

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No.: 2015-002089

DAVID ONLEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

ARGUMENT

 There is probative evidence in the record to support the PCR Court’s finding that counsel was not ineffective for failing to investigate whether Petitioner was the driver of the vehicle involved in the accident, where 1) counsel’s investigation was reasonable under the circumstances, and 2) Petitioner failed to meet his burden to show any resulting prejudice1

CONCLUSION.....9

QUESTION PRESENTED

Is there any probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to investigate whether Petitioner was the driver of the vehicle involved in the accident, where 1) counsel's investigation was reasonable under the circumstances, and 2) Petitioner failed to meet his burden to show any resulting prejudice?

STATEMENT OF THE CASE

Petitioner (David Onley) was indicted at the December 2012 term of the Lexington County Grand Jury for felony DUI, resulting in death (2012-GS-32-3276). Petitioner waived presentment to the grand jury. Matthew Buchanan, Esquire represented Petitioner. On December 12, 2012, Petitioner entered a guilty plea as indicted. The Honorable Roger M. Young sentenced Petitioner to confinement for twenty-five (25) years.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. State v. Onley, Appellate Case No. 2012-213656 (S.C. Ct. App. filed April 18, 2013). The Remittitur was issued on May 15, 2013.

Petitioner subsequently filed an application for post-conviction relief on June 21, 2013. Respondent filed a Return on December 23, 2013. On October 13, 2014, an evidentiary hearing was held before the Honorable DeAndrea G. Benjamin. Aimee Zmroczek represented Petitioner. Clay Mitchell represented the State. On June 11, 2015, the Honorable DeAndrea G. Benjamin issued an Order of Dismissal. On July 25, 2015, Petitioner filed a motion to reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The State filed its return to Petitioner's motion to reconsider on September 2, 2015. The State argued that Petitioner's motion should be denied. On September 9, 2015, the PCR court denied Petitioner's motion to reconsider. On July 13, 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. There is probative evidence in the record to support the PCR Court's finding that counsel was not ineffective for failing to investigate whether Petitioner was the driver of the vehicle involved in the accident, where 1) counsel's investigation was reasonable under the circumstances, and 2) Petitioner failed to meet his burden to show any resulting prejudice.**

Petitioner's argument that his guilty plea counsel was ineffective for failing to investigate whether he was the driver of the vehicle involved in the accident is without merit. Petitioner frames his allegation as one of ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant 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, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant 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, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

A.) Deficient Performance

Petitioner failed to show that counsel's performance was deficient. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E. 2d 60, 64 (2011) (internal citations omitted). Regardless, the allegation rests entirely on speculation. See Moorehead v. State, 329 S.C. 329, 496 S.E. 2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"). From the testimony and evidence in the record, there was never a question as to whether Applicant was the driver of the vehicle involved in the accident. Defense counsel made the initial standard and proper discovery request in order to receive investigatory material including the MAIT report and the incident report. (App. p. 63, ll. 14-18). Counsel testified that he received all the documents that the Solicitor possessed. (App. p. 63, ll. 19-24). Counsel testified further that after concluding his investigation, he was certain that Petitioner was the driver the vehicle involved in the fatal accident. (App. p. 62, ll. 1-5). He firmly believed that the State had a solid case centered around the fact that his client was the driver. (App. p. 64, l. 23 – p. 65, l. 6). Additionally, Petitioner admitted to counsel that he remembered driving at some point the night of the accident. (App. p. 51, l. 23 – p. 52, l. 4).

Petitioner also remembered agreeing with the State's recitation of the facts during his guilty plea, which included that he was driving the vehicle. (App. p. 78, ll. 18-20). Petitioner testified that he remembered picking up the decedent to give him a ride, despite never having any relationship with him before that night. (App. p. 67, ll. 5-11; 22-24, p. 72, ll. 13-15). Counsel also testified to the fact that it was undisputed that Petitioner had been drinking alcohol prior to the accident and was over the legal blood alcohol content limit. (App. p. 67, ll. 22-24).

Because counsel's belief that Petitioner was the driver of the vehicle was reasonable and supported by the evidence, his investigation was not deficient. Accordingly, there is probative evidence to support the PCR Court's finding. Certiorari should therefore be denied.

B.) Prejudice

There is also probative evidence to support the PCR Court's finding with respect to prejudice. Petitioner did not present *any* evidence that he was not the driver of the vehicle. Rather, Petitioner has pointed to various alleged inconsistencies in medical records and argued that they raise the possibility that he was not the driver. In addition to these inferences being entirely speculative, they are contrary to the factual findings made by the PCR Court, which found that the documents produced in discovery indicated that Petitioner was the driver of the vehicle.¹ App. p. 157. Because Petitioner did not meet his burden to prove prejudice, certiorari should be denied.

¹ The PCR Court specifically found that Petitioner failed to produce *any* evidence tending to show that he was not the driver of the vehicle. App. p. 158.

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,

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By: 

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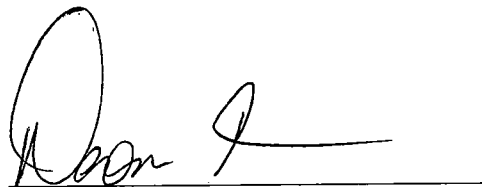
RESPONDENT,

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:

**Tiffany Lorraine Butler, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201**

This 28th day of November, 2016



DEONNA ROGERS
LEGAL ASSISTANT