STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001077

RECEIVED
MAR 30 2016
SC SUPREME COURT

James R. Byers, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the record contain evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving counsel was ineffective for not challenging the sufficiency of the indictment based on an allegedly defective affidavit?

STATEMENT OF THE CASE

James Byers ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Petitioner was indicted at the October 2009 term of the Cherokee County Grand Jury for distribution of crack cocaine (2009-GS-11-1179) and distribution of crack cocaine within half-mile of school or park (2009-GS-11-1180). William Rhoden, Esquire, represented Petitioner. On April 19, 2011, Petitioner proceeded to trial before the Honorable J. Derham Cole and jury. On April 20, 2011, he was found guilty on both counts. Judge Cole sentenced Applicant to life without parole for distribution of crack cocaine—third or subsequent offense and distribution of crack cocaine within one-half mile of a school or park.

A timely Notice of Appeal was filled and an appeal was perfected by Dayne C. Philips of the South Carolina Appellate Division of Indigent Defense. The South Carolina Court of Appeals affirmed Applicant's sentence and conviction. State v. Byers, Op. No. 2013-UP 121 (Filed March 27, 2013). The Remittitur was issued on April 12, 2013.

Petitioner filed an application for post-conviction relief ("PCR") on May 13, 2013. An evidentiary hearing into the matter was convened on January 14, 2015, at the Spartanburg County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. William Rhoden ("Counsel") also testified. Judge Jefferson filed an order denying and dismissing Petitioner's PCR application with prejudice on May 1, 2015.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

I. The record contains evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving counsel was ineffective for not challenging the sufficiency of the indictment based on an allegedly defective affidavit.

In a PCR action, the applicant 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 applicant 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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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 prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

A. The record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show Counsel's performance was deficient.

This Court should deny review because there is ample evidence of probative value in the record to support the PCR judge's finding that Petitioner failed to show Counsel's performance fell below an objective standard of reasonableness. Petitioner argues that Counsel should have challenged his indictments at trial because at the time the officer swore the affidavit in support of the indictments, the officer could not affirm that the substance was in fact crack because the substance had not yet been chemically tested.

This case involved a controlled purchase of narcotics in which the Spartanburg County Sheriff's office equipped a confidential informant with audio and visual equipment and the purchase was recorded. (App. pp. 77-84; p. 107, line 24-p. 109, line 15). Officer Todd Parker testified at trial that the informant made the purchase and returned to the Sheriff's vehicle with a quantity of what "appeared to be crack cocaine." (App. p. 84, lines 17-23). Parker further testified that he did not normally test the substance under these circumstances because in the controlled buy, "[they] normally bought small quantities and it [was not] enough there to test. [They] actually just packaged it up and sent it to SLED where [it is] tested." (App. p. 78, lines 6-10). SLED analysist Carmen Tucker testified at trial that she tested the substance that SLED received from the sheriff's department and determined that it was in fact .08 grams of crack-cocaine. (App. p. 202, line19-p. 203, line 8). Several witnesses also testified regarding the chain of custody, including Jason Burgess (App. pp. 148-51), Chris Wyatt (App. pp. 183-88), Parker (App. p. 85, lines 5-23), and Tucker (App. pp. 197-202). The judge instructed the jury that "the

indictments. . . are not evidence . . . [t]hey don't establish anything. They don't prove anything." (App. p. 251, lines 11-16).

Counsel testified that there was nothing "having to do with the indictment . . . that [he] would [have] seen as a legal reason to move to quash [the indictments]." (App. p. 354, lines 19-22). Counsel testified "the indictments were regular on their face. . . [were] true billed, signed by the foreman[,]" and that he did not "see any basis to make any motions to quash the indictments." (App. p. 354, line 23-p. 355, line 3).

The PCR judge likewise stated that after reviewing the subject indictment and arrest warrant, she could "discern no basis for Counsel to challenge the indictments," (App. p. 401), and found that "based on a facial review of the indictments and Counsel's credible testimony regarding his and [Petitioner's] trial preparation, [Petitioner] was fully aware of the charges he was facing and suffered no surprise or prejudice by proceeding to trial on the indictments." (App. p. 403). The PCR judge further found that "[e]ven if the SLED report had been made available to [Petitioner] at the time the officer swore the affidavit, the substance would still have tested as crack cocaine, and it is unlikely a trial court would have . . . overturned the indictment." (App. p. 406).

