STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge (PCR)
The Honorable J.C. Nicholson, Circuit Court Judge (Trial)

Appellate Case No. 2016-001477

Samuel Brown Jr.,..Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the record support the PCR court's finding that Petitioner failed to prove ineffective assistance of counsel for failure to further investigate a confidential informant where Petitioner failed to present any evidence as to what such further investigation would have revealed or how it would have affected the outcome of trial?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted by the Charleston County Grand Jury for trafficking cocaine 10-28 grams, third offense (2012-GS-10-6790). Petitioner was represented by James Smiley, Esquire. On September 10-12, 2013, Petitioner proceeded to trial before the Honorable J.C. Nicholson and a jury. The jury found Petitioner guilty as indicted. Judge Nicholson sentenced Petitioner to imprisonment for a period of ten years. A notice of appeal was filed on Petitioner's behalf, but the South Carolina Court of Appeals dismissed the appeal for failure to timely serve the notice of appeal upon opposing counsel pursuant to Rule 203(b)(2), SCACR. State v. Brown, Ct. App. Order dated August 1, 2014.

Petitioner filed an application for post-conviction relief (PCR) on September 5, 2014. On April 18, 2016, an evidentiary hearing was held in Charleston County before the Honorable Doyet A. Early III. Petitioner was present and represented by William H. Nixon, Jr., Esquire. J. Rutledge Johnson, Esquire of the Office of the Attorney General represented Respondent. Petitioner testified on his own behalf. James Smiley, Esquire ("Counsel") also testified.

Following the evidentiary hearing, Judge Early issued an order on July 5, 2016, finding Petitioner was entitled to a belated review of direct appeal issues,[1] but denying relief and dismissing the application for PCR on all remaining allegations.

[1] The State agreed Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). (App. p. 324, lines 16-19). Respondent does not contest the PCR court's ruling on that issue.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

Counsel was not ineffective for not further investigating the confidential informant where the identity of the informant and his criminal record was provided to Counsel the day of trial, Counsel cross-examined the informant about potential bias, and Petitioner presented no evidence of what additional information Counsel could have uncovered had he further investigated or how such information would have affected the outcome of trial.

This Court should deny review because there is ample evidence in the record to support the PCR court's finding that Petitioner failed to satisfy his burden of proving Counsel was ineffective for failing to further investigate the confidential informant.

In a PCR action, the applicant has the burden of proving the allegations in his 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 show 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688.

The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. An

applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. In making a fair assessment of attorney performance, a court must make every effort 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 v. Washington, 466 U.S. 668, 689 (1984). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id.

To show prejudice, the applicant must show prove that "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. 115, 117-18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 690). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

Petitioner's conviction arose out of a buy-bust operation whereby a confidential informant ("CI") was equipped with a recording device, searched, and provided with funds to purchase drugs from Petitioner. (App. p. 66-67).

Counsel agreed that "everything hinged on the CI." (App. p. 290, lines 14-15). Counsel testified he filed a detailed discovery request for specific information concerning the CI. (App. p. 294, lines 13-16). He testified that the request contained "direction that if there is a CI [Counsel needed] their information to be able to investigate." (App. p. 294, lines 13-19). He testified that he "had been asking" for the information on the CI "for a long time. And they kept telling [him] that Mt. Pleasant was getting it together." (App. p. 298, lines 12-15). Petitioner also testified that Counsel "was working persistently towards getting this evidence and to trial." (App. p. 314).

Counsel testified that it "caught everybody. . . off guard that [the case went] to trial that morning," (App. p. 298, lines 14-18), and that the State provided the identity of the CI immediately before trial. (App. p. 290, lines 19-25). Counsel testified that he did not make a motion to continue because he did not think the trial judge would have granted it. (App. p. 292, lines 17-24). He testified if he had, it might have given him more leverage to work out a plea offer. (App. p. 302).

Counsel testified if they had gotten the information about the CI sooner, it would have given him more opportunity to negotiate a better plea offer. (App. p. 309). Counsel testified Petitioner rejected a five-year offer and a seven-year offer. (App. p. 310). Counsel testified that after Petitioner rejected the seven-year offer, he was able to negotiate a five-year deal, but that Petitioner also rejected that offer. (App. p. 288). Petitioner testified he did not reject the five-year deal but was "waiting to see if it was a first or a second." (App. p. 314). Counsel testified both deals would have been for a second offense and that there was never a first offense offer on the table. (App. p. 288). Counsel testified he thought Petitioner was being tried for a third—as opposed to a second—offense, and that he had always advised Petitioner that way. (App. p. 281, lines 1-22). Counsel acknowledged and agreed that a third offense was punishable by twenty-five to thirty years imprisonment, while a second offense was punishable by only five to thirty years. (App. pp. 282-84).

At trial, Officer Jonathan Jones testified that he searched the CI's vehicle thoroughly and found no weapons or contraband. (App. p. 86, lines 11-12; App. p. 101, lines 7-14). Jones testified that they met with the CI prior to the buy at which time they searched him and his vehicle and equipped him with an audio recording device. (App. p. 95). Jones testified that the officers stayed with him and maintained contact with him and his vehicle until the transaction.

(App. pp. 95-97). Officer Jones and Officer Alexander Blake both testified they saw Petitioner throw the money back into the vehicle. (App. p. 100; App. p. 153, lines 19-24). At the PCR hearing, Counsel testified he vigorously cross-examined the officers on what they observed, specifically, that Petitioner threw something back in the car. (App. p. 305).

At trial, Counsel questioned the CI about Petitioner's "story." (App. pp. 123-38). He also questioned the CI about the benefit he was receiving by testifying, specifically, that he was never charged with distribution of marijuana or proximity charges because of his work with law enforcement. (App. p. 138). Counsel also questioned Officer Jones about this. (App. p. 87-89). The CI testified that Petitioner brought the drugs to him, (App. p. 138, lines 18-19), and that when law enforcement "rushed in" Petitioner threw the money for the drugs (not the drugs themselves) back into the vehicle. (App. p. 138, lines 21-25).

Counsel testified it was "probably the worst job [he] [has] ever done on a CI, and the reason being [the CI] was smart enough to say very little . . . wouldn't expound and [Counsel] couldn't touch him." (App. p. 295, lines 19-23). Counsel stated that according to Petitioner, he met the CI the night before the buy-bust and the two of them partied with "two girls" that night. (App. pp. 293, line 4-p. 294, line 12). However, Counsel stated that even if he had been able to corroborate some of Petitioner's story concerning his interaction with the CI, "it could not [have been] an entrapment defense because he has a prior conviction," but that it "could have created bias and that kind of stuff" if he had been able to track down the two girls. (App. p. 295, line15-p. 296, line 7).

The PCR court found that "while Counsel admitted he should have done a more thorough investigation into the confidential informant, [Petitioner] presented no credible evidence that any further investigation would have been fruitful." (App. p. 360). The court found that as a result,

Petitioner failed to establish that had Counsel been more fully prepared, the outcome of his trial would have been different. Lastly, the court ruled that Petitioner failed to satisfy his burden of proving that Counsel was ineffective for failing to further investigate and interview the confidential informant. The record contains ample evidence supporting this finding.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (Applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Further, a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). An applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

Here, Counsel testified that he made a detailed request for discovery and specifically requested the identity of the CI. Petitioner and Counsel both testified that Counsel vigorously and repeatedly pursued the identity of the CI, but the State simply did not provide that information until immediately before trial because the trial went forward sooner than everyone expected. Based on the record of Petitioner's trial and the evidentiary hearing, Counsel adequately cross-examined the CI and law enforcement at trial. Counsel had the CI's agreement

with law enforcement and his record and questioned him about the deal he received for testifying.

Further, Petitioner presented no witnesses other than himself and Counsel at the evidentiary hearing. Although Counsel speculated he could have further impeached the CI to show bias, no testimony was presented as to what specifically he could have impeached him about. Counsel testified the CI could have corroborated Petitioner's story, but acknowledged it nevertheless *could not have been an entrapment defense* because Petitioner has a prior conviction. (App. p. 295, line15-p. 296, line 7). Instead, it might have merely "created bias and that kind of stuff" if he had been able to track down the two girls. (App. p. 295, line15-p. 296, line 7). Accordingly, Petitioner presented no testimony or evidence as to anything Counsel could have discovered in addition to what was already presented at trial had he known the CI's identity sooner.

Petitioner asserts that if he had known more about the CI and his credibility, he would have accepted the five-year plea offer. However, Petitioner previously rejected two plea offers—one for seven years and one for five years—each for a second offense. (App. p. 315). A handwritten note on Plaintiff's Exhibit 1 reflects the five-year offer was turned down on October 3, 2012, which was almost a year prior to trial. (App. p. 328). Counsel testified he strongly encouraged him to accept a plea offer but that Petitioner was unwilling to accept an offer for a second offense. Counsel's testimony that he might have been able to negotiate a better deal had he had this information sooner is based on speculation, and Petitioner presented no evidence that the State had extended any additional plea offers immediately prior to trial, nor did he present any evidence that the State would have been willing to make any further offers given he had already rejected two. Further, according to Counsel's testimony, Petitioner thought he was being

tried for a third offense when he proceeded to trial. (App. p. 280). Therefore, Petitioner failed to show the alleged deficiency affected his decision to reject a plea offer a year before trial. Though Petitioner testified he would have accepted the five year offer, the Court did not rule on this claim specifically, but found that Petitioner failed to satisfy his burden of proving that "had Counsel been more fully prepared, the outcome of his trial would have been different[.]"

Based on these facts, Petitioner provided no evidence of what a further investigation would have revealed, or how such information would have affected the outcome of trial or his decision to reject a plea offer. Therefore, the record fully supports the PCR court's finding that Counsel was not ineffective for failing to further investigate and interview the confidential informant.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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April 10th, 2017

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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Court of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge (PCR)
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Appellate Case No.: 2016-001477
Lower Court Case No. 2014-CP-10-5417

SAMUEL BROWN, #254907,

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
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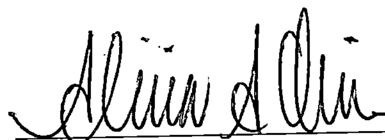
This 10th day of April, 2017.



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