

RECEIVED

JUL 11 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO Horry COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2015-001770

Dameon Myers, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

CAITLIN BAZAN HASTINGS
Assistant Attorney General
SC Bar #102187

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

ISSUE'S PRESENTED.....3

STANDARD OF REVIEW4

STATEMENT OF THE CASE.....5

ARGUMENTS

 I. Probative evidence exists to support the PCR court's finding that Petitioner's trial counsel was not ineffective in failing to challenge the jurisdiction of the trial court, preparation for trial, failing to review discovery with Petitioner, and failure to present witnesses at trial 7

 II. Probative evidence exists to support the PCR court's finding that the trial court had proper jurisdiction over the Petitioner; therefore, Petitioner's due process rights have not been violated 9

CONCLUSION.....11

ISSUE'S PRESENTED

- I. Whether the PCR court erred in refusing to find Petitioner's trial counsel ineffective for failing to challenge the jurisdiction of the trial court, failing to adequately prepare and review the case with Petitioner, and failing to present witnesses at trial?

- II. Whether the PCR court erred in finding that the trial court had proper jurisdiction to hear the case and therefore did not violate the Petitioner's due process rights?

STANDARD OF REVIEW

The 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). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge "if there is any evidence of probative value sufficient to support them." Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. "If no probative evidence exists to support the findings, the Court will reverse." *Id.* at 368–69, 610 S.E.2d at 814. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011).

STATEMENT OF THE CASE

In October 2002, the Georgetown County Grand Jury indicted Petitioner for failure to stop for a blue light (2002-GS-22-861), trafficking crack cocaine (2002-GS-22-862), possession with intent to distribute crack cocaine within proximity of a school or park (2002-GS-22-863), and possession with intent to distribute of marijuana (2002-GS-22-864). Petitioner was represented by Michael T. Hursey, Jr., Esquire ("trial counsel"). After failing to appear for his guilty plea hearing, Petitioner was tried in his absence before the Honorable Paula H. Thomas and a jury on December 5, 2002. Petitioner did not appear for trial, and the jury found him guilty of failure to stop for a blue light, possession with intent to distribute crack cocaine, and simple possession of marijuana. The jury found him not guilty of possession with intent to distribute crack cocaine within proximity of a school or park. Judge Thomas issued a sealed sentence at that time.

Almost a decade later, the Petitioner was apprehended in 2011. On October 17, 2011, Petitioner appeared before the Honorable Steven H. John, who unsealed and pronounced Judge Thomas' sentences of three (3) years for failure to stop for a blue light, twenty (20) years for possession with intent to distribute crack cocaine, and one (1) year for simple possession of marijuana. Petitioner was represented at this proceeding by T. Kirk Truslow, Esquire ("sentencing counsel"). Judge John denied Petitioner's motion to vacate sentence, motion for a new trial, and motion to reduce sentence.

Petitioner filed and served notice of appeal on October 19, 2011. The South Carolina Court of Appeals dismissed Petitioner's appeal on October 4, 2012. The Court of Appeals denied a motion for reconsideration on March 11, 2013. The remittitur was returned to the circuit court on April 17, 2013.

Petitioner filed an Application for Post-Conviction Relief (PCR) on October 18, 2012. (App. p. 37). Respondent made a timely Return on or about June 28, 2013. (App. p. 59). On August 4, 2014, Respondent filed a Motion to Dismiss. A hearing was held on August 28, 2014, at which time Respondent moved to dismiss the Application based on the Fugitive Disentitlement Doctrine. (App. p. 64). Petitioner appeared *pro se*.¹ Respondent was represented by Assistant Attorney General Joshua L. Thomas, Esquire. The Honorable Kristi Lea Harrington denied Respondent's motion and ordered that an evidentiary hearing into the matter be held.

Accordingly, the Honorable Michael G. Nettles ("the PCR judge") convened an evidentiary hearing into the matter on May 13, 2015. (App. p. 87). Petitioner appeared *pro se*.² J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent. The PCR judge denied relief in an order filed June 26, 2015. (App. p. 150).

A timely notice of intent to appeal was served on August 25, 2015. On February 26, 2016, Petitioner submitted his petition for writ of certiorari. This return to the petition for writ of certiorari follows.

¹ By order filed April 29, 2014, the Honorable George C. James, Jr., granted Petitioner's motion to relieve counsel and proceed *pro se*.

² This Court further advised Petitioner of his right to counsel at the PCR hearing, but Petitioner chose to proceed *pro se*.

