STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Darlington County
Court of Common Pleas

The Honorable Paul M. Burch, Plea Judge
The Honorable Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2015-000230

Timothy Michael Farris, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN M. WILSON
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ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Whether probative evidence supports the PCR Court's finding that trial counsel performed effectively.

STATEMENT OF THE CASE

Petitioner is not presently confined in the South Carolina Department of Corrections. In December 2008, the Darlington County Grand Jury indicted Petitioner for criminal solicitation of a minor (2008-GS-16-1555). Tonya Copeland Little, Esquire, and Matthew S. Swilley, Esquire, represented Petitioner.[1] On March 9, 2011, Petitioner pled guilty as indicted. In exchange for the plea, the State dismissed two (2) other pending solicitation charges. The Honorable Paul M. Burch sentenced Petitioner to five (5) years of incarceration, suspended upon the service of time served and four (4) years of probation. Petitioner did not appeal his plea or sentence. On January 23, 2013, Petitioner appeared before the Honorable J. Michael Baxley regarding a probation violation, and Judge Baxley terminated Petitioner's probationary sentence at that time.

Petitioner filed the current application for post-conviction relief on September 24, 2012. Respondent made a timely return and motion to dismiss on or about January 15, 2013, asking the application be dismissed as untimely. By order dated January 28, 2013, Judge Baxley conditionally dismissed the action as untimely. Petitioner filed a timely response to the conditional order, and Judge Baxley rescinded the conditional order by written order dated January 10, 2014.

The Court convened an evidentiary hearing into the matter on July 24, 2014, at the Darlington County Courthouse before the Honorable Thomas A. Russo. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's plea

[1] Both Ms. Little and Mr. Swilley were employed by the public defender's office. Ms. Little represented Petitioner first, and was succeeded by Mr. Swilley. Because Mr. Swilley represented Applicant at the time

counsels, Tonya Copeland Little, Esquire, and Matthew S. Swilley, Esquire, also testified. Judge Russo denied relief and dismissed the matter via an order of dismissal dated November 24, 2014 and filed December 19, 2014. Petitioner filed a motion to alter or amend order pursuant to rule 59(e), SCRCP on January 5, 2015. The State filed a return to this motion on February 6, 2015, and Petitioner filed a reply to the return. On June 26, 2015, Judge Russo issued a written order denying Petitioner's motion.

This return to the petition for writ of certiorari follows.

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 court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief 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 an 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

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of his plea, his conduct will be the main focus of this analysis.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the 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." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Whether probative evidence supports the PCR Court's finding that plea counsel performed effectively.

Petitioner argues that the PCR Court erred when it did not find plea counsel ineffective for, in his words, "abandon[ing] his role as defense counsel when he advised Petitioner to plead guilty without having subjected the State's case to adversarial testing and without having conducted any independent investigation during the two weeks that the represented Petitioner." PWC p.11. The facts that Petitioner relies on for this argument are that Mr. Swilley had represented Petitioner for a short period, and that Mr. Swilley did not conduct an independent investigation, thus allegedly failing to subject the State's case to meaningful adversarial testing and coercing the Petitioner into an involuntary guilty plea.

Petitioner looks first to the case of United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984) for a legal foundation to this argument. This opinion contains strong language regarding the need for a criminal trial to be a contest between adversaries and that, though faults may be made by the defendant's counsel, it is the process that presents

the test and satisfies the Sixth Amendment. In the instant case, no adversarial proceeding was denied because none was had. Petitioner pled guilty after being advised by counsel whom had adequately reviewed his case. A noted in the order of dismissal, none of the three (3) scenarios from Cronic that presume prejudice are present: Petitioner was not denied counsel at a critical stage of prosecution; plea counsel did not "entirely fail[] to subject the prosecution's case to meaningful adversarial testing;" and this is not a situation where even the best of lawyers would have most likely failed to provide effective assistance. App. p. 233. Petitioner's reference to Nance v. Ozmint, 367 S.C. 547, 616 S.E.2d 878 (2006) is similarly offbase, as the counselors found ineffective in that matter committed gross and obvious errors during a capital criminal trial. Again, this is not an equal comparison to Petitioner's case.