An "indictment is a notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). In considering a timely challenge to the sufficiency of an indictment, the trial judge should determine whether

> (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Id. at 102-103, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); see also S.C. Code Ann. § 17–19–20 (2003) (sufficiency of indictment)).[1] A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' *and* consider the events at trial." State v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). The court must also observe the indictment with a practical eye in view of all the surrounding circumstances. Gentry, 363 S.C. at 103, 610 S.E.2d at 500 (citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981)). In other words, a court should examine "the totality of the circumstances" to determine if Petitioner was cognizant of the crimes for which he was charged. Reddick, 348 S.C. at 636, 560 S.E.2d at 443. Moreover, a challenge to the indictment on the ground of insufficiency must be made before the jury is sworn. Gentry, 363 S.C. at 102, 610 S.E.2d at 500; S.C. Code Ann. § 17-19-90.

Here, the PCR judge reviewed the indictments and found no facial defect because Petitioner was fully aware of the charges he was facing, Counsel testified he had no basis to challenge the indictments, and ultimately, the chemical analysis that SLED performed revealed that the substance was crack cocaine. Officer Parker testified that he observed the purchase and that when the confidential informant returned to the car, she had a quantity of what appeared to him to be crack cocaine. The indictment alleged that Petitioner sold crack cocaine. At the time the indictment was sent to the grand jury, the substance had been sent to SLED for testing and based on his observation of the transaction, the officer had reason to believe the substance was as

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[1] Section 17-19-20 provides:

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20.

alleged in the indictment. The trial judge instructed the jury that the indictment was not evidence. The State presented witnesses and evidence at trial to prove the substance alleged to be crack cocaine was, in fact, crack cocaine. Petitioner points to no authority that would require the State, upon seeking an indictment, to offer proof of all elements of the alleged offense. Petitioner failed to show there was any basis upon which counsel could have moved to quash the indictment.

Accordingly, the record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show there was a basis upon which Counsel could have moved to quash the indictment, and, therefore, failed to satisfy his burden of proving Counsel's performance fell below an objective standard of reasonableness.

B. The record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show prejudice.

The record supports the PCR judge's finding that Petitioner failed to satisfy his burden of proving that any alleged deficiency in Counsel's performance prejudiced him.

Counsel testified that he advised Petitioner to plead guilty and communicated a plea offer to Petitioner, but Petitioner rejected it verbally and in writing. (App. p. 357-58). Petitioner also testified that he rejected the plea offer because he could not take a guilty plea offer that would require him to plead guilty to something he was not guilty of. (App. p. 352, lines 2-10).

The PCR judge found that even if Counsel had challenged the indictment, there was no reasonable probability that the trial judge would have overturned the indictment. (App. p. 406). The PCR judge also stated she could "discern no prejudice to [Petitioner] for Counsel's failure to object to the sufficiency of the affidavits." (App. p. 405).

To satisfy the second prong of Strickland, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In other words, Petitioner would have to show not only that the challenge to the indictment would have been successful, but that he would not have been convicted.

Petitioner suggests that there is a reasonable probability that the outcome would have been different had Counsel challenged the indictment because the court would have overturned the indictment, and the trial would have been continued to allow the State to re-indict Petitioner which would have given Petitioner additional time to consider a plea offer. However, Petitioner unequivocally stated he would not have pleaded guilty and has produced no evidence to indicate that a delay in trial would have caused him to change his mind. More importantly, Petitioner has introduced no evidence that the State would have made another plea offer. Petitioner's argument is too tangential and speculative, and as such, is insufficient to show prejudice.

Counsel testified the indictments were facially valid and he saw no reason to challenge them. Petitioner has offered no authority supporting his claim that an indictment for a drug offense cannot be issued unless the drugs have already been tested. Rather, the statute requires only that the indictment place the Petitioner on sufficient notice of the allegations against him. S.C. Code Ann. § 17-19-20. Petition never testified he did not understand the charges he was facing at trial. The PCR judge found he was fully aware of the charges he faced. Therefore, Petitioner has failed to show that the challenge to the indictment (or to the affidavit underlying the indictment) would have been successful.

Accordingly, the record supports the PCR judge's finding that there is no reasonable probability that, but for the alleged errors of Counsel, the outcome of the proceeding would have been different.

Accordingly, the record fully supports the PCR judge's finding that Petitioner failed to show that Counsel's performance was deficient or that he was prejudiced by any alleged deficient conduct. Therefore, this Court should deny review.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's 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

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STATE OF SOUTH CAROLINA
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Certiorari to Cherokee County
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The Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2015-001077

JAMES BYERS, #293715, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **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:

LaNelle C. DuRant, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 30th day of March, 2016

Ashley Haworth

ASHLEY HAWORTH
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 30 2016
SC SUPREME COURT

March 30, 2016

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

RE: **James Byers v. State of South Carolina**
Appellate Case No.: 2015-001077

Dear Ms. 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,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: LaNelle C. DuRant, Esquire