STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-001317

Milciades Alcantara, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Does the record support the PCR judge's finding that Counsel was not ineffective for not moving to sever Petitioner's charges where the offenses both took place at retail establishments and occurred within an hour and a half and a mile apart from one another?

STATEMENT OF THE CASE

Milciades Alcantara ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2009 term of the Spartanburg County Grand Jury for criminal sexual conduct ("CSC"), first degree (2009-GS-42-4458), two counts of armed robbery and possession of a weapon during the commission of a violent crime (2009-GS-42-4456, and -4459, counts 1 and 2), and two counts of kidnapping (2009-GS-42-4457, and -4460). Petitioner was represented by Tanya Jones, Esquire, and Richard Whelchel, Esquire. Petitioner proceeded to trial before the Honorable J. Derham Cole and a jury February 8–10, 2010. The jury found Petitioner guilty of all charges as indicted. Judge Cole sentenced Petitioner to twenty-five years for CSC, first degree, consecutive terms of 15 years for the first armed robbery charge (-2256) and ten years for the second (-4459), concurrent terms of ten years for each kidnapping charge, and concurrent terms of five years for each possession of a weapon during the commission of a violent crime charge.

A timely notice of appeal and Anders brief were filed on Petitioner's behalf. Petitioner also filed a pro se brief in support of his appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Alcantara, Op. No. 2012-UP-108 (S.C. Ct. App. filed February 22, 2012). The Remittitur was returned on March 12, 2012.

Petitioner filed an application for Post-Conviction Relief ("PCR") on January 7, 2013. The State of South Carolina ("Respondent") made its Return on June 6, 2014. An evidentiary hearing into the matter was convened on September 16, 2014, at the Spartanburg County Courthouse before the Honorable Roger L. Couch. Petitioner was present at the hearing and was

represented by J. Brandt Rucker, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Petitioner testified on his own behalf. Richard Whelchel, Esquire, ("Counsel") also testified. The Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Petitioner's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript. By Order filed May 8, 2015, Judge Couch denied and dismissed Petitioner's application for PCR.

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). 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)). Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

ARGUMENT

The record supports the PCR judge's finding that Counsel was not ineffective for not moving to sever Petitioner's charges where the offenses both took place at retail establishments and occurred within an hour and a half and a mile apart from one another.

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.

Petitioner alleges that the PCR judge erred in finding that Counsel was not ineffective for choosing not to move to sever his charges because there were two different crimes that occurred in two different places at two different times. 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 or that he was prejudiced by any alleged deficiency.

Petitioner was convicted of crimes that took place at two different businesses—an Ultratan and a Subway—on the same day. (App. p. 369-70). At the PCR hearing, Counsel testified that he and Petitioner discussed the possibility of severing the charges, but that the decision was to go forward on all charges. (App. p. 342, lines 18-24).The PCR court found Counsel's testimony to be credible than Applicant's testimony. (App. p. 361). Counsel testified that this decision was based primarily on the fact that if the motion were granted and Petitioner was convicted at the first trial, the State could have served Petitioner with notice of life without parole. (App. p. 343, lines 2-9). Counsel also testified he did not think a motion to be severed would be granted because the charges were so closely connected in time and location, in that one store was about a mile away from the other, and the robberies happened only an hour and fifteen minutes apart. (App. p. 347, lines 1-11). Counsel testified that he did not speak to anyone regarding the life without parole issue because he did not want to bring up life without parole to anyone. (App. p. 347, lines 16-25). Counsel testified he discussed this with Petitioner. (App. p. 348, lines 4-6).

Petitioner testified that he wanted to plead guilty to the Subway incident, but go to trial on the Ultratan incident. (App. p. 324). Counsel testified that they approached the State about that but the State was unwilling to accept his plea on the Subway issue and take the other to trial. (App. p. 342, lines10-18). Petitioner testified that he believed if he had gone to trial on the Subway case he would have been convicted. (App. pp. 327-28). Counsel testified that had he made the motion to sever and had the judge granted the motion, the State would have had the option to choose which case to call first because the arrest date was the same for all charges. (App. p. 350).

Counsel testified that he did not make a motion to sever because he did not think that the motion would have been granted. "[C]harges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence, (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced." State v. Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). Here, the incidents were less than two hours apart and occurred within a very short distance from one another. In both incidents, the assailant was described as wearing the same clothing and carrying a knife. (App. p. 129, line 22; p. 165-66). The same evidence—the knife and clothing—were used to prove both charges. Both charges were of the same general nature, in that they both involved the taking of money from businesses while holding an employee at knifepoint. Finally, no real right of Petitioner was prejudiced because the trial judge pointed out to the jury at least three times in his charges that these were separate charges and he instructed the jury that it had to consider the charges separately. (App. p. 247; pp. 265-67). Accordingly, the record supports the PCR judge's finding that Counsel's performance in not making a motion to sever did not fall below an objective standard of reasonableness.

Pursuant to S.C. Code Ann. § 17-25-45(A), when an individual with a prior conviction for a most serious offense, the solicitor may seek life without parole, and a conviction, after notice, requires that such sentence be imposed. 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, 294, 454 S.E.2d 312, 313 (1996). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)).

Here, The PCR court found Counsel's testimony to be more credible than Applicant's testimony. (App. p. 361). Counsel testified he did not make a motion to sever because if he had, the State could have served Petitioner with notice of life without parole if Petitioner had been convicted of the first set of charges. Additionally, Counsel testified that he did not speak to anyone regarding the life without parole issue because he did not want to bring up life without parole to anyone. (App. p. 347, lines 16-25). Accordingly, the record supports the PCR judge's finding that Petitioner failed to show that Counsel's performance was deficient.

The record likewise 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. 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 motion to sever would have been successful, but that he would not have been convicted of at least one offense.

Here, Petitioner himself testified that he wanted to plead guilty to the Subway charges and admitted that the State had enough evidence to convict him on those charges. Petitioner's DNA matched the semen found at the Ultratan, and the victim testified regarding the clothing he was wearing, and he was caught on the surveillance video. Counsel testified that the State would likely have been able to choose which case to call first based on the way Spartanburg handles the docket. The PCR judge found Counsel's testimony to be credible. This Court should defer to the PCR judge's credibility findings. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521) ("[This Court] gives great deference to a PCR judge's findings where matters of credibility are involved."). Accordingly, the record supports the PCR judge's finding that there is no reasonable probability that the motion for severance would have been granted or that if it had been granted, Petitioner would not have been convicted.

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.

[*Signature page to follow*]

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

May 6th, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable Roger L. Couch, Circuit Court Judge

MILCIADES ALCANTARA,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

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:

Ms. Tiffany Lorraine Butler
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201

This 6th day of May, 2016.

JOCELYN BAKER
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

May 6, 2016

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

Re: **Milciades Alcantara v. State of South Carolina**
Appellate Case No. 2015-001317
Lower Court Case No. 2013-CP-42-0051

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,

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

AAO/jyb

Enclosures

cc: Tiffany L. Butler, Esquire
Trisha Allen, Victim Services (w/o enclosures)