

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CLARENDON COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No.: 2015-002141

RECEIVED

AUG 10 2016

SC SUPREME COURT

DUSTIN EVANS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
SC Bar # 102214

P.O. Box 11549
Columbia, SC 29211
(803) 734-4124

ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUES PRESENTED

- I. The circuit court erred by summarily dismissing Petitioner's PCR application for failing to file within one year of his conviction where another circuit court judge had previously ruled that summary dismissal of Petitioner's PCR application was improper and that Petitioner was entitled to an evidentiary hearing on the merits of his application.

- II. The PCR court erred in finding plea counsel provided effective assistance of counsel where plea counsel failed to perfect Appellant's direct appeal, despite being requested to do so, because plea counsel did not believe that Petitioner should have appealed his sentence.

STATEMENT OF THE CASE

Petitioner (Dustin Evans) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Clarendon County. Petitioner was indicted during the October 2007 term of the Clarendon County Grand Jury for two (2) counts of kidnapping and two (2) counts of criminal sexual conduct – first degree (2007-GS-14-0363). Petitioner was also indicted for one (1) count of and assault and battery with intent to kill (2007-GS-14-0364). Scott Robinson, Esquire represented Petitioner. On April 30, 2008, Petitioner pled guilty to two (2) counts of criminal sexual conduct – first degree, two (2) counts of kidnapping, and one (1) count of assault with intent to kill. The Honorable George C. James, Jr. sentenced him to a negotiated sentence of fifteen (15) years for kidnapping, running concurrent to a fifteen year sentence for criminal sexual conduct – first degree. Those sentences run consecutively to a sixteen year sentence for the count of assault and battery with intent to kill. Petitioner was sentenced to a concurrent sentence of fifteen years for the second count of kidnapping. Those sentences run consecutively to a sixteen year sentence for criminal sexual conduct – first degree. Overall, Petitioner was sentenced to confinement for a total of forty-seven (47) years. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief on March 4, 2013. Respondent filed a Return and Motion to Dismiss on June 28, 2013, stating that Petitioner filed his application well after the one-year statute of limitations had expired pursuant to S.C Code § 17-27-10 -160. On July 1, 2013, the Honorable George C. James, Jr. issued a Conditional Order of Dismissal. Petitioner responded to the conditional order by stating that his plea counsel failed to appeal his guilty plea. A motion hearing was held on September 9, 2014, before the Honorable

Clifton Newman. Petitioner was represented by Tommy Thomas, Esquire. Respondent was represented by Daniel Gourley, Esquire. Respondent moved to dismiss all claims except for the failure to file a notice of appeal because Petitioner failed to timely file his post-conviction relief application. On November 30, 2014, Judge Newman denied Respondent's motion to dismiss and ordered a full evidentiary hearing on all issues. An evidentiary hearing was convened on July 16, 2015 at the Sumter County Courthouse. Petitioner was represented by Tommy Thomas, Esquire. Respondent was represented by Daniel Gourley, Esquire. The Honorable Steven H. John issued a Final Order of Dismissal dated August 3, 2015, ruling that Petitioner failed to meet his burden to prove any constitutional violations or deprivations that would warrant a grant of post-conviction relief. On May 25, 2016, Petitioner filed a Petition for Writ of Certiorari to this Court. This Return follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR 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

I. The PCR court sufficiently held an evidentiary hearing on the merits of Petitioner's allegations, thereby correctly issuing a ruling that Petitioner failed to establish any constitutional violations, regardless of the fact that the statute of limitations had run.

Petitioner's allegation that the PCR court erred in dismissing his PCR application because of his entitlement to an evidentiary hearing is without merit. Subsequent to Judge Newman's denial of Respondent's motion to dismiss, Petitioner was afforded a full evidentiary hearing on the merits on July 16, 2015 before the Honorable Steven H. John. Both Petitioner and Respondent were present and fully adjudicated their cases, which included testimony from Petitioner, Petitioner's mother, Petitioner's sister, and Plea Counsel. Petitioner alleges that his delay in filing his post-conviction application was due to mistaken belief that his plea counsel filed an appeal on his behalf within the ten day statutory period from the day of his guilty plea hearing. This was the basis of Judge Newman's granting of a full evidentiary hearing so that Petitioner could get his one fair "bite at the apple." Therefore, Petitioner was able to adjudicate each of his allegations in PCR court; however, he simply failed to meet his burden of proof.

Probative evidence supports the PCR Court's findings. It is clear from the record that Judge John provided a thorough explanation on each finding of fact and conclusion of law for each allegation. These findings were firmly supported by the testimony presented during the evidentiary hearing. Regarding the dispute over the guilty plea sentencing, Petitioner himself admitted that he saw the sentence of forty-seven years on the sentencing sheet. (App. p. 145). He further admitted that no one forced him to plead guilty and that counsel advised him of the type of questions to be asked and procedure that would be followed during the hearing, so he would know what to expect. (App. p. 145). He stated under oath that he was fully competent and knew what was going on during his guilty plea hearing. (App. p. 146). Furthermore, Solicitor Land

testified that based on her meetings with Petitioner, she firmly believed that his education level and mental capacity would not affect his ability to understand the numbers and descriptions on the sentencing sheets. (App. p. 147). Petitioner's plea counsel testified that there was never a communication gap between the two of them. (App. p. 148). Furthermore, he testified that he never promised Petitioner a sixteen-year sentence; the only thing he ever promised him was the negotiated forty-seven (47) year sentence. (App. p. 148). Plea counsel believed that, based on his experience, Judge John would not have accepted the plea if he had any doubt that Petitioner did not understand or was not sure if he desired to accept the plea. Id. Therefore, it was correctly determined that Petitioner entered into his guilty plea freely, voluntarily, and intelligently.

Most importantly, Plea Counsel credibly testified that he had no recollection that Petitioner ever requested him to file a notice of appeal. (App. p. 149). He stated that if Petitioner had asked, he most certainly would have perfected an appeal on his behalf. (App. p. 149). Despite that belief, Plea Counsel testified that it was his professional belief that there was no basis for an appeal, when the co-defendant's harsh sentence and the grand potential of a similar sentence was at stake if the case were to go to trial. (App. p. 149). Therefore, the PCR court's ruling on the merits of Petitioner's allegation was correctly supported by probative evidence.

Overall, Petitioner offered no evidence to show that the PCR court summarily dismissed his PCR application without ruling on the merits of his allegations; it is quite clear from the final order of dismissal that Judge John discussed these claims in depth. Judge John merely included a brief discussion of the statute of limitations for filing a PCR application. Petitioner failed to provide sufficient evidence to show that Plea Counsel's performance was deficient even if the statute of limitations had not run. Therefore, Petitioner's allegation disputing the PCR court's dismissal of the case is without merit.

II. Probative evidence supports the PCR Court's finding that plea counsel was not ineffective for failing to file an appeal of Petitioner's guilty plea.

Petitioner argues that the PCR Court erred in finding that plea counsel was not ineffective for failing to file an appeal.

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).

Petitioner's allegation that Plea Counsel was ineffective for failing to file a direct appeal is without merit. There is certainly evidence of probative value to support the PCR Court's ruling. First, it is important to note that the PCR Court found Counsel's testimony to be credible. App. 474. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

As discussed above, during the PCR evidentiary hearing, Plea Counsel did not recall Petitioner ever requesting that he file an appeal following entering into his guilty plea. (App. p. 123, lines 15-17). Counsel credibly testified that he still believes that though he would have filed an appeal if he had been asked, there would be no rational basis for one. (App. p. 123, lines 7-8, 9-16). Furthermore, Counsel stated that again, there was no gap in communication between him and his client. (App. p. 129, 7-16). Therefore, there were never any misunderstandings between the two of them regarding Counsel's representation. As mentioned before, Applicant himself testified that he was aware of what was going on during the guilty plea hearing and that every action he took, including his plea, was voluntary; he knew it was ultimately his choice to plead and to sign the sentencing sheets. (App. 145). Therefore, it is apparent that throughout the judicial proceeding, Petitioner retained his competency.

Specifically regarding his belated desire to appeal, Judge John correctly discussed how counsel has a constitutional duty to consult with the defendant regarding an appeal *only* when there is sufficient reason to believe that either (1) a *rational* defendant would want to appeal or (2) that the defendant demonstrated to his or her counsel that he or she was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). Here, Petitioner's plea counsel successfully demonstrated that based on the fact that all five charges were "most serious" crimes that carry substantial sentences, it is reasonable for any ordinary, prudent person to want to plead guilty instead of go to trial, in hopes of receiving a smaller sentence. As a result, Petitioner failed to meet his burden of presenting evidence indicating that he wanted to appeal or that it was rational to do so in the first place.

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 issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE COLEMAN
Assistant Attorney General
SC Bar # 102214

By:


ATTORNEYS FOR RESPONDENT

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

August 10, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Clarendon County

The Honorable Steven H. John, Circuit Court Judge

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DUSTIN EVANS, #328054

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SC SUPREME COURT

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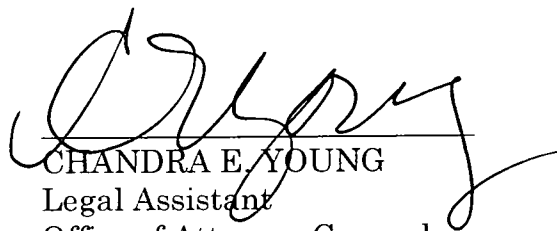
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 10th day of August 2016.



CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

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SC SUPREME COURT

August 10, 2016

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

**RE: Dustin Evans, #328054 v. State of South Carolina
2015-002141**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:cey
Enclosures

cc: John H. Strom, Esquire
Trisha Allen, Victim Services (letter only)