STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Anderson County
Honorable Cordell J. Maddox, Jr., Circuit Court Judge

Appellate Case No. 2015-002372

RAHIEM KIRKMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#79054

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR court correctly find that trial counsel rendered effective assistance despite not moving for a continuance prior to Petitioner's trial *in absentia* when Counsel objected to Petitioner being tried in his absence, the case had already been continued multiple times, the State had not made any plea offers to Petitioner, and Counsel made extensive efforts to locate and notify Petitioner prior to the trial to no avail?

STATEMENT OF THE CASE

On August 22, 2006, Petitioner was stopped while traveling northbound on I-85 in Anderson County for following too closely to a tractor-trailer. App. 98-101. Officer Jaime Crawford initiated the stop near mile marker nineteen. App. 99-100. Petitioner was the sole occupant and registered owner of the vehicle. App. 102. Officer Crawford asked Petitioner to sit in the passenger's side of the police cruiser while he wrote a citation and ran a check on Petitioner's drivers' license, and he observed Petitioner exhibiting "extremely nervous" body language such as a quivering lip, shaking hands, and a vein throbbing in Petitioner's neck. App. 104-106. As the officer was writing a warning citation, he asked Petitioner where he had been, and Petitioner gave conflicting stories. App. 107. Officer Crawford then took his dog to conduct a "free air sniff" of Petitioner's car while awaiting the results of the drivers' license check, and the dog alerted to the presence of drugs. App. 107-108. Petitioner at first denied there were any drugs in the car, then told Officer Crawford that there was $18,000 in the back seat if he wanted it. App. 112. When Officer Crawford's partner arrived, he told Petitioner that they were going to search the car, and Petitioner fled the scene, running down the exit ramp to I-85 and jumping a fence into the woods. App. 115-116. Officer Crawford and his partner then searched Petitioner's car and discovered a duffle bag containing approximately 10 kilograms of cocaine in the trunk. App. 117-118. Petitioner was located and arrested the following day. App. 123.

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment by the Anderson County Clerk of Court. Petitioner was indicted at the September 2006 term of the Anderson County Grand Jury for trafficking in cocaine more than 400 grams (2006-GS-04-2922). App. 402-403. He was represented by Dorothy Manigault,

Esquire. App. 1. On November 5, 2007 the case proceeded to trial in front of the Honorable Alexander S. Macaulay, and Petitioner was tried and convicted in his absence. App. 1-298. The Honorable J.C. Nicholson, Jr., unsealed Petitioner's sentence on May 20, 2009, and sentenced him to confinement for a term of twenty-five years and a $200,000 fine. App. 401.

A timely Notice of Appeal was filed on Petitioner's behalf and perfected by J. Falkner Wilkes, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Kirkman, Op. No. 2011-UP-500 (S.C. Ct. App. filed November 9, 2011). The Remittitur issued on November 28, 2011.

Petitioner filed an application for post-conviction relief (PCR) on October 12, 2012. App. 299-334. Respondent made its Return on or about August 1, 2013. App. 336-341. An evidentiary hearing into the matter was convened on February 20, 2014, at the Anderson County Courthouse. App. 342. Petitioner was present and was represented by Hugh W. Welborn, Esquire. App. 342. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office. App. 342. By Order filed November 5, 2015, Judge Maddox denied and dismissed Petitioner's application for PCR. App. 390-400. Petitioner appealed the order of dismissal on November 16, 2015, and this Petition followed on August 17, 2016.

ARGUMENT

The record supports the PCR judge's finding that trial counsel rendered effective assistance despite not moving for a continuance prior to Petitioner's trial *in absentia*, when Counsel objected to Petitioner being tried in his absence, the case had already been continued multiple times, the State had not made any plea offers to Petitioner, and Counsel made extensive efforts to locate and notify Petitioner prior to the trial to no avail.

When Petitioner's case was called for trial on November 5, 2007, Counsel first made a motion to be relieved based on Petitioner's lack of cooperation with her. App. 3-4. Counsel informed the court that she had not heard from her client in six months, the phone number she had for him had been cut off, recent letters she sent were returned, and she contacted his bondsman, who was also unsuccessful in locating him. App. 3-4. When the court denied her motion, Counsel then objected to the State's request to try Petitioner in his absence. App. 8. The State presented the bond form signed by Petitioner explaining that he had an obligation to appear for trial and that he would be tried in his absence if he did not appear. App. 6. The solicitor also informed the court that Petitioner's case was on the docket in May, June, and August, and was continued each of those times. App.7. Finally, the solicitor noted that his office mailed notice to the address they had on file from the bondsman, and the docket for the November 2007 term was published on October 22, 2007, with Petitioner's case listed on it. App. 7, 10. Given that Petitioner's case was properly noticed and he was informed that he could be tried in his absence, Counsel had no good faith basis to move for a continuance. Counsel argued instead for the court to issue a bench warrant for Petitioner's arrest to remove the case from the active docket – which would have the same effect as continuance – but the court declined to do so. App. 8.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. 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, 466 U.S. at 689. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 U.S. at 688). 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.