To say that plea counsel abandoned his role as defense counsel is to ignore the simple fact that Petitioner wanted to plead guilty. He admitted his guilt to both attorneys, yet tried to mitigate it by admitting an addiction to pills, as well. The closest Petitioner came to asking for a trial was telling Ms. Little that he had been thinking about requesting one. Both attorneys testified that if Petitioner had wanted a trial, they would have put much more research and effort into the matter during their trial preparation. Instead, after thorough review of the discovery presented to them, coupled with Petitioner's admission of guilt to them, they advised their client that the State's case appeared to be strong and he would not do well at trial. Mr. Swilley, when asked why he did not consult an expert before the plea, testified, "I didn't think there was any reason to believe that he was not on the other end of the computer with Investigator Speck." App. p. 214:13-16.

Counsel always has a duty to conduct a reasonable investigation. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447

(1986)). This Court in Ard went on to maintain that '"[w]hen evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.' Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. 2052." In the case at bar, Mr. Swilley did what worked for the case: he reviewed materials, confirmed his thoughts with others, consulted with prior counsel, and became comfortable that his client's decision to plead guilty was, indeed, in his best interest. Mr. Swilley had no obligation to hire experts or prepare for trial when his client told him that he wanted to plead guilty. When he did not undertake these actions, it was a conscious and reasonable strategy, not a failure of assistance. When a plea is sought by the defendant and the solicitor's office is open to the possibility of a plea, it is reasonable for counsel to turn their focus from investigation to negotiation in order to obtain the best possible outcome for the client.

As stated in the plea transcript and reiterated at the PCR hearing, Petitioner pled guilty and, in doing so, waived his constitutional protections, testified that he was satisfied with his attorneys, and stated in no uncertain terms that he was guilty of the offense. Petitioner alleges that the record does not reflect a free and voluntary waiver of constitutional trial rights, but Respondent avers that these waivers are clearly in the guilty plea colloquy on page 7 of the appendix. At no point does Petitioner affirmatively allege that any actions on the part of plea counsel would change the meaning and effect of Petitioner's words during the plea colloquy.

When reviewing the PCR court's findings, "great deference" must be given to the credibility findings of the judge, as it is he or she whom has had the ability to personally experience the testimony. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542

(1994) (reversed on other grounds). In this matter, the PCR judge found both counselors to be "very credible" and Petitioner "not credible." App. p. 226. This Court cannot place weight on Petitioner's testimony, and his petition for writ of certiorari does not present ample case law to overcome the standards that case law places on PCR matters.

These arguments all return to the two-prong test of Strickland v. Washington, supra, and the procedural guidance of Cherry v. State, supra. It simply cannot be said that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. Under the first prong of Strickland, supra, the Court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland, supra. Certainly, Mr. Swilley was reasonable in reviewing discovery, speaking with his client, speaking with prior counsel, speaking with an investigator, and considering all facets of the case before him. The PCR Court found "very credible Mr. Swilley's testimony he would have sought expert testimony and prepared for trial had Applicant requested one," as well as that "Mr. Swilley conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation." App. p. 233-4. Secondly, per Strickland, supra, counsel's deficient performance must have prejudiced the petitioner to such an extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. This burden has not been overcome. The PCR court described the weight of the evidence against the Petitioner as "overwhelming," and did not find that counsel's advice to enter into a guilty plea was improper. App. p. 234

CONCLUSION

For the reasons stated above, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN M. WILSON
Attorney General

JESSICA E. KINARD
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By: Jessica E Kinard
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February 3, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Plea Judge
The Honorable Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2015-000230

Timothy Michael Farris, ... Petitioner,

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CERTIFICATE OF SERVICE

I, Jessica E. Kinard, 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:

John H. Strom, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 3rd day of February, 2016.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

February 3, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
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Re: **Timothy Michael Farris v. State of South Carolina**
Appellate Case No. 2015-000230
Lower Court Case No. 2012-CP-16-0814

Dear Mr. Shearouse:

Enclosed for filing please find an 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,

Jessica E. Kinard
Assistant Attorney General
S.C. Bar # 77889

JEK/jacc
Enclosures

cc: John H. Strom, Esquire
Trisha Allen, Victim Services (without enclosure)