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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge
Case No. 2008-CP-04-0073

WAYMON HARBIN, JR., #249126, ... Respondent,

v.

STATE OF SOUTH CAROLINA, ... Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF THE ISSUE ON APPEAL

Did the PCR Court err in finding that the Respondent was provided ineffective assistance of counsel due to the late hour of counsel's appointment, resulting in a guilty plea that was not knowingly and voluntarily entered?

STATEMENT OF THE CASE

Respondent was indicted at the January 1998 term of the Anderson County Grand Jury for Murder (1998-GS-04-94) and Possession of a Firearm During the Commission of a Violent Crime (1998-GS-04-93). He was represented by Richard Warder, Esquire. On April 21, 1998, Applicant pled guilty as charged. He was sentenced by the Honorable Gerald C. Smoak, Sr., to confinement for periods of thirty (30) years and five (5) years concurrent. Respondent did not appeal his conviction or sentence.

Respondent filed this application for post-conviction relief (PCR) on January 9, 2008 (2008-CP-32-3812). It was his third PCR Application. A hearing was convened on March 26, 2009 at the Anderson County Courthouse. At that time, the Petitioner made its motion to dismiss the application for post-conviction relief. After hearing arguments from both counselors, the Court denied the Petitioner's motion to dismiss and proceeded with an evidentiary hearing. Respondent was present at the hearing and was represented by Bruce Byrholdt, Esquire. At the hearing, Respondent testified on his own behalf. Additionally, Respondent offered the testimony of Waymon Harbin, Sr., (Mr. Harbin) Respondent's father. The Petitioner offered the testimony of Richard Warder, Esquire (Mr. Warder) Respondent's plea counsel. The Honorable J. Cordell Maddox, Jr., granted Respondent's application for post-conviction relief by written Order dated August 26, 2009.

Petitioner filed a timely Notice of Appeal and a Petition for Writ of Certiorari on March 3, 2011. Respondent filed a Return to Petition for Writ of Certiorari on March 30, 2011. This Court granted the petition by Order dated January 11, 2012. This brief 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR judge's decision can be reversed on PCR appeal when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004); Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

ARGUMENT

The PCR Court erred in finding that the Respondent was provided ineffective assistance of counsel due to the late hour of counsel's appointment, resulting in a guilty plea that was not knowingly and voluntarily entered.

When determining issues relating to guilty pleas, the Supreme Court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the post-conviction relief hearing. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). Where the application for post-conviction relief alleges ineffective assistance of counsel as a ground for relief, 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984). The Applicant 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, the Applicant 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 Applicant such that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985); Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997).

Petitioner submits that there is no evidence in the record to support the PCR Court's

conclusion that plea counsel was ineffective, thereby rendering Respondent's guilty plea involuntary. The PCR court found that plea counsel was ineffective for failing to conduct a thorough investigation of Respondent's case due to the extreme short amount of time plea counsel was involved in Respondent's case; for failing to review more than 350 pages of discovery material; and for failing to review the physical evidence in the case. (App. p.98-99). A central issue in Respondent's case is the amount of time in which plea counsel had to prepare Respondent's case for trial. Plea counsel and Mr. Harbin (Respondent's father) testified at the PCR hearing that plea counsel was retained a few days, shortly before the case was called to trial on Tuesday, April 21, 1998. (App. p.58, lines22-24; p.90, lines12-19). The record reflects that plea counsel made a motion for continuance on Monday, April 20, 1998. (App. p.20, lines5-12). Plea counsel testified at the PCR hearing that the basis for the motion for a continuance was the shortness of the time. (App. p.64, lines15-16). Plea counsel testified that he was prepared and ready to proceed with the trial, in the event the continuance motion was denied. (App. p.60, lines12-25). Plea counsel testified explaining that while he would have liked to have more time, he was nevertheless prepared for trial if Respondent had to proceed with trial. (App. p.61, lines13-25).

