

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Berkeley County

The Honorable William Jeffrey Young, Circuit Court Judge

Appellate Case No.: 2015-001319

BRIAN M. CURTIS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
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PETITIONER'S QUESTION PRESENTED

- I. Trial counsel erred with respect to his delay in scheduling an expert to conduct a psychosexual evaluation of petitioner after the plea proceeding rather than before the plea proceeding, especially since the expert's report was unfavorable to the mitigation case presented at the sentencing hearing where petitioner requested a probation sentence instead of jail, because had the evaluation occurred before the plea, then counsel would have had sufficient time to secure a second expert's opinion, which more likely than not would have yielded a more favorable report and ultimately a more favorable case in mitigation at the sentencing hearing.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Berkeley County Clerk of Court. Petitioner was indicted at the February 2012 term of the Berkeley County Grand Jury for second degree criminal sexual conduct with a minor (2012-GS-08-0281). He was represented by Christopher P. Biering, Esquire. On April 1, 2012, Petitioner pled guilty as indicted. The Honorable Roger Young, Sr., deferred sentencing to August 16, 2012, at which time he sentenced Petitioner to ten years imprisonment. Petitioner did not appeal his plea or sentence.

On August 15, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about December 30, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on April 20, 2015, in Charleston County before the Honorable G. Thomas Cooper. Rodney Davis, Esquire, represented Petitioner at the hearing. Joshua L. Thomas, Esquire, of the South Carolina Office of the Attorney General, represented Respondent. At the hearing, Petitioner proceeded solely on the allegations of ineffective assistance of plea counsel for waiting until after Petitioner pled to have him evaluated and for presenting an unfavorable evaluation report at Petitioner's sentencing hearing. Petitioner and his plea counsel testified at the hearing. By an Order of Dismissal signed May 12, 2015 and filed May 19, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice.

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 plea counsel (hereinafter "Counsel") ineffective where Counsel alleged erred in scheduling Petitioner's evaluation after his plea and before his sentencing, rather than before the plea. For the following reasons, Respondent contends that these arguments are without merit.

Relevant Law

In a PCR 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 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 reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced 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. at 117-18, 386 S.E.2d at 625. Because Petitioner pled guilty, he must show there is a reasonable probability that, but for plea counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

I. There is evidence of probative value to support the post-conviction relief court's ruling that Petitioner did not meet his burden of proving that plea counsel was ineffective for failing to obtain an expert's evaluation prior to the plea proceeding.

How the Issue Was Raised

At the guilty plea hearing, the plea judge informed Petitioner "Now, today we are just going to take your plea. Sentencing is deferred. I understand your lawyer has requested that you get the opportunity to have an evaluation by Dr. William Burke. I would retrain jurisdiction of this case, and would sentence you at a later date." App. 6, ll. 25 – 7, l. 5. Petitioner did not object and appeared to be in agreement with the plea judge's timeline of events. After the entire plea colloquy, the plea judge accepted Petitioner's guilty plea. App. 15, ll. 1-3.

At the sentencing hearing, the solicitor gave the court the facts of the case, including the fact that the state dismissed one charge and asked for a cap of ten years. App. 20, ll. 1-4. Counsel spoke at length to the plea judge in mitigation. Counsel explained that Dr. Burke is well respected for his work with sex offender counseling for offenders who are supervised in the community. Counsel read from Dr. Burke's August 14, 2012 letter updating the evaluation and treatment, which concluded

[...]Mr. Curtis has exhibited responsibility and accountability for his deviant behavior...

Given above as my professional opinion that Mr. Curtis can be safely maintained in the community under the condition that he continues, which evidences the fact he's already begun participation, he continue his participation in group therapy in intensive outpatient program specializing in sexual disorders.

App. 24, ll. 8-10, 14-19.

Counsel continued in mitigation to plead for the court to impose a probationary sentence because he believed the registry and Petitioner's sex offender counseling due to Petitioner's low level of risk that Dr. Burke found in his report. See App. 29-31. Counsel also reiterated that Dr. Burke's report concluded that Petitioner could be safely maintained in the community under certain guidelines. App. 30, ll. 2-7; see also App. 111. Despite Counsel's mitigation and Dr. Burke's conclusion, the plea judge sentenced Petitioner to ten years imprisonment with suspension to probation. App. 36, ll. 15-17.

