STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-001231

Lorenzo R. Nicholson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Did the PCR judge err by finding counsel provided effective representation where counsel failed to argue that Petitioner's prior simple possession of marijuana charge in municipal court could not be used to enhance Petitioner's trafficking in cocaine conviction to a second offense where the simple possession of marijuana was a bond forfeiture, which did not qualify as a conviction for enhancement purposes under S.C. Code Ann. § 44-53-470 (1985)?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the April 2009 term of General Sessions for possession of a weapon during commission of a violent crime (2008-GS-23-4268, count 1) and trafficking cocaine (2008-GS-23-4268, count 2). (App.pp.216-17). Christopher D. Scalzo, Esquire represented Petitioner.

Though the case began as a jury trial, Petitioner opted to have the matter proceed as a bench trial. (App.pp.104-09). On August 13, 2009, the Honorable John C. Few found Petitioner guilty and sentenced him to concurrent terms of 5 years for possession of a weapon during commission of a violent crime and 13 years for trafficking cocaine, second offense. (App.p.135).

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Nicholson, Op. No. 2011-UP-588 (S.C. Ct. App. filed Dec. 21, 2011). The South Carolina Supreme Court denied Petitioner's subsequent petition for writ of certiorari by order dated July 25, 2013. The remittitur was sent on July 31, 2013.

Petitioner filed an application for post-conviction relief (PCR) on June 17, 2014 (2014-CP-23-3378). (App.pp.138-72). A hearing was held at the Greenville County Courthouse on April 21, 2015. (App.pp.178-204). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W.

Miller denied relief in an order filed May 19, 2015. (App.pp.207-15).

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 was ineffective.

Petitioner asserts trial counsel failed to argue his prior conviction for simple possession of marijuana was not a conviction for enhancement purposes because it was a bond forfeiture. As Petitioner's prior conviction, however, was not a bond forfeiture this argument is without merit.

A.

After Petitioner was found guilty of the charges as indicted, the assistant solicitor recited his prior criminal record for the court. (App.pp.127-28). One of Petitioner's prior convictions was for simple possession of marijuana, "in which [Petitioner] received a fine of $641, no respective jail time which may would make this offense a trafficking second offense." (App.p.127). The assistant solicitor cited Robinson v. State, 380 S.C. 201, 669 S.E.2d 588 (2008) in arguing a prior uncounseled misdemeanor conviction may be used to enhance a sentence for a subsequent conviction only if the defendant was not

imprisoned as a result. (App.p.128).

In contrast, trial counsel argued State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009) held the trial judge should make a determination of whether or not the prior uncounseled guilty plea was proper. (App.p.128). To that end, trial counsel questioned Petitioner about his prior conviction. Trial counsel noted this was a bench trial in municipal court. Petitioner stated he came to court without an attorney, was never instructed he "needed a lawyer for the case," and paid a fine on the charge. (App.pp.128-29). Trial counsel argued the prior conviction should not be used to enhance the current charge because Petitioner "was not given warnings." (App.p.131). The trial judge found Spratt was inapplicable and concluded the current charge would be treated as a second offense. (App.pp.131-32).

B.

At the PCR hearing, Petitioner stated trial counsel was "unprepared and didn't take the time to familiarize himself with all the relevant facts and circumstances surrounding [his] case" and should not have argued Spratt because "that was irrelevant to my case." (App.pp.193-94). Petitioner argued trial counsel should have instead "raised 44-53-470 or the State v. Scott case." (App.pp.201-04).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving both that trial counsel did not properly argue against sentence enhancement and that he was prejudiced as a result." The PCR judge concluded Petitioner "was properly sentenced as a second offense and has failed to produce any evidence that the sentence enhancement in his case was improper."

(App.p.213).

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.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving – under Strickland v. Washington – that he is entitled to post-conviction relief. Petitioner cannot demonstrate trial counsel's performance was in any way deficient. While Petitioner argues trial counsel should have argued Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999) in support of the argument against sentence enhancement, that case was not applicable here. In Scott, this Court held "the Legislature did not intend for a bond forfeiture to be the equivalent of a conviction under Section 44–53–470." Id. at 255, 513 S.E.2d at 104. Petitioner's prior conviction, however, was not a bond forfeiture.