Petitioner submits the record is void of any evidence to support the PCR court's finding that counsel failed to review more than 350 pages of discovery material and the physical evidence in the case. Counsel testified that he could not recall whether he filed a discovery motion and obtained the discovery materials from the solicitor's office or whether Respondent's prior attorney provided the discovery to counsel; however, counsel testified that he did obtain all the discovery materials. (App. p.59, lines4-10). Respondent did not present any testimony or evidence at the PCR hearing of discovery material that counsel

failed to obtain or review. (App. p.51-96). Counsel has practiced law for thirty-five years and in that amount of time has handled over one-hundred murder cases. (App. p.64, lines21-23). Counsel testified that he had experience handling murder cases where voluntary manslaughter and/or involuntary manslaughter was an issue. (App. p.64-65). Both counsel and Respondent testified that they were able to meet at least once, but possibly more, to discuss the facts of the case, whether there was any evidence to support any defenses such as provocation, and counsel's opinion that there was no evidence of heat of passion. (App. p.59, line22 – p.60, line7; p. 71, line22 – p.72, line9). Counsel and Respondent together and separately met with counsel's investigator and Respondent testified that he reviewed his entire case with counsel's investigator. (App. p.59, lines13-15; p.72, lines4-9). Furthermore, counsel, his investigator, and Respondent reviewed the witness statements together. (App. p.59, line13-15). While counsel testified that he did not interview any witnesses, Respondent cannot prove he was prejudiced by counsel's failure. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Respondent presented no such witness testimony at the PCR hearing. (App. p.51-96).

Counsel testified that his trial strategy would have been to attack the sufficiency of the evidence, "trying to get where you can get reasonable doubt," trying to impeach where

one could, but that the facts were bad in Respondent's case. (App. p.66, lines8-12). Counsel testified that Respondent's case was not a "who did it" scenario because Respondent had told counsel that he did commit the murder, that he waited for the victim as the victim approached the house. (App. p.59, lines14-21; p.66, lines17-22). Petitioner submits that the "83 items of discovery materials which had been produced to a former attorney of the Respondent of more than 350 pages of documents plus physical evidence which was in the custody of the Anderson County Sheriff's office" was not presented or entered into evidence at the PCR hearing. Nor did the Respondent claim that counsel failed to review the discovery; Respondent alleged that counsel did not have enough time to investigate, specifically referring to the inability of counsel to contact witnesses over the weekend prior to Respondent's trial. (App. p.74, lines8-14). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronic, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

Neither Respondent nor plea counsel suggested how additional preparation on counsel's behalf would have resulted in a different outcome. Respondent presented no witnesses or any specific testimony establishing he would have had a defense if he had additional time to prepare for trial. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (where PCR applicant fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's incomplete preparation); Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)(Court will not

speculate concerning what might have occurred if counsel had conducted further investigation). Petitioner submits that the record does not support the PCR court's finding that had plea counsel had sufficient time to prepare a defense and prepare for trial that it was reasonable a different result would have been achieved.

In Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998), the South Carolina Supreme Court held that the PCR judge erred in finding counsel was ineffective in preparing respondent's case where the respondent did not "present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for trial." In the instant case Respondent asserted that counsel failed to discover that the victim had on prior occasions threatened physical harm to Respondent and at some point allegedly put a gun in Respondent's mouth. Counsel testified that he did not recall Respondent informing him of that story and that Respondent did not tell counsel of such an incident in connection with the facts and circumstances of Respondent's case. (App. p.69, lines13-21). The only testimony Respondent offered to support this alleged defense what Mr. Harbin's testimony that he spoke with someone working for plea counsel and told that person Respondent had a gun put in his mouth. (App. p.91, line1-4). Petitioner submits that this testimony alone, which fails to specify who, when, and where, is insufficient to show Respondent was prejudiced.

In Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), the Court found that a PCR judge's conclusion that trial counsel's preparation was inadequate was not supported by the evidence in the record. The Court noted that counsel testified he had been practicing law for approximately thirty years and that half of his practice involved criminal cases. Id. The Court found that Harris failed to offer any evidence or argument as to how counsel's alleged lack of

preparation prejudiced him, and that it was merely speculative that counsel's deficient performance was prejudicial to Harris. Id. Petitioner submits that plea counsel's thirty-five years of experience of practicing law, and especially handling numerous murder cases with issues similar to Respondent's is evidence that supports counsel being able to prepare for trial in a shorter amount of time than usually required.

Petitioner submits that the PCR court erred in granting relief as Respondent never indicated that had counsel's alleged performance not been deficient, Respondent would not have pled guilty but would have insisted upon going to trial. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (where counsel was appointed 20 minutes before plea and had not investigated charges and was found to be unprepared for trial. Grant of PCR reversed because applicant failed to show what benefits would have resulted from additional preparation by failing to present any witness or testimony establishing applicant would have had a defense to the charges). In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. Hill, 474 U.S., at 59, 106 S.Ct., at 370. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. Id. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Id.

Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry

will depend largely on whether the affirmative defense likely would have succeeded at trial. Id, 474 U.S., at 59, 106 S.Ct., at 371. The predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decision maker." Strickland, 466 U.S., at 669, 104 S.Ct., at 2068. In the present case counsel testified that Respondent received a plea offer of thirty (30) years, taking the possibility of life off the table, and that the Respondent decided to accept it. (App. p. 61, lines 4-7). Counsel testified at the PCR hearing that the facts were bad in Respondent's case and that Respondent admitted to committing the crime. (App. p.66, lines10-19). Petitioner submits that Respondent failed to present any evidence that counsel failed to discover that would have likely changed the outcome of trial.

In Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009), the South Carolina Supreme Court in making its ruling explained that the South Carolina Court of Appeals followed Hill when it engaged in a prejudice analysis and found no evidence to support the PCR judge's finding that Stalk had met his burden. Stalk's prejudice claim rested on his assertion that his attorney was so unprepared that Stalk felt coerced into pleading guilty. Id. The South Carolina Supreme Court agreed with the Court of Appeals that to meet his prejudice burden Stalk was required to prove more than the fact of counsel's inattentiveness, which is the "deficiency." Id. The Court stated that "for example, Stalk needed to present some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful to Stalk, that is, something that would have affected counsel's advice to Stalk to accept the plea bargain offered or that would have caused Stalk to decline to accept it." Id. The Court ruled that Hill makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not

have pled but would have gone to trial. Id.

Petitioner submits that there is no evidence in the record to support the PCR court's finding that plea counsel's performance was deficient due to a lack of time to prepare and investigate. Additionally, there is no evidence in the record to support the PCR court's finding that had counsel had sufficient time to prepare a defense and prepare for trial that it was reasonable a different result would have been achieved. Petitioner submits that even if plea counsel's performance could be held deficient, there is certainly no evidence or testimony in the record to support a finding of prejudice. Petitioner further submits that PCR court committed an error of law in granting PCR when it failed to make the requisite finding that had counsel's performance not been deficient, Respondent would not have pled guilty but would have insisted on going to trial pursuant to Hill. Accordingly, because the PCR court improperly granted relief in this case, this Court should reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

CONCLUSION

For the reasons stated above, this Court should reverse the PCR court's Order and deny the relief sought by the Respondent.

Respectfully submitted,

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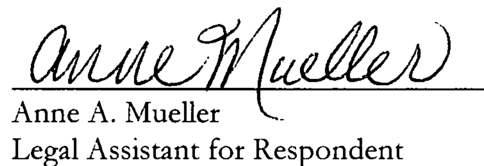
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Bruce A. Byrholdt, Esquire, P.O. Box 2506, Anderson, South Carolina, 29622, on this the 11th day of April, 2012.



Anne A. Mueller
Legal Assistant for Respondent

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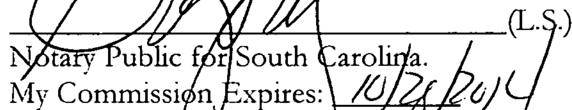
11th day of April, 2012.



______________________ (L.S.)
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