the first PCR denial. On April 15, 2014, another PCR hearing was held at the Charleston County Courthouse before Judge R. Markley Dennis, where Judge Dennis denied Petitioner's second PCR application except for the ground alleging denial of Petitioner's appellate rights. On January 15, 2014, Judge McDonald issued an Order granting Petitioner's requested belated PCR appeal via *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). On June 19, 2014, Judge Dennis issued an Order denying relief to Petitioner on the additional allegations raised in her second PCR action.

Per this Court's Order dated January 30, 2015, granting Petitioner's motion for leave to reconstruct the record of the prior PCR hearing record, which could not be transcribed, a PCR reconstruction hearing in the matter was held on March 13, 2015, at the Charleston County Courthouse before Judge Roger M. Young. Petitioner's trial counsel and first PCR counsel testified at the hearing and the record was reconstructed.

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 did not raise a mental illness defense. For the following reasons, Respondent contends that this argument is without merit.

Relevant Law

In a PCR action, the Petitioner bears the burden of proving the allegations in her 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 question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (citing Strickland 466 U.S., at 690, 104 S.Ct. 2052).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of 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.

There is evidence of probative value to support the post-conviction relief court's ruling that Petitioner did not meet her burden of proving that trial counsel was ineffective for failing to develop a mental illness defense on Petitioner's behalf to present at the trial of the case.

Petitioner argues that Counsel was ineffective for failing to raise a mental illness defense. Respondent submits that the PCR Court correctly found that Counsel was not ineffective.

Respondent took notes on Counsel's testimony presented at the first PCR hearing, (that was adopted by the second PCR Court while reconstructing the record), which show that Counsel believed that Petitioner did not qualify for a mental defense and did not have a real history of mental illness. (App. 1210). The notes also show that Counsel testified that there was no question that she was ready to try the case. (App. 1211). Counsel also appeared to testify that the issue was more of a lack of understanding by Petitioner as to how serious the charges were. From the reconstruction hearing, Counsel testified that Petitioner was "out of touch with reality" because the "the codefendant had actually physically killed the lady" and Petitioner "didn't understand at all why the codefendant was getting some kind of deal when she was the person who actually killed the woman". (App. 1188, ll. 18, 20-25).

In its Order of Dismissal, the PCR Court found Petitioner had been evaluated pre-trial by a Dr. Wong, who found Petitioner was competent to understand the proceedings and assist in her own defense. Dr. Wong also found that Petitioner did not suffer from a mental disorder, but rather a personality disorder. Accordingly, Counsel testified that she did not have a basis to assert a mental defense. The only issue that Counsel brought up was Counsel's belief that Petitioner's behavior was bizarre before and during trial and that at some point, she felt that Petitioner was no longer able to assist in her own defense.

The PCR Court found that Counsel testified that Petitioner had a mental break during the trial, but found that this assertion was refuted by the trial transcript. The PCR Court made findings from the trial transcript that outline Petitioner's understanding of what was happening during the trial. The PCR Court noted that Petitioner understood the trial court's questions involving testifying at trial, plea negotiations, and sentence exposure. The PCR Court also noted that the trial court again went over Petitioner's right to testify and Petitioner again understood the questions and responded appropriately. The PCR Court also noted that Petitioner testified and found that she appropriately answered Counsel's questions and the State's questions.

The PCR Court found that Petitioner failed to prove that she lost competency to stand trial during the trial. (App. 1220). The PCR Court then called Counsel's testimony and credibility into question by finding that Counsel's testimony at the PCR hearing was "an attempt to 'fall on the sword' for a young client who received a life sentence." (App. 1220). The PCR Court found that the trial record, when objectively viewed as a whole, revealed that "at no point did [Petitioner] act in such a way as to indicate a lack of cognitive or volitional abilities during the course of her trial such that it indicates she lacked capacity to understand what was going on or to assist her attorney." (App. 1220).

Analysis

Petitioner's argument is without merit. First, although the word "credibility" is not used, Respondent would argue that the PCR Court questioned Counsel's credibility by finding that she was attempting to "fall on her sword" for Petitioner and by then following with the PCR Court's conclusion when viewing the record as a whole. 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 probative evidence to support the PCR Court's rulings. First, as the PCR Court outlined in its Order of Dismissal, the trial court questioned Petitioner about her understandings of testifying at trial, plea negotiations, and sentence exposure. (See App. 576-583). Petitioner answered all questions appropriately and there was never any dispute during trial nor anything in the record to show that she did not understand what was going on during trial or the charges against her. Furthermore, at the close of trial during the sentencing hearing, the trial judge stated to Petitioner:

And your attorney mentioned a couple of times something about, maybe that you had either intelligent problems or mental problems. But from what I can tell, from listening to you testify as well as from your observations in the courtroom, there seems to be no problems in that regard at all. I think that you knew what you were doing. I think that you were suffering under no mental or intelligence hindrances.

(App. 976, ll. 18-25).

Thus, the trial judge, after presiding over the entire trial and witnessing Petitioner's behavior and testimony, made a point to emphasize that he did not think that Petitioner had any mental or intelligence problems and that she knew what she was doing. Essentially, the only testimony showing that Petitioner may have had mental competency issues during trial was Counsel's testimony at the PCR hearing (which, again, was called into question and not believed by the PCR Court) and the reconstruction hearing, stating that Petitioner started "acting weird" during the trial and was "zoned out" when "dealing with the stress." (App. 1190, ll. 13, 20-21). Counsel's perception that Petitioner was acting strange because of the stress of facing a life

sentence for a murder charge does not show any evidence that Counsel should have asserted a mental illness defense during trial.

Counsel even testified during the reconstruction hearing that Petitioner did not qualify for mental health defenses. (App 1189, ll. 2-3). Given the fact that Petitioner was evaluated and found competent to stand trial and as to criminal responsibility – and this was never disputed during trial – there is certainly probative evidence showing that Counsel was not ineffective for failing to raise a mental illness defense. As the PCR Court properly found, when viewing the trial record as a whole and the questions asked to Petitioner and her answers to the attorneys and the trial judge, Petitioner gave no indication to the Court or to her attorney at the time of trial that she was not competent to stand trial, that she was not competent as to her criminal responsibility, or that she was entitled to any mental illness defense during trial. Accordingly, Petitioner failed to prove that Counsel was ineffective for failing to raise a mental illness defense, and there is evidence of probative value to support the PCR Court's findings.


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

February 1, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

KANDY GILLIARD,

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:

**Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201**

This 1st day of February, 2016.



ELIZABETH MCELLEN
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 1, 2016

RECEIVED

FEB 01 2016

SC SUPREME COURT

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

Re: Kandy Gilliard v. State of South Carolina
Appellate Case No. 2014-001425
Lower Court Case No. 2012-CP-10-0383

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: Wanda H. Carter, Esquire
Trisha Allen, Victim Services