

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Darlington County
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2015 – 002428
Lower Court Case No. 2013-CP-16-00261

CHARLTON L. HILL, SCDC # 152778,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT

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RESPONDENT'S COUNTER ISSUES

- I. The PCR court was correct in ruling Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State.
- II. Certiorari is not warranted where the PCR court correctly found Counsel reasonably attempted to investigate Petitioner's witnesses, where there is no evidence in the record about what Petitioner's witnesses would have testified to, and where there is overwhelming evidence of Petitioner's guilt.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In September 2010, the Darlington County Grand Jury indicted Petitioner for felony driving under the influence resulting in death (2010-GS-16-1335) and driving under suspension (2010-GS-16-1336). (App. pp. 601-602, 604-605.) In April 2011, the Grand Jury indicted Petitioner for failure to stop for a blue light resulting in death (2011-GS-16-422), reckless homicide (2011-GS-16-423), and involuntary manslaughter (2011-GS-16-424). (App. pp. 607-608, 610-11, 613-614.) Matthew S. Swilley, Esquire, and Emily M. Crayton, Esquire, (collectively, "trial counsel") represented Petitioner. On April 13, 2011, Petitioner proceeded to trial before the Honorable J. Michael Baxley and a jury. (App. p. 1, p. 12, ll. 1-2.) The jury found Petitioner guilty as indicted. (App. pp. 603, 606, 609, 612, 615.) Judge Baxley sentenced Petitioner to concurrent terms of twenty-five years for felony driving under the influence resulting in death, ninety days for driving under suspension, ten years for reckless homicide, and five years for involuntary manslaughter. (Id.) Judge Baxley sentenced Petitioner to a consecutive term of ten years for failure to stop for a blue light resulting in death. (Id.)

Petitioner filed a notice of appeal, but the South Carolina Court of Appeals dismissed the appeal as untimely on May 24, 2012. (Supp. App. pp. 3.) The remittitur was returned to the circuit court on August 7, 2012. (Supp. App. p. 4.)

Petitioner then filed a Post-Conviction Relief application on March 25, 2013. (App. p. 346.) Respondent made a timely Return on or about April 1, 2014. (App. p. 506.) The Court convened an evidentiary hearing into the matter on July 27, 2015, at the Darlington County Courthouse. (App. p. 511.) Petitioner was present at the hearing and represented by Tristan M.

Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

The PCR Court issued an Order granting Petitioner relief pursuant to *White v. State* and dismissing the remaining allegations. (App. p. 589.) Petitioner filed a Notice of Appeal, and the Petition for Writ of Certiorari was filed on August 17, 2016. This Return follows.

STATEMENT OF THE FACTS

Summary of the Trial

For purposes of this Return to the Petition for Writ of Certiorari, Respondent adopts the summary of the trial in Petitioner's brief on pages 2-4.

Summary of the Relevant Testimony at the PCR Hearing

At his PCR hearing, Petitioner testified he was aware there was in-car video from the patrol vehicle that was following the car before he wrecked it, and he knew there were photos. However, Petitioner claimed he did not know there were "120 pictures of—of me, where they posed me," which he explained meant that he was alleging law enforcement told him to sit back in the driver's seat and put his hands on the wheel. (App. p. 524, l. 18 – p. 525, l. 6.) Petitioner admitted he had never told his counsel that police had "posed" him in those pictures. (App. 544, ll. 12-14.) Petitioner testified his defense at trial was that the victim was "actually under the wheel when—when the traffic stop was initiated." (App. p. 525, ll. 12-16.)

Petitioner's trial counsel Matthew Swilley testified that he did not recall Petitioner ever claiming police had posed him in the driver's seat to take photos. (App. p. 551, ll. 3-11.) Trial counsel testified the officer who pursued Petitioner's vehicle testified he saw Petitioner driving the vehicle and trial counsel confirmed the in-car video from the patrol car corroborated that testimony. (App. p. 551, ll. 12-16.) Trial counsel explained that, although their defense at trial

was that Petitioner was not driving, trial counsel had explained to Petitioner that he could not “really fathom a jury finding [Petitioner] not guilty of anything with the video. I mean, it was – it—it was overwhelming.” (App. p. 554, ll. 7-17.) Trial counsel testified he did meet with Petitioner’s mother prior to trial about Petitioner’s claim that she let the victim have the car keys. (App. p. 556, ll. 2-6.) Trial counsel testified Petitioner’s mother was in the hospital at the time and when questioned about what she recalled from the day of the accident, “she couldn’t—she didn’t really seem—I mean she was conscious, but she didn’t really seem very lucid and couldn’t recall very much from the date that [the victim] had died.” (App. p. 556, ll. 2-11.) Trial Counsel also testified Petitioner said other individuals were with Petitioner and the victim before the car chase, but counsel was not able to locate them. (App. p. 556, ll. 13-16.)

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).

In a PCR action, “[t]he burden of proof is on the petitioner 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), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, 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 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, 286 S.C. at 441, 334 S.E.2d at 813. Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Petitioner 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, 466 U.S. at 668, 104 S.Ct. at 2064). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR court was correct in ruling Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State.

Petitioner's trial counsel failed to perfect a direct appeal from the trial, and Petitioner testified he requested and wanted a direct appeal to be filed. Respondent agrees Petitioner should be allowed to petition this Court for belated review of direct appeal issues because he did not knowingly and voluntarily waive his right to an appeal.

II. Certiorari is not warranted where the PCR court correctly found Counsel reasonably attempted to investigate Petitioner's witnesses, where there is no evidence in the record about what Petitioner's witnesses would have testified to, and where there is overwhelming evidence of Petitioner's guilt.

Petitioner argues Trial Counsel was ineffective for failing to further investigate witnesses provided by Petitioner who could have provided testimony about who was seen with keys to the car prior to the accident. Petitioner argues further investigation would have helped him present a defense that the victim was "under the wheel when the traffic stop was initiated." This issue is without merit. Counsel properly investigated the defense by contacting one of the witnesses and attempting to contact the other witness provided by Petitioner. Furthermore, prejudice cannot be established by Petitioner because neither witness testified at the PCR hearing as to what their testimony would have been at trial, and a defense that Petitioner was not the one driving was highly unlikely and not supported by the overwhelming evidence of Petitioner's guilt.

"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). “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.” Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). Furthermore, “[a] PCR petitioner cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)); cf. Lounds v. State, 380 S.C. 454, 461-63, 670 S.E.2d 646, 649-51 (2008) (finding counsel was ineffective where counsel offered **no testimony** on strategy for failing to call witnesses critical to petitioner’s defense and where **both witnesses testified at the PCR hearing** as to what evidence they would have been prepare to offer at trial but for trial counsel’s deficiency).

Here, Petitioner failed to meet his burden of proof, and there is clearly evidence to support the PCR court’s ruling. Trial counsel testified he did interview Petitioner’s mother, but she was not in any condition to offer favorable testimony for Petitioner, which is why counsel requested a continuance. Trial counsel also attempted to interview other witnesses provided by Petitioner but was unable to do so because they could not be located. There is nothing in the record to indicate interviewing the other witnesses would have led to any different result. Trial counsel testified he observed Petitioner driving the vehicle on the in-car video that was part of the evidence offered at trial and presented to the jury. The fact that Petitioner was seen behind the wheel of the car both by a witness and on the in-car video, as well as being found behind the wheel after the wreck, makes it very difficult for Petitioner to deny his guilt.

Petitioner has also failed to prove prejudice. Unlike the petitioner in Lounds, here,

Petitioner presented **no witnesses** at the evidentiary hearing to demonstrate he was not driving the vehicle when it crashed. Neither Petitioner's mother nor Mackie Tomlinson testified. See Dempsey, 363 S.C. at 369, 610 S.E.2d at 814 ("A PCR petitioner cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover, 318 S.C. at 498, 458 S.E.2d at 540)). The PCR court did not err in finding Trial Counsel committed no error and that Petitioner was unable to meet his burden of establishing any prejudice from the alleged error.

Overwhelming Evidence

Furthermore, independent of the above analysis, Petitioner cannot show he was prejudiced by the actions or decision of trial counsel because the record contains overwhelming evidence of his guilt.

Where there is overwhelming evidence of guilt, a trial counsel's representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991); cf. Vasquez v. State, 388 S.C. 447, 463-64, 698 S.E.2d 561, 569 (2010) ("[T]he sheer weight of the evidence in the instant case does not negate the prejudicial impact of the solicitor's improper comments"). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the petitioner's guilt in Ford was overwhelming, and the South Carolina Supreme Court held the petitioner failed to prove the second prong of Strickland, which requires that a petitioner show prejudice by the deficient representation.

Here, Petitioner can prove no resulting prejudice. The arresting officer saw Petitioner driving the vehicle before it crashed. (App. 137, ll. 11-24.) After the crash, Petitioner was behind the steering wheel. (App. p. 137-138; p. 104, ll. 1-25.) The victim's injuries were consistent with the theory that she was sitting in the passenger seat, where a tree limb entered the passenger side windshield of the car and would have caused serious injury to the head and neck of any person in the passenger seat. (App. p. 242, ll. 1-23; p. 254, ll. 14-p. 256, l. 7; App. p. 167, ll.10-p. 168, ll. 24; p. 178, l. 3-p. 179, l. 23; p. 184, l.15-p. 185, l. 12.) Petitioner's consensual blood test was positive for alcohol, cocaine, hydrocodone, marijuana, Tramadol, and Soma. (App. p. 102, l. 1-p. 104, l. 25.) Accordingly, Petitioner cannot show prejudice from trial counsel's actions.

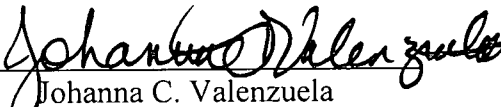
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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January 3, 2017

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-002428
Lower Court Case No. 2013-CP-16-0261

CHARLTON L. HILL, SCDC #152778,

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:

LaNelle C. Durant, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 3rd day of January, 2017


BRIANNA ARNONE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JAN -3 2017

January 3, 2017

S.C. SUPREME COURT

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

Re: Charlton L. Hill v. State of South Carolina
Appellate Case No. 2015-002428
Lower Court Case No. 2013-CP-16-0261

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,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
SC Bar No. 79834

JCV/bea
Enclosures

cc: LaNelle C. Durant, Esquire (2 copies)