In Morris v. State, this Court noted that there is a distinction between objecting to a trial *in absentia* and requesting a continuance, and held that trial counsel's failure to request a continuance, in some circumstances, will be considered ineffective assistance of counsel. 371 S.C. 278, 639 S.E.2d 53 (2006). In that case, however, the State offered the applicant a favorable plea deal to a lesser-included charge, which the applicant accepted by signing the sentencing sheet, and then left the courthouse. Morris, 371 S.C. at. 280-281, 639 S.E.2d at 54. The Morris Court found the applicant was prejudiced by his counsel's failure to request the

continuance because he received a significantly longer sentence after he was tried in his absence than he would have received under the plea. Id. at 281, 54. Petitioner attempts to liken the circumstances of his case to Morris, but in Petitioner's case, there was no good faith basis for counsel to move for a continuance as Counsel testified there was nothing else she could have done to locate him, and there was no plea offer. App. 379, 387. Furthermore, it is speculative at best that the trial court would have granted a continuance had Counsel requested it. Counsel's motion to be relieved was denied, the court declined to issue a bench warrant, the jury panel was ready for selection, and the State's witnesses were present and prepared to testify. App. 4, 8-9.

Even if Counsel's performance was deficient for failing to request a continuance, Petitioner still does not meet the Strickland standard because he did not present any evidence to show he was prejudiced as a result. *See* Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) ("Respondent presented no witnesses or any specific testimony establishing he would have had a defense if he had had additional time to prepare for trial.... Accordingly, respondent failed to demonstrate prejudice as required by Strickland...."). At the evidentiary hearing, Petitioner produced no evidence of any potential benefit that would have accrued to him if Counsel had requested a continuance, other than "more time." App. 360. Counsel testified that Petitioner had no witnesses who could testify in his defense as he was alone in the car when he was stopped, the traffic stop and his flight from police were on videotape, and Petitioner gave an incriminatory statement to the police after his arrest. App. 378-379. Notably, Counsel also testified that although Petitioner indicated his willingness to accept a plea, the State refused to negotiate due to the overwhelming evidence against him. App. 378-379, 397. Thus, Petitioner here cannot have been prejudiced by the lack of a continuance because he was facing the same potential charge and sentence whether he pleaded guilty or proceeded to trial. The statute under which Petitioner

was charged[1] carries a minimum of twenty-five years with a maximum of thirty, plus a $200,000 fine, so Petitioner in fact received the minimum sentence possible for this offense. App. 295-296.

In this way, Petitioner's case is more closely analogous to State v. Ravenell, wherein the applicant failed to return for the second day of his trial, and his counsel made a motion for a continuance but did not object to the trial continuing *in absentia*. 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010). The Court of Appeals distinguished Morris, noting the continuance request in Ravenell was based on counsel's desire to locate his client for trial, not so that his client could accept a favorable guilty plea. Ravenell, 387 S.C. at 458, 692 S.E.2d at 559. The Court of Appeals held that the trial judge did not abuse his discretion by declining to grant the continuance and proceeding with the trial in Ravenell's absence, stating that "to read Morris to require a trial judge to grant a continuance anytime a defendant intentionally absents himself from trial of which he has notice would subvert the rule and case law specifically allowing a trial *in absentia* under the proper circumstances...." Id.

In Petitioner's case, the trial judge made the required findings on the record that Petitioner had notice that his case was up for trial, he had a right to be present at trial, and he could be tried in his absence if he failed to appear. App. 9-10. At the evidentiary hearing, Petitioner offered no excuse for his absence except that he thought he had more time to hire a different attorney, and he didn't expect to be tried so quickly. App. 367-368. Petitioner also failed to present any evidence or witnesses that he was unable to present at trial due to the lack of a continuance. App. 390. Accordingly, the PCR court correctly found Petitioner presented no evidence to contradict the trial court's determination that Petitioner "freely, voluntarily,

[1] Petitioner was charged with trafficking in cocaine greater than 400 grams. App. 47. In fact, Petitioner had approximately 10,000 grams of cocaine in his car when he was stopped, which perhaps offers some insight into why the State was unwilling to offer a plea to a lesser charge or sentence.

knowingly, and intelligently waived his right to be present at trial," that Counsel's performance was not deficient, and that he was not prejudiced by being tried in his absence. App. 393-395.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Probative evidence exists to support the post-conviction relief court's findings that Counsel did not render deficient performance in not requesting a continuance prior to Petitioner's trial *in absentia*, and further, that Petitioner was not prejudiced by the alleged deficiency. The record fully supports the PCR judge's finding that Petitioner failed to show Counsel's performance was deficient or that he was prejudiced by any alleged deficient conduct. Therefore, this Court should deny the petition.

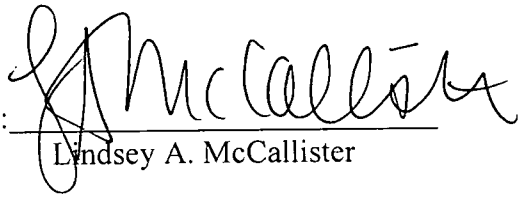
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

January 3, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Anderson County
Honorable Cordell J. Maddox, Jr., Circuit Court Judge

RAHIEM KIRKMAN,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

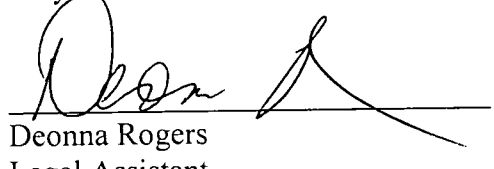
Petitioner.

PROOF OF SERVICE

I, Deonna Rogers, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert Michael Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 3rd day of January, 2017.



Deonna Rogers
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

January 3, 2017

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

RE: Rahiem Kirkman v. State of South Carolina
Appellate Case No. 2015-002372

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,

Lindsey A. McCallister
Assistant Attorney General

LAM/dgr

Enclosures

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