

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2015-001654

Dedric L. Isreal Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

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

ATTORNEYS FOR RESPONDENT

RECEIVED

SEP 23 2016

S.C. SUPREME COURT

INDEX

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT.....4

I. The PCR Judge correctly dismissed Petitioner’s claim that counsel was ineffective for introducing a psychiatric report during his guilty plea, as it was not an appropriate ground for relief given that the only prejudice alleged is his placement on the sex-offender registry 4

II. Alternatively, counsel was not ineffective because he introduced Petitioner’s psychiatric evaluation pursuant to a valid strategy; and Petitioner failed to meet his burden to show prejudice..... 8

CONCLUSION.....10

STATEMENT OF ISSUES UPON APPEAL

- I. Is Petitioner's claim that counsel was ineffective for introducing a psychiatric report during his guilty plea sufficient to warrant relief in a PCR proceeding, where the only prejudice alleged is his placement on the sex-offender registry?

- II. Alternatively, was counsel ineffective for introducing Petitioner's psychiatric evaluation where he did so pursuant to a valid trial strategy, and Petitioner failed to meet his burden to show prejudice?

STATEMENT OF THE CASE

Petitioner waived presentment to a Lexington County grand jury and on April 2, 2014, pled guilty to indecent exposure before the Honorable William P. Keesley. Petitioner was represented by Barry B. George, Esquire. Judge Keesley accepted the plea and sentenced Petitioner to a term of three years imprisonment suspended upon the service of five years probation. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed an application for PCR on June 6, 2014. An evidentiary hearing was convened on April 20, 2015 before the Honorable Brooks P. Goldsmith. Petitioner was represented by Jeremy Thompson, Esquire. Walt Whitmire, Esquire, represented the State. The PCR judge dismissed the matter by written order dated June 3, 2015, and filed June 12, 2015.

Petitioner filed a timely Notice of Appeal, and submitted his petition for writ of certiorari on May 11, 2016. This Return follows.

STANDARD OF REVIEW

The proper standard for review of 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

- I. The PCR Judge correctly dismissed Petitioner's claim that counsel was ineffective for introducing a psychiatric report during his guilty plea, as it was not an appropriate ground for relief given that the only prejudice alleged is his placement on the sex-offender registry.**

Certiorari should be denied because Petitioner is attacking the collateral consequences of his underlying guilty plea rather than its actual validity.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Where allegations of ineffective assistance of counsel are made, the question becomes whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). As such, courts evaluate allegations of ineffective assistance of counsel using a two-prong test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. The applicant must also demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different. Strickland 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

In the context of a guilty plea, the deficiency prong of Strickland's ineffective assistance analysis turns on whether the plea was voluntarily, knowingly, and intelligently entered. Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). A criminal defendant may knowingly,

intelligently, and voluntarily enter a guilty plea having never been informed of its collateral consequences. See Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002) (trial counsel need not advise client of collateral consequence of parole eligibility). Registration as a sex offender does not constitute a criminal penalty. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Only where counsel has given incorrect advice concerning collateral consequences, and the defendant would not have entered the plea but for that advice, are they relevant to the Strickland analysis. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997).

The South Carolina Court of Appeals has directly addressed the issue presented here, holding that a claim that defense counsel's deficient performance caused an applicant to be placed on the sex-offender registry is inappropriate in the post-conviction relief forum. Williams v. State, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008). Williams involved a defendant pleading guilty to kidnapping. Id. During his post-conviction relief hearing, Williams alleged counsel's failure to request that he be exempted from sex offender status constituted deficient performance.¹ Id. at 514, 662 S.E.2d at 617. On appeal following the denial of his application, the Court of Appeals held in a published opinion that

“[t]he pivotal question of whether Williams’ counsel was ineffective for failing to ask the trial court to make a finding on the record that Williams kidnapping charge was not sexual in nature . . . depend[ed] on whether registration on the sexual offender registry is a collateral consequence of sentencing. If registration is a collateral consequence of sentencing, Williams’ trial counsel cannot be viewed as ineffective for failing to advise Williams of the registration requirement, and by implication, **trial counsel cannot be deemed ineffective for failing to move to exempt Williams from sexual offender status.**”

¹ A defendant over the age of eighteen who pleads guilty to kidnapping will be classified as a sexual offender unless the trial court makes a finding on the record that the kidnapping did not include a criminal sexual offense. S.C. Code § 23-3-430(C)(15)(2007).

Id. (emphasis added). The Court of Appeals concluded that because registration had no effect on the range of Williams’ punishment, but was instead a non-punitive measure implemented “to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes,” placement on the registry is a collateral consequence of sentencing, and therefore not subject to scrutiny under Strickland. Id. at 515-16, 662 S.E.2d at 617-18.

In this case, as in Williams, the allegation that counsel was ineffective fails on its face because the only prejudice alleged – placement on the sex-offender registry – is a collateral consequence of sentencing. The outcome in Williams makes a qualitative analysis of whether or not counsel’s alleged deficiency caused Petitioner’s placement on the sexual offender registry unnecessary. Based on the fact that the only prejudice alleged is indisputably collateral and “non-punitive,” the PCR judge properly denied relief.

Petitioner has not presented any authority that suggests the Court of Appeals opinion is incorrect, or that relief is otherwise available in this forum where the only prejudice alleged is that counsel’s performance resulted in placement on the sex-offender registry – a classification which is, as the Court of Appeals emphasized, civil in nature, and does not constitute a deprivation of any constitutionally protected liberty interest. See Williams at 617-18, 662 S.E.2d at 515-16; see also State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); In re Shaquille O’Neal B., 385 S.C. 243 n.6, 255, 684 S.E.2d 549, 556 n.6 (2009) (*citing Hendrix v. Taylor*, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003)). Aside from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence.* Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 748 (2000).

Petitioner argues Padilla applies and should change South Carolina's approach to claims involving collateral consequences, but the United States Supreme Court declined in that case to address whether collateral consequences, standing alone, implicate the concept of "reasonable professional assistance." Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010). Instead, it held that due to the unique nature of deportation, "[t]he collateral versus direct distinction is . . . ill suited to evaluating a Strickland claim concerning the specific risk of deportation." Id. at 365-66, 130 S.Ct. at 1481-82. Having by its own language side-stepped the issue of collateral consequences in the context of a claim for ineffective assistance of counsel, the narrow rule espoused in Padilla is not applicable here.

Petitioner also argues in favor of applying the South Carolina line of parole eligibility PCR cases to the present situation. (PWC, p. 9). Those cases, however, involve specific findings that counsel's unreasonable performance – namely, incorrect advice that an applicant would be parole eligible – actually induced a guilty plea. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (finding petitioner satisfied Strickland's prejudice requirement by submitting evidence which conclusively established that but for his trial counsel's misadvice as to sentencing he would not have pled guilty); Hinson v. State, 297 S.C. 456, 377 S.E.2d 3385 (1989) (finding prejudice where evidence was uncontroverted that the petitioner entered his plea in expectation of receiving the lesser period for parole eligibility)). Where an applicant does not testify that but for counsel's erroneous advice concerning parole eligibility he would not have pled guilty, he is not entitled to relief. See Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). These cases illustrate the point the collateral consequences themselves have no independent Strickland significance, but are only relevant in post-conviction relief inasmuch as they render a guilty plea or conviction invalid.

Petitioner has neither argued nor presented any evidence that counsel's performance with respect to his placement on the sex-offender registry impacted the validity of his guilty plea or sentence. Petitioner testified at the evidentiary hearing that he expected placement on the sex-offender registry to be mandatory following his plea. App. p. 54. Petitioner also conceded that his goal in post-conviction relief "was to be ultimately removed from the sex offender registry because of his attorney's ineffective handling of the situation." (PWC, p. 8). Because Petitioner is using these proceedings to challenge his placement on the sex-offender registry, rather than the underlying validity of his guilty plea, the PCR Court's findings should be affirmed and certiorari should be denied.

II. Alternatively, Counsel was not ineffective because he introduced Petitioner's psychiatric evaluation pursuant to a valid strategy; and Petitioner failed to meet his burden to show prejudice.

Even assuming that a claim where the only prejudice alleged is placement on the sex-offender registry is appropriate under the PCR Act, Petitioner has failed to meet his burden to prove either deficient performance or prejudice. As discussed above, an applicant must generally prove deficient performance and prejudice in order to make a valid claim of ineffective assistance of counsel. Strickland, 466 U.S. at 668. Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

In this case, counsel pursued a valid trial strategy in deciding to submit the psychological report to the trial judge. Counsel testified that his strategy was to introduce the medical report in an effort to avoid any time in prison for Petitioner. The plea judge indicated that counsel's strategy worked. App. p. 13-14. The plea judge said that while he initially wanted to send the applicant to prison "for as long as I could send you," after reviewing the psychologists report

detailing the Petitioner's history and past treatment, he came "to the conclusion that ... the better course is to let you have probation and continue the treatment you've been given..." App. p. 14.

Further, inasmuch as placement on the sex-offender registry can be construed to be Strickland-type prejudice, Petitioner also failed to meet the second prong of the ineffective assistance of counsel analysis. During the evidentiary hearing, Petitioner testified that he went into his plea expecting the sex offender registry to be mandatory. App. p. 54, l. 8-10. Petitioner further agreed that when he went to court to enter his guilty plea, he thought he was "coming out on the sex offender registry." Id. at 11-16. As a result, there is no probative evidence in the record that but for counsel's purportedly deficient performance, he would have refused to plead guilty and proceeded to trial.

As there is substantial probative evidence in the record to support the PCR judge's findings of fact and conclusions of law with respect to this argument, certiorari should be denied.

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

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

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

By: 
ATTORNEYS FOR RESPONDENT

September 23, 2016

RECEIVED

SEP 23 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2015-001654
Lower Court Case No. 2014-CP-32-2121

DEDRIC L. ISREAL,

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:

**Robert Michael Dudek, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211**

This 23rd day of September, 2016



DEONNA ROGERS
LEGAL ASSISTANT



RECEIVED

SEP 23 2016

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 23, 2016

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

Re: Dedric L. Isreal v. State of South Carolina
Appellate Case No. 2015-001654
Lower Court Case No. 2014-CP-32-2121

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General
SC Bar No. 102100

PS/dr
Enclosures

cc: Robert M. Dudek, Esquire (2 copies)
Trisha Allen, Victim Services