The purpose of requiring an individual to post bond is to ensure they appear at their trial. See State v. Policao, 402 S.C. 547, 558, 741 S.E.2d 774, 780 (Ct. App. 2013) ("The overriding purpose of requiring a criminal defendant to post bond before his release from custody is to assure his appearance at trial."). A bond forfeiture occurs when a defendant fails to appear in court and, as such, forfeits his bond. See generally Samuel v. Mouzon, 282 S.C. 616, 620, 320 S.E.2d 482, 485 (Ct. App. 1984) (noting a bond forfeiture "involves the failure of a person to act") abrogated on other grounds by Doe v. Doe, 346 S.C. 145, 551 S.E.2d 257 (2001). The record is clear, though, that Petitioner appeared in court for a bench trial, was convicted, sentenced to a fine, and then paid that fine. The following took place during the discussion about sentence enhancement at the close of Petitioner's trial on the instant charges:

The Court:	Okay. Do you have any evidence you wish to present?
[Trial counsel]:	Yes, sir. We can offer some testimony from Petitioner regarding that particular bench trial I believe it was.
The Court:	You're still under oath, sir.
[Trial counsel]:	[Petitioner], would you tell the Court. What we are talking about is the hearing in Greenville Municipal Court back in 2007 for possession of marijuana that day.
[Petitioner]:	It happened on the weekend.
[Trial counsel]:	Not the incident. I'm talking about the court date.
[Petitioner]:	He made me come to court the following Monday without consulting a lawyer. He did not give me time to consult a lawyer. He sentenced me without consulting a lawyer.

The Court:	Did the judge talk to you about, uh, the perils – I guess I will use that word – of not having a lawyer?
[Petitioner]:	I never was instructed that I needed a lawyer for the case.
[Trial counsel]:	When you appeared before the judge, did you ask that you be allowed to have a lawyer?
[Petitioner]:	Yes, I did.
[Trial counsel]:	This was in Municipal Court?
[Petitioner]:	Yes, sir.
[Trial counsel]:	It was for a charge of Simple Possession of Marijuana.
[Petitioner]:	Yes, sir.
[Trial counsel]:	Your sentence, was it a suspended sentence? Did you go to jail that day?
[Petitioner]:	No. I was fined fines.
[Trial counsel]:	Did you ever pay the fine or go to jail as a result?
[Petitioner]:	I paid the fine.

(App.pp.129-30) (emphasis added).

Based upon the clear record before this Court – and Petitioner's own trial testimony – Petitioner's prior conviction was the result of a bench trial and not a bond forfeiture. The fine of $641 on this charge that was noted by the assistant solicitor at trial[1] was simply that – a fine. Petitioner testified he was sentenced to a pay a fine and

[1] App.p.127.

that he did so. The sum of $641 was that fine and does not represent the forfeiture of Petitioner's bond. As such, Petitioner cannot demonstrate trial counsel was ineffective for failing to argue either (1) his prior conviction was a bond forfeiture or (2) that Scott was applicable. See Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064 (finding an applicant "must show that his trial counsel's performance was deficient, meaning that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [applicant] by the Sixth Amendment'").

Regardless, Petitioner also cannot demonstrate he was prejudiced by trial counsel's representation. Though Petitioner argues the failure of trial counsel to argue his prior conviction was a bond forfeiture prejudiced the outcome of his case, Petitioner has not presented any evidence that the conviction at issue was actually a bond forfeiture. As explained supra, the record before this Court clearly demonstrates Petitioner's prior conviction was the result of a bench trial. Petitioner has not presented any evidence, in the form of clerk of court records, for example, to support his claim that his prior conviction was a bond forfeiture. A PCR applicant bears the burden of proving the allegations in his PCR application. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Absent such evidence, Petitioner cannot meet his burden of proving he suffered any prejudice that affected the outcome of his case. See Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735; Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

Accordingly, Petitioner failed to prove both prongs of the Strickland test. 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,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

March 30, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 30 2016
SC SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-001231

Lorenzo R. Nicholson, ... 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 into inter-agency mail and addressed to:

Tiffany L. Butler, 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 30th day of March, 2016.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT