

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

RECEIVED

The Honorable Roger M. Young, Circuit Court Judge

NOV -9 2016

Appellate Case No. 2016-00001

S.C. SUPREME COURT

ARTEASA M. WHITLOCK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PETITIONER'S ISSUE PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW6

ARGUMENT.....7

 The PCR Court correctly ruled that Petitioner's sentencing counsel
 was not ineffective for failing to obtain Petitioner's trial transcript8

CONCLUSION.....12

PETITIONER'S ISSUE PRESENTED

- I. Sentencing counsel erred in failing to place a timely request for petitioner's trial transcript because the failure to do so denied him of the right to a direct appeal.

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. Petitioner was indicted at the June 2004 term of the York County Grand Jury for trafficking crack cocaine (2004-GS-46-1846) and possession of crack cocaine with intent to distribute (PWID) within proximity of a park (2004-GS-46-1846). He was represented by Jim Morton, Esquire. On March 2, 2005, Petitioner proceeded *in absentia* to a jury trial before the Honorable Lee S. Alford, after which he was found guilty of both charges as indicted. The sentence was sealed and was opened on June 6, 2013 when Petitioner appeared with his counsel, Twana Burris, Esquire, before Judge Alford. Judge Alford published Petitioner's sentence, which was confinement for eighteen years for trafficking crack cocaine 10-28 grams (2nd offense) and ten years, concurrent, for PWID crack cocaine within proximity of a park.

A notice of appeal was filed and an appeal perfected on Petitioner's behalf by Benjamin Tripp, Esquire. A "Petition for Order to Reconstruct the Record of Appellant's Criminal Trial" was filed on Petitioner's behalf on March 26, 2014. The South Carolina Court of Appeals denied the petition to reconstruct the record and granted Respondent's motion to dismiss the appeal. State v. Whitlock, Order Appellate Case No. 2013-001340 (filed May 14, 2014). The Remittitur was issued on June 3, 2014.

On July 18, 2014, Petitioner filed an application for post-conviction relief. Respondent made its return on or about March 19, 2015. An evidentiary hearing into the matter was convened on August 5, 2015, at the Moss Justice Center in York, South Carolina. Petitioner was present at the hearing and represented by Nathan Sheldon, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner

testified on his own behalf. Also testifying on behalf of Petitioner were Kelly McClure and Michael Whitlock. Petitioner's trial counsel, Jim Morton, Esquire, testified. Petitioner's sentencing counsel, Twana Burris, Esquire, testified. Misti Shelton, Esquire, of the Sixteenth Circuit Solicitor's Office also testified. By an Order of Dismissal signed September 11, 2015 and filed December 10, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice.

Petitioner filed a timely notice of appeal. The Petition for Writ of Certiorari was submitted, dated June 20, 2016. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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 post-conviction relief 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

Petitioner argues that the PCR Court erred in failing to find Petitioner's sentencing counsel ineffective where sentencing counsel failed to timely obtain Petitioner's trial transcript, causing Petitioner's direct appeal to be dismissed. For the following reasons, Respondent contends that this argument is without merit.

Relevant Law

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 counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, 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.

I. The PCR Court correctly ruled that Petitioner's sentencing counsel was not ineffective for failing to obtain the trial transcript.

How the Issue Was Raised

Petitioner was arrested on February 27, 2004 and later indicted for trafficking crack cocaine, third offense, and possession with intent to distribute crack cocaine within proximity of a park. He was represented by Jim Morton, Esquire. On February 15, 2005, a bench warrant was issued for Petitioner's arrest after he failed to appear on February 7, 2005 in General Sessions on the charges. On March 3, 2005, Petitioner was tried in his absence before a jury and the Honorable Lee S. Alford. Petitioner was found guilty on both charges and Judge Alford sealed the sentence. Supp. App. 2.

Petitioner was not returned to the jurisdiction of York County until 2013. On June 6, 2013, Petitioner was brought before Judge Alford and Petitioner's sentences were published. Petitioner was sentenced to imprisonment for ten years for the proximity charge and eighteen years for trafficking. At the sentencing hearing, Petitioner's sentencing counsel, Twana Burriss (hereinafter "Counsel Burriss"), informed the court that after being a fugitive for four years, Petitioner was arrested in 2009 on federal charges and sentenced to forty-seven months in federal prison. App. 6, ll. 12-14. Counsel Burriss mentioned that she had tried to obtain the trial transcript but informed the court that it had been "deleted and expunged." App. 16, l. 14. The sentencing court noted that it had been deleted "[b]ecause it's been so long" and added "[t]hat's [Petitioner's] fault." App. 16, ll. 15-16. The sentencing court summarized its point, stating:

Now, the thing is – because he didn't come in when this happened. He went years before he picked up federal charges when he was absconded. He knew this was outstanding. He knew that he had been tried and

convicted. He knew that there was a sealed sentence here and knew there was a bench warrant out for him. I'm sure they were trying to pick him up. They had the known address. They couldn't find him. He absconded. That's his problem. I mean, he should have – if he would have come in at that time because, you know, he could have dealt with it.

App. 16, l. 17 – 17 l. 1.

After filing a direct appeal, Petitioner's appellate counsel filed a Petition for Order to Reconstruct the Record of Appellant's Criminal Trial in order to sufficiently perfect his direct appeal. Supp. App. 1-4. The State made a Return, arguing that Petitioner's petition should be denied because the transcript became unavailable due to Petitioner's fugitive status for over eight years between his conviction and sentence publication. Supp. App. 11. The Court of Appeals dismissed Petitioner's motion to remand, citing State v. Serette, 375 S.C. 650, 654 S.E.2d 554 (2007) which dismissed a defendant's appeal because the defendant's willful decision to remain a fugitive led to the destruction of the transcript. Supp. App. 16.

At the PCR hearing, Petitioner testified that he found out about his sealed sentence but did not return to York County because he figured that he was already sentenced and "wanted to have a good time." App. 61, ll. 1-2. Petitioner's fiancé testified that she discussed with Counsel Burris about a transcript but Counsel Burris told her that it was not available. App. 72, ll. 23-25. Counsel Morton testified at the PCR hearing that he did not obtain a trial transcript because that would be left up to appellate defense. App. 83, ll. 14-17.

Counsel Burris testified that she had no discussions with Petitioner about obtaining a transcript; however she did make efforts to obtain the trial transcript which were unsuccessful. App. 88, ll. 8-11. Counsel Burris testified that she sent a letter to Petitioner's family near the end of 2009 but did not officially represent him until the beginning of 2010. Counsel Burris testified that she diligently pursued the transcript after finding out the appropriate information about his plea.

At the end of the PCR hearing, the PCR Court found that Counsel Morton did not have a duty to obtain the trial transcript absent a communication from Petitioner that he wished to appeal. App. 109, ll. 21-23. The PCR Court also found that Counsel Burris was under no duty to order the transcript, finding that she may have been able to order it immediately in late 2009 but was not fully retained at the time. App. 110, ll. 1-11. The PCR Court further found that Petitioner was not prejudiced because the lack of transcript was of his own making and because he never communicated with either lawyer about wanting an appeal. App. 110, l. 23 – 111, l. 5.

Analysis

Petitioner's argument is without merit. Respondent would submit that Petitioner has failed to prove the deficiency prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. As Petitioner failed to meet his burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR 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."). There is certainly probative evidence to support the PCR Court's finding that Counsel Burris was not ineffective because she was under no duty to obtain the trial transcript and Petitioner never expressed his desire for an appeal. Counsel Burris represented Petitioner in a sentencing hearing, where the sentence was already decided and sealed. All that was left was the publishing of the sealed sentence. No part of her representation would have required the trial transcript because the trial was already complete. Likewise, there was no evidence that Petitioner asked Counsel Burris for an appeal or asked Counsel Burris to obtain the transcript.

Further, Respondent would argue that the sentencing court and PCR court were correct in deducing that the unavailability of the trial transcript is solely due to the fact that Petitioner fled

the State and ended up in federal incarceration. Just as the Court of Appeals found in Serrette, which it cited in denying Petitioner's motion to reconstruct the trial, this Court should find that Petitioner's fugitive flight directly led to the breakdown of his direct appeal process. This Court should find, as it did in Serrette, that Petitioner's "actions have the kind of connection to the appellate process that justifies an appellate sanction of dismissal. Serrette, 375 S.C. at 653, 654 S.E.2d at 555 (internal citations omitted).

Furthermore, Respondent would argue that the PCR Court correctly found that Petitioner failed to prove that he was prejudiced because Judge Alford made the correct inquiry before he proceeded to a TIA and Petitioner was properly notified of his duty to appear in court. Petitioner cannot show that there were any appealable issues that he was not able to raise on appeal, when these issues would have arisen at the trial from which he knowingly and voluntarily fled. Lastly, Respondent would argue that Petitioner's own actions, not Counsel's actions, contributed to any prejudice he suffered. Accordingly, the PCR Court was correct in dismissing Petitioner's application.

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 issue discussed above fully.

Respectfully submitted,

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November 9, 2016

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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:

**Wanda H. Carter, Esquire
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This 9th day of November, 2016.



JOCELYN BAKER
LEGAL ASSISTANT