ARGUMENT

I. Probative evidence exists to support the PCR court's finding that Petitioner's trial counsel was not ineffective in failing to challenge the jurisdiction of the trial court, preparation for trial, failing to review discovery with Petitioner, and failure to present witnesses at trial

Petitioner asserts trial counsel was ineffective in his representation. Specifically, Petitioner argues trial counsel was deficient by failing to thoroughly prepare his case and review discovery with him. Petitioner also asserts that trial counsel's performance during his trial was deficient. (Pet. for Writ of Cert. p. 8). For the following reasons, Respondent contends that this issue is without merit.

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).

In the present case, there is ample probative evidence in support of the PCR court's finding. First, Petitioner was tried in his absence due to the fact that he absconded prior to his trial. Further, Petitioner evaded the law for almost a decade. Second, due to the numerous years between Petitioner's trial and his capture, the transcript of his trial was destroyed pursuant to Rule 607, SCACR. Without having any records or personal knowledge of his trial, Petitioner, in reality, has no idea how his trial proceeded despite his allegations to the contrary. Accordingly in its Order of Dismissal, the PCR court found the Petitioner's testimony **not credible**. (App. p. 156.) Therefore, the PCR court found the Petitioner failed to meet his burden of showing trial counsel did not render adequate assistance. (App. p. 156). The PCR court also stated in its Order that "in the absence of evidence to the contrary, the regularity of the proceedings of a court of general jurisdiction will be assumed." Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986). (App. p. 156).

Accordingly, Petitioner has failed to meet the two prongs of the Strickland test. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel, the PCR court did not err in denying the 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.").

II. Probative evidence exists to support the PCR court's finding that the trial court had proper jurisdiction over the Petitioner; therefore, Petitioner's due process rights have not been violated.

Petitioner asserts that the trial court lacked jurisdiction to hear his case. (Pet. for Writ of Cert. p. 6). For the following reasons, Respondent contends that this issue is without merit.

In PCR actions, the Petitioner may challenge the subject matter jurisdiction of the trial court, and this claim may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Subject matter jurisdiction is the power of a court to hear a particular class of cases. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Circuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 610 S.E.2d 494; see also S.C. Const. Art. V, § 7. Therefore, the Petitioner must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Defects in the indictment do not affect subject matter jurisdiction. See Gentry, 610 S.E. 494; U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment document is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code Ann. § 17-19-20 (2003). In PCR actions, the Petitioner may only challenge the sufficiency of the evidence in the context of ineffective assistance of counsel. Other sufficiency of the evidence allegations are not proper for PCR review, as they are issue for direct appeal that are procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974).

In the present case, Petitioner has failed to present any probative evidence to support his lack of subject matter jurisdiction allegation. In its Order of Dismissal, the PCR court found that the Petitioner's convictions involved criminal charges in General Sessions Court and, therefore, the circuit court had proper subject matter jurisdiction over Petitioner's case. (App. p. 158). Additionally, Petitioner's crimes were committed in Georgetown County where his case was tried. While Petitioner does present constitutional allegations to support his subject jurisdiction claim, the Respondent contends that these claims go to the sufficiency of the evidence and are, therefore, direct appeal issues not proper for PCR review.

Accordingly, Petitioner has failed to meet his burden of proving the trial court lacked subject matter jurisdiction to hear his case. Therefore, the PCR court did not err in denying the application.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

CAITLIN BAZAN HASTINGS
Assistant Attorney General
S.C. Bar #102187

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

By: 
ATTORNEYS FOR RESPONDENT

July 11, 2016

RECEIVED

JUL 11 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No.: 2015-001770

DAMEON MYERS,

Petitioner,

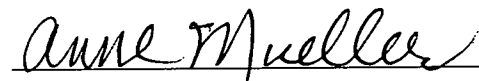
v.

STATE OF SOUTH CAROLINA,

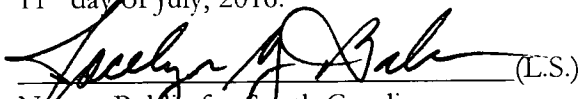
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to Dameon Myers, SCDC No. 279666, Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, on this the 11th day of July, 2016.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
11th day of July, 2016.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 12/16/2024



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUL 11 2016

July 11, 2016

SC SUPREME COURT

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Dameon Myers v. State of South Carolina
Appellate Case No.: 2015-001770**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

Sincerely,

for Caitlin B. Hastings
Assistant Attorney General
State Bar No. 102187

CBH/aam
Enclosures

cc: Dameon Myers, SCDC No. 279666