

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County
Steven H. John, Circuit Court Judge

2014-CP-45-485
Appellate Case No. 2015-002398

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S.C. SUPREME COURT

DAVID VICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITIONER'S ISSUE PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW4

ARGUMENT

I. Probative evidence supports the PCR court's finding that trial counsel was not ineffective for not objecting to the curative instruction after officer's testimony at trial5

CONCLUSION.....8

PETITIONER'S ISSUE PRESENTED

- I. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to the curative instruction given as insufficient after an officer testified that Petitioner was known to run from law enforcement when Petitioner stood trial for failure to stop for a blue light and siren and drug offenses?**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Petitioner was true bill indicted at the March 2012 term of the Williamsburg County Grand Jury for failure to stop for light, possession with intent to distribute marijuana, and trafficking in cocaine, 28 g. or more, but less than 100 g. (2012-GS-45-0050). Matt Swilley, Esquire represented Petitioner. Petitioner proceeded to a jury trial and was found guilty as indicted on November 6, 2012. The Honorable Clifton Newman sentenced Petitioner to ten year term of imprisonment and a 50,000 fine for trafficking in cocaine (more than 28 g. but less than 100 g.), three year term of imprisonment for failure to stop for a blue light, and five year term of imprisonment for possession with intent to distribute marijuana with all sentences running concurrently.

A timely notice of appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. David R. Vice, 204-UP-103 (Ct. App. 2014). The Remittitur was issued on October 28, 2014.

Petitioner subsequently filed an application for post-conviction relief (PCR) on September 17, 2014¹ (C.A. No. 2014-CP-45-485). Respondent filed its Return on March 4, 2015. The Honorable Steven H. John issued an Order of Dismissal denying and dismissing the application signed on August 4, 2015 and filed on September 16, 2015.

Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on November 18, 2015. Petitioner's Appendix and Petition for Writ of Certiorari were filed on July 22, 2016. This Return to the Petition for Writ of Certiorari follows.

¹ The application was received by Respondent on January 27, 2015.

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

I. Probative evidence supports the PCR court's finding that trial counsel was not ineffective for not objecting to the curative instruction given after officer's testimony at trial.

Petitioner argues the PCR Court erred in failing to find trial counsel ineffective for not objecting to the curative instructions given to the jury for testimony presented by a law enforcement officer. Respondent submits that Trial Counsel was not deficient in failing to object to the curative instruction because he objected to the officer's inadmissible testimony, he moved for a mistrial, and when his motion was denied, the proper curative instructions were given. Furthermore, Petitioner can prove no prejudice as a result of Trial Counsel's alleged deficiency because the curative instructions were sufficient to cure the inadmissible testimony.

Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 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 trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

Discussion

Petitioner argues Trial Counsel was ineffective for failing to object to the curative instructions offered by the trial court following the inadmissible testimony of a law enforcement officer. However, the PCR Court properly found that Trial Counsel was not ineffective in his representation.

As the PCR Court noted in its Order of Dismissal, at trial, Officer Loy Hayes stated, "Considering knowing that - - of who the suspect was and knowing he was known to run from law enforcement - - -." Trial Counsel immediately objected to the testimony and argued admission was improper because it was evidence of prior bad acts. App. 80 lines 10-16. Trial Counsel moved for a mistrial and thoroughly argued why he believed Petitioner was prejudiced by the prior bad acts that had just been introduced to the jury. App. 80-86. After hearing the arguments and considering case law, the trial court then sustained the objection but denied the motion for a mistrial. App. 86. The trial court issued a curative instruction including striking the testimony from the record. App. 86 lines 7-11. Specifically, the trial court instructed the jury to "disregard the entire question and response." App. 86. Trial Counsel then renewed his motion for a mistrial. App. 87 line 1-2.

At the evidentiary hearing, Petitioner argued that Trial Counsel should have objected to the curative instruction, even though he moved for a mistrial. Trial Counsel testified at the hearing that he should have objected to the curative instruction. App. 318. "I should have objected to the sufficiency of the curative instruction and renewed my motion for a mistrial. . . I just made a mistake."² App. 332 lines 10-13. Respondent submits that Trial Counsel was not ineffective in his failure to object, regardless of what he would have done in hindsight. "[E]ven if

² Trial Counsel did, in fact, renew his motion for a mistrial after the curative instruction was given. App. 87.

an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Strickland requires courts to assess attorney performance based on their point of view at the time of the trial. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland at 689, 104 S. Ct. at 2065. At the time the curative instructions were given, Trial Counsel reasonably believed that his objection to the testimony and his renewed motion for a mistrial had protected the record. His actions demonstrate that he met the reasonable standards of professional norms in his representation at trial.

Furthermore, as the PCR Court found, the curative instruction was properly given. There was no reason to object to the instruction, as it was proper within the law and within the trial court's discretion. The trial court considered arguments from both parties and relevant case law in its decision and made a choice to deny the motion for a mistrial and offer the proper curative instruction instead. This probative evidence supports the PCR Court's ruling that Trial Counsel was not ineffective in failing to object, and the first prong of the Strickland test was not met.

Additionally, the second prong of the Strickland test was not met because Petitioner can prove no prejudice from Trial Counsel's failure to object. As discussed above, the curative instructions were properly given within the trial court's discretion. The trial record indicates that Trial Counsel fully argued his position and the trial court denied his motion for a mistrial and offered a proper curative instruction within the law. Even if Trial Counsel had objected to the instruction, the court would have overruled his objection, and this decision likely would not have

been overturned on appeal. Therefore, since this action would not have changed the outcome of the case, Petitioner can prove no prejudice.

Petitioner failed to present any credible evidence to meet his burden in proving either prong of the Strickland test, and he cannot show ineffective assistance of counsel. Because the PCR Court's decision in denying the petition for post-conviction relief was supported by the probative evidence above, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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December 12, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County

The Honorable Steven H. John, Circuit Court Judge

DAVID VICE, #314663

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

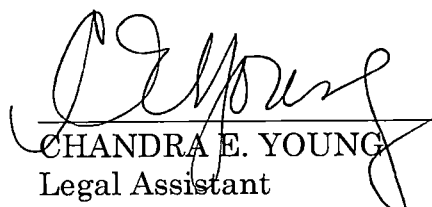
PROOF OF SERVICE

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:

Kathrine H. Hudgins, Esquire
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.

This 12th day of December 2016.



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