

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2015-000820

John W. Mack,Petitioner,

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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PETITIONER'S ISSUE PRESENTED

- I. Trial Counsel erred in failing to object to the State's publication of Petitioner's three prior burglary convictions in order to prosecute him on a first degree burglary charge under 16-11-311(A)(2) because the statute required proof of only two prior burglary convictions. As a result, the prejudicial value of admitting three priors outweighed the probative value and untimely deprived Petitioner of the right to a fair trial, particularly where the State's case against the Petitioner was comprised of only a single piece of evidence.

STANDARD OF REVIEW

The Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge "if there is any evidence of probative value sufficient to support them." Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. "If no probative evidence exists to support the findings, the Court will reverse." *Id.* at 368-69, 610 S.E.2d at 814. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2006 term of the Spartanburg County Grand Jury for burglary – 1st degree (2006-GS-42-1167) and grand larceny (2006-GS-42-1166). Petitioner was represented by J. Roger Poole, Esquire. On February 23, 2011, Petitioner proceeded to trial and was convicted of the charges by a jury. The Honorable J. Derham Cole sentenced Petitioner, pursuant to §17-25-45(A), to a sentence of life imprisonment without possibility of parole (LWOP) for burglary – 1st degree and a concurrent term of five years for grand larceny.

A timely notice of appeal and brief were filed on Petitioner's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Mack, Op. No. 2013-UP-161 (filed April 17, 2013). The Remittitur was returned on May 7, 2013.

Petitioner subsequently filed an application for post-conviction relief (PCR) on May 6, 2013 (2013-CP-42-2063). (App. p. 171). Respondent made its Return on March 19, 2014. (App. p. 184). The Honorable Deadra L. Jefferson ("the PCR judge") convened an evidentiary hearing on the application at the Spartanburg County Courthouse on January 14, 2015. (App. p. 250). Petitioner was present and represented by Leah B. Moody, Esquire. Judge Jefferson denied Petitioner's PCR application in an Order filed April 10, 2015 (App. p. 250).

A timely notice of intent to appeal was served on April 21, 2015. On October 19, 2015, Wanda H. Carter, Esquire, perfected the appeal in the form of a Johnson¹ petition for writ of certiorari. By Order dated August 11, 2016, the South Carolina Supreme Court denied the Johnson petition, ordering further briefing on the matter. This return to the petition for writ of certiorari follows.

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

Petitioner subsequently filed another PCR application on September 10, 2015, that is still pending before the circuit court (2015-CP-42-3806).

On June 28, 2016, Petitioner subsequently filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (C/A No. 9:16-1190-DCN-BM). On June 28, 2016, the Honorable Bristow Marchant, United States Magistrate Judge, issued a Report and Recommendation ordering that Petitioner's petition for writ of habeas corpus be summarily dismissed without prejudice. Petitioner subsequently filed an Objection to the Report and Recommendation dated July 12, 2016. On July 20, 2016, the Honorable David C. Norton, United States District Judge, accepted and affirmed the Report and Recommendation, therefore denying the petition.

ARGUMENT

- I. **The record contains substantial evidence of probative value to support the PCR judge's finding that Trial Counsel was not ineffective for failing to object to the State's publication of Petitioner's criminal history in order to satisfy the elements of Burglary-First Degree.**

Petitioner argues the PCR judge erred in finding Petitioner failed to satisfy his burden of proving that Trial Counsel was ineffective for failing to object to the State's publication of Petitioner's criminal history in order to satisfy the elements of Burglary-First Degree. There is ample evidence of probative value in the record to support that finding.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 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, 334 S.E.2d 813.

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. 668. The Applicant 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 plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

Deficiency

Petitioner failed to meet his burden to prove Trial Counsel's performance was objectively unreasonable. In her Order, the PCR judge found Trial Counsel's testimony to be more credible than that of the Petitioner. The PCR judge also found Trial Counsel to be an experienced criminal litigator who "zealously advocated on his client's behalf." (App. p. 263). During the PCR hearing, the PCR judge stated that Trial Counsel's performance could not be found deficient for failing to object to the introduction of Petitioner's criminal history. (App. p. 246). During the trial, Trial Counsel and the State stipulated to Petitioner's three burglary convictions. Therefore, Petitioner was not surprised by their publication to the jury. Furthermore, no underlying facts regarding the three prior burglary convictions were provided to the jury, and the trial judge instructed the jury on the current and prevailing law applicable to the facts of the case. Therefore, the PCR judge reasoned that Trial Counsel had no basis to object to the publication of Petitioner's criminal history. (App. p. 116, 271).

Second-guessing Trial Counsel's strategic decision absent any actual evidence that he were unreasonable would be inappropriate, given that Petitioner has the burden in this forum. Simply put, Petitioner's current dissatisfaction with the result does not render Trial Counsel's objectively reasonable performance deficient. "There are countless ways to provide effective assistance in any given case." Strickland at 689, 104 S.Ct. at 2065. "Even the best criminal defense attorneys would not defend a particular client in the same way." Id. Because the PCR Court's finding is supported by probative evidence in the record, certiorari should be denied.

Prejudice

The PCR judge also properly concluded that Petitioner failed to meet his burden to show that, had Trial Counsel objected to the State's publication of Petitioner's *three* prior burglary convictions, the outcome of the proceeding would have been different.

South Carolina Code Section 16-11-311(A)(2) enumerates that for a burglary to be found in the First Degree, the burglary must be committed "by a person with a prior record of *two or more* convictions for burglary or housebreaking or a combination of both." S.C. CODE ANN. § 16-11-311(A)(2) (2005)(emphasis added). While both Old Chief v. U.S., 519 U.S. 172 (1997) and State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003) recognize greater prejudicial effect when allowing extensive criminal history² to be presented to the jury, neither speak to the situation of this particular case where the State published *one* more conviction over the minimum requirement. Rather, the case law states that a Rule 403 balancing analysis should be performed in each factual situation to weigh the probative value versus the prejudicial effect regarding those particular facts. The case State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) provides a method trial judges can employ in order to avoid allowing improper convictions:

To ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first-degree burglary, the trial court should limit the evidence to the prior burglary and/or housebreaking convictions as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime can be considered.

Benton, at 156, 526 S.E.2d at 231. In this case, Petitioner's prior convictions were published to the jury in the form of a stipulation; therefore, Petitioner should have been aware that three rather than two convictions were going to be published to the jury. In addition, the State did not provide

² In James, the State published seven of the defendant's prior criminal convictions to the jury. In this case, by entering one more conviction over the minimum requirement, the probative value of the entered convictions should not decrease to the level of being outweighed by prejudicial effect as it did in James.

any underlying facts regarding the prior convictions. Further, the trial judge provided a detailed limiting instruction regarding the published criminal history (App. p. 149-50, 272). Accordingly, probative evidence exists to support the PCR Court's finding that Petitioner was not prejudiced by Trial Counsel's failure to object to the publication of Petitioner's criminal history, as the trial court took the necessary precautionary measures. Certiorari should therefore be denied.

CONCLUSION

For the foregoing reasons, 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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Jan. 12th, 2017

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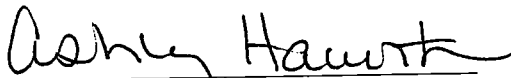
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies of the RPWC in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
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This 12th day of February, 2017


ASHLEY HAWORTH
PARALEGAL