At the PCR hearing, Counsel testified that through plea negotiations he was able to obtain a negotiated cap of ten years in this case even though the crime carried up to twenty years. App. 59, l. 25 – 60, l. 5. Counsel testified that in addition to Dr. Burke evaluating Petitioner, he requested Petitioner's sentencing be deferred because Petitioner's wife was going through chaperone training and Petitioner was actually beginning counseling. App. 60, l. 18 – 61, l. 3. He stated that in addition to the report from Dr. Burke, other factors that would support a probationary sentence included Petitioner's wife speaking at his sentencing and a large packet of affidavits showing community support. App. 61, l. 25 – 62, l. 7. Although Counsel agreed that there a number of very positive assertions about Petitioner in Dr. Burke's report, he did concede that there was some less than favorable items that came out during the sentencing hearing as well. App. 63, ll. 5-10. Counsel admitted that the report detailed negative aspects of Petitioner's "having sexual relations outside of marriage and having problematic internet use" but asserted that these were not issues that would suggest Petitioner be incarcerated for a significant period of time. App. 66, l. 22 – 67 l. 1. Counsel further asserted that Petitioner's openness with Dr. Burke, which resulted in some of the negative aspects of the report, "was a desired end showing that he

could be successful with sex offender counseling." In the end, Counsel testified that he did not want to subject Dr. Burke to the State's cross-examination and believed that Petitioner's best option was the report and its conclusion along with a letter from Dr. Burke showing that Petitioner had already started counseling. App. 71, ll. 2-17.

Counsel testified that he discussed deferring the assessment until after the plea was entered, similar to how a presentence report works in a federal criminal case. App. 80, ll. 14-17. He testified that he still told Petitioner that a ten year sentence was still possible even with Dr. Burke's report. App. 81, ll. 4-6.

In its Order dismissing Petitioner's PCR application, the PCR Court found that Counsel's strategy of conceding guilt and focusing on mitigation was a reasonable strategy under the circumstances. App. 116. The PCR Court further found that "Dr. Burke's report, coupled with the other evidence presented at the sentencing hearing, demonstrate[d] [C]ounsel prepared a thorough and compelling mitigation presentation." App. 117. Specifically, the PCR Court found that despite having some negative evaluations of Petitioner, the report demonstrated that Petitioner could "be maintained in the community under conditions similar to those he was successfully complying with while out on bond." App. 117. The PCR Court found that the sentencing judge's decision to impose an active sentence "does not render [Counsel's] performance deficient. App. 117. Lastly, the PCR Court found that Counsel was not ineffective as Counsel "conducted a proper investigation, adequately conferred with [Petitioner], and was thoroughly competent in his representation." App. 117.

Analysis

Petitioner's argument is without merit. First, the PCR Court found that Counsel's strategy, although unsuccessful in obtaining a probationary sentence, was a reasonable strategy under the

circumstances. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

There is certainly probative evidence to support the PCR Court's ruling that Counsel was not ineffective when the conclusion of Dr. Burke's report and the subsequent letter from Dr. Burke emphasized that Petitioner could be safely maintained in the community instead of being sent to prison. Respondent contends that Counsel's actions were certainly reasonable and appropriate for Petitioner's mitigation. "Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case." Wiggins v. Smith, 539 U.S. 510, 533 (2003). Clearly, Counsel's decision to enter a plea and defer sentencing was a valid decision given Counsel's rationale to obtain Dr. Burke's report with a positive recommendation, present information that Petitioner's wife had started chaperone training, and present information that Petitioner had already started counseling.

The sentencing judge made his decision to impose an active sentence despite Counsel's mitigation and his sentencing decision was made well within his discretion. Respondent contends that there is no evidence showing that the outcome of Petitioner's sentencing would have been different if Counsel had obtained Dr. Burke's report before the sentencing hearing, especially considering that the negative evaluations were made during Dr. Burke's analysis of Petitioner but Dr. Burke's conclusion and recommendation was essentially that a probationary sentence would be appropriate given certain conditions that Petitioner had already started to follow.

Additionally, to the extent that Petitioner argues that Counsel should have employed a second expert to provide a more favorable evaluation, Respondent contends that there has been no evidence presented of the identity of another expert, this expert's analysis, or this expert's favorable conclusion. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (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).

Accordingly, Petitioner has failed to prove both prongs of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by Counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea 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 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
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S.C. Bar # 101254

By: 
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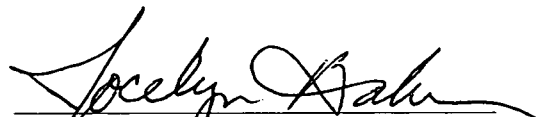
RESPONDENT.

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:

Mrs. Wanda H. Carter
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 2nd day of May, 2016.


JOCELYN BAKER
LEGAL ASSISTANT



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SC SUPREME COURT,

ALAN WILSON
ATTORNEY GENERAL

May 2, 2016

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

Re: Brian M. Curtis v. State of South Carolina
Appellate Case No. 2015-001319
Lower Court Case No. 2013-CP-08-1847

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/jyb

Enclosures

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