

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Kristi Lea Harrington, Circuit Court Judge

Ronald Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-002526

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the PCR court erred in ruling that the trial/guilty plea transcript was not necessary to its determination that Petitioner's application for post-conviction relief was without merit?

STATEMENT OF THE CASE

Petitioner was indicted during the May 2011, term of the grand jury for Orangeburg County for Murder (2011-GS38-1076). He was represented by Margaret Hinds, Esquire. On September 13, 2011, Petitioner proceeded to trial before the Honorable Edgar W. Dickson. On September 14, 2011, after several witnesses testified, Petitioner pled guilty to Murder. He was sentenced by the Honorable Edgar W. Dickson to confinement for a period of thirty-one years.

Petitioner timely filed a notice of intent to appeal his conviction and sentence with the South Carolina Court of Appeals. An Order of Dismissal was issued on November 23, 2011, for failure of Appellant to identify an appealable issue. The Remittitur was issued on December 14, 2011.

Petitioner filed application for post-conviction relief (hereinafter "PCR") on June 26, 2012. Respondent made its Return on November 29, 2012, requesting an evidentiary hearing. James B. Jackson Jr., Esquire was appointed for the Petitioner by the Orangeburg County Clerk of Court. On April 16, 2013, Petitioner filed a Motion to Relieve Counsel. On November 1, 2013, at the Dorchester County Courthouse, a hearing was held. On January 7, 2014, an Order was issued denying Petitioner's motion. On September 14, 2011, Petitioner proceeded to trial before the Honorable Edgar W. Dickson and a jury. Smith was represented by Margaret Hinds (hereinafter "plea counsel"), and the State was represented by Solicitor David Pascoe and Assistant Solicitor Donald Sorenson. App. p.1. Petitioner pleaded guilty to murder and Judge Dickson imposed a sentence of thirty-one years incarceration. App. p.162.

A Notice of Appeal was filed on September 21, 2011. Supp. App. p.1-2. On November 23, 2011, the Court of Appeals issued an Order dismissing the appeal. Supp. App. p.5. The Remittitur was filed on December 14, 2011. Supp. App. p.6.

Petitioner filed a subsequent application for PCR on June 2, 2014. Respondent made its Return on July 2, 2014, requesting an evidentiary hearing be convened. With Petitioner and plea counsel present, an evidentiary hearing was held on October 27, 2014, before the Honorable Kristi L. Harrington at the Dorchester County Courthouse. Judge Harrington denied and dismissed the application by order dated January 30, 2015. Petitioner timely filed a notice of intent to appeal and subsequently submitted a Petition for Writ of Certiorari on August 12, 2016. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

In a post-conviction relief action, the proper standard of review 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). "This Court gives great deference to the post-conviction relief (PCR) courts findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). "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).

The proper measure of an attorney's performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Petitioner must overcome this presumption in order to receive relief. Cherry.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 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 the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

The testimony elicited at the PCR hearing provided the PCR court with the ability to rule intelligently and meaningfully concerning the representation of plea counsel and the voluntariness of Petitioner's plea.

Petitioner argues the transcripts of the Petitioner's trial and guilty plea were necessary for the PCR judge to make a ruling on whether Petitioner's plea counsel was effective within the parameters of professional norms. The transcript was unnecessary because the PCR court was able to base his determination on the testimony taken at the evidentiary hearing. The transcript is also unnecessary because the only issue of substance raised by the Petitioner was his guilty plea was involuntary due to his lack of knowledge about "third party defense." App. p.179. Plea counsel testified her entire defense of Petitioner at trial consisted of third-party defense and Petitioner was informed of his discovery and defenses. App. p.199-203.

Although a transcript of the guilty plea proceeding was unavailable for review, the PCR court found it unnecessary to the court's ruling. "[It] just becomes an issue of credibility and believability for me to make a determination. While the transcript would be most helpful, I don't find that it is a dispositive issue." App. p. 164. The PCR Court's ruling was correct. This Court observed the following:

Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge. Section 7-406, 1962 Code of Laws; Rule 4, Section 7, Rules of the Supreme Court; South Carolina State Highway Department v. Meredith, 241 S.C. 306, 128 S.E.2d 179; Southern Pine Lumber Co. v. Martin, 118 S.C. 319, 110 S.E. 804.

In order to settle the record on appeal, it became necessary for the trial judge to determine what transpired with reference to the withdrawal of the demand for punitive damages and the submission of the issue of recklessness to the jury. In doing so he properly considered the affidavits of counsel and the court reporter as to what happened. The fact that the notes of the court reporter were lost and the trial judge had no independent recollection of the incident under inquiry did not preclude him from determining the question upon the basis of the affidavits submitted. Their probative value was for him to determine and his conclusions thereabout are binding on the court.

China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968).

A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (citing State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918)). It is incumbent upon one who challenges a proceeding to prove his claims. See Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001).

Petitioner argues a new trial should be granted because the Court is without the full transcript of the trial and plea proceedings. Petitioner presented no evidence other than his own self-serving testimony that the plea was not proper and that he did not knowingly and voluntarily plead guilty. This allegation is without merit as counsel's testimony was persuasive on this issue.

It is important to note that Petitioner pled guilty before Judge Dickson, the resident Orangeburg circuit court judge, before whom plea counsel had appeared numerous times. Plea counsel was familiar with the structure of Judge Dickson's normal plea proceedings and testified there is no reason to think Petitioner's plea deviated from those practices. App. p. 221. Petitioner disagreed, claiming the plea judge did not go over Petitioner's right to remain silent, his right to confront witnesses, whether Petitioner was under the influence of drugs or alcohol, whether Petitioner had any competency issues, or what the maximum sentence could be. App. p. 183-187. Petitioner also claimed that he couldn't remember whether he agreed with the State's statement of the facts of the case. App. p. 186. Petitioner's testimony lacks credibility in this regard. These are common elements of the guilty plea colloquy and plea counsel credibly testified she had been before Judge Dickson numerous times and always gave a full colloquy. App. p. 204. In the instant case, plea counsel testified he gave his complete colloquy. App. p. 204. Plea counsel

further testified if the plea judge hadn't gone through his complete colloquy she would have objected and the plea would not have gone forward. App. p. 206, 208.

Petitioner admitted that the plea judge went over Petitioner's right to confront witnesses, his right to a jury trial, if anyone had threatened, coerced, or promised anything to get him to plea, and asked whether he was pleading freely and voluntarily. App. p. 183-185. Petitioner testified that he told the judge he had not been threatened, coerced, or promised anything to get him to plea and that he was pleading freely and voluntarily. App. p. 185. Petitioner testified that plea counsel went over the potential sentence he could receive. App. p. 183. There is no dispute that Petitioner testified, under oath, to the plea judge that his plea was entered into freely and voluntarily. When PCR counsel asked Petitioner whether his plea was freely and voluntarily entered into, he replied, "[M]y counselor did not inform me of third-party defense." App. p. 179. Plea counsel testified credibly and persuasively that she went over all of Petitioner's discovery and defenses with him. App. p.199-203. In particular, plea counsel testified that her trial strategy, which she discussed with Petitioner, was to pursue a third party defense. App. p.201. In pertinent part, plea counsel testified, "The strongest defense was going to be that nobody -- you know, nobody could really tell whose bullet killed who." App. p.201.

In the instant case, plea counsel advised Petitioner to plead guilty after hearing the testimony of a particularly harmful witness at trial. App. p. 196-197. In Whetsell v. State, 276 S.C. 295, 298, 277 S.E.2d 891, 892-93 (1981), this Court observed the following:

[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would these facts convince a judge or jury of the defendant's guilt? On these facts would evidence seized without a warrant be admissible?

Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

The Petitioner's decision to plead guilty after hearing from a witness at trial is incapable of being appropriately judged by a cold record. Impression, believability, and impact are determined in person and counsel should be given great deference in their determination. A transcript of the words spoken by the witness would not change or give weight to the credibility given to them by counsel and Petitioner at the evidentiary hearing. As the PCR court stated, "[It] just becomes an issue of credibility and believability for me to make a determination." App. p. 164.

The PCR court's ruling that plea counsel's assistance was within reasonable professional norms and Petitioner's plea was voluntarily made is supported by the testimony taken at the evidentiary hearing. The testimony at the hearing provided probative value to support the PCR judge's ruling on the issues raised. The testimony elicited at the PCR hearing provided the PCR court with the ability to rule intelligently and meaningfully concerning the representation of plea counsel and the voluntariness of his plea despite the lack of a plea transcript.

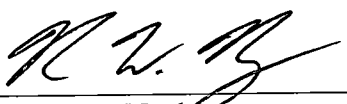
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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Columbia, South Carolina
September 12, 2016

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The Honorable Kristi Lea Harrington, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

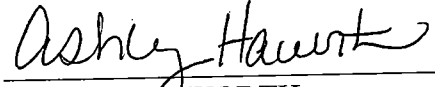
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

**Laura R. Baer, Esquire
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This 12th day of September, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT