STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Anderson County
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

2013-CP-04-1769
Appellate Case No. 2015-002282

DEVIN M. NIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED

I. Should certiorari be granted where probative evidence supports the PCR Court's finding that counsel was not ineffective in his advice to Petitioner with respect to whether to plead guilty?

II. Should certiorari should be denied where probative evidence supports the PCR Court's finding that counsel was not laboring under an actual conflict of interest that adversely affected the adequacy of his representation; counsel was not ineffective in cooperating with Attorney Drawdy leading up to Petitioner's preliminary hearing; and Petitioner's arguments that counsel was ineffective for allowing Petitioner to waive attorney client privilege and for moving to quash the indictment rather than move to suppress Mr. Tubbs' testimony were not raised at the lower level and are not properly before this Court?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Petitioner was indicted by the August 2011 term of the Anderson County Grand Jury for three counts of accessory/accessory before the fact to a felony (2011-GS-04- 1364; -1365; -1366), and conspiracy (2011-GS-04-0527), Petitioner was represented by W. Norman Epps, III., Esq. On April 23, 2013, the State called its case. Petitioner entered guilty pleas to burglary, second-degree violent (-1364); strong armed robbery (-1365), kidnapping (-1366) and conspiracy (-0527). The Honorable R. Lawton McIntosh sentenced Petitioner to fifteen years imprisonment for burglary, second-degree violent, fifteen years imprisonment for strong armed robbery, fifteen years imprisonment for kidnapping. The sentences were to be served concurrently. Judge McIntosh further sentenced Petitioner to five years imprisonment for conspiracy suspended on the service of five years probation. The conspiracy sentence was to be served consecutively. Petitioner did not appeal his guilty pleas or sentences.

Petitioner filed an application for post-conviction relief on July 31, 2013. The State made its responsive pleadings. An evidentiary hearing as convened at the Anderson County Courthouse on February 18, 2015, before the Honorable J. Cordell Maddox. By written order signed October 28, 2015, and filed October 30, 2015, Judge Maddox denied and dismissed Petitioner's application with prejudice.

Petitioner filed a timely Notice of Appeal and petition for writ of certiorari. This return follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR 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 PCR 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. Certiorari should be denied where probative evidence supports the PCR Court's finding that counsel was not ineffective in his advice to Petitioner with respect to whether to plead guilty.

The issue is whether there is any probative evidence to support the PCR Court's finding that counsel was not ineffective in his advice to Petitioner concerning whether to plead guilty. Petitioner argues counsel should have advised him to accept the State's initial plea offer of a recommended twelve (12) years.

The Sixth Amendment right to counsel extends to the plea-bargaining process. Missouri v. Frye, 132 S.Ct. 1399, 1407-08, 182 L.Ed.2d 379 (2012). Petitioner still had the burden in this proceeding, however, of proving counsel's performance fell below and objective standard of reasonableness. Lafler v. Cooper, 132 S.C. 1376, 1384, 182 L.Ed.2d 398 (2012); see also Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) ("A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness"). Petitioner failed to meet that burden here.

Counsel testified at the evidentiary hearing that there were both defenses and weaknesses in the State's case, which he discussed with Petitioner and Petitioner's family. App. p. 78-79. Counsel said he did not tell Petitioner to take the 12 year offer, but instead advised him that whether to accept was his decision to make. Id. Counsel said Petitioner "didn't want the 12 . . . years straight up," explaining that the difference – and key benefit – in the deal he ultimately ended up taking was that it was a range of "zero to 15." App. p. 94.[1]

[1] Incidentally, counsel testified that he believed Petitioner had a strong case for mitigation. App. p. 97. Counsel planned on asking for the low end of the sentencing range, and understood the state would be asking for the high end. App. p. 98.

Counsel's testimony constitutes probative evidence in support of the PCR Court's decision to deny relief. Rather than being objectively unreasonable, counsel's decision to leave the ultimate choice as to whether to plead or go to trial with Petitioner – after advising him of the strengths and weaknesses of his case – simply reflects the reality that the choice was Petitioner's to make in the first place. See Jones v. Barnes, 463 U.S. 745, 751 103 S.Ct. 3308, 3312 (1983) ("the accused has the ultimately authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

Admittedly, Petitioner and his witness offered conflicting testimony. That testimony, however, has already been heard – and weighed – by the PCR Court. The weighing of testimony is the province of the finder of fact, to whom great deference is owed on review. See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (PCR Court's findings of fact and conclusions of law are entitled to great deference). Clearly the finder of fact in this case found that counsel's testimony was more credible than Petitioner's. Because the standard is whether there is **any** probative evidence in the record to support the PCR Court's findings, certiorari should be denied.

II. **Certiorari should be denied where probative evidence supports the PCR Court's finding that counsel was not laboring under an actual conflict of interest that adversely affected the adequacy of his representation; and counsel was not ineffective in cooperating with Attorney Drawdy leading up to Petitioner's preliminary hearing. Further, Petitioner's arguments that counsel was ineffective for allowing Petitioner to waive attorney client privilege and for moving to quash the indictment rather than move to suppress Mr. Tubbs' testimony were not raised at the lower level and are not properly before this Court.**

a). Counsel was not working under conflicting interests that adversely affected the adequacy of his representation.

Petitioner failed to meet his burden to prove counsel was working under conflicting interests that adversely affected the adequacy of his representation. The PCR Court's findings are supported by ample probative evidence. To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representations, a defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance. Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (20-11). However, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief. Staggs v. State, 372 S.C. 549, 551-52, 643 S.E.2d 690, 692 (2007). The purpose of this limited exception to the ordinary requirements of Strickland is "not to enforce the Canon of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to Counsel." Mickens v. Taylor, 535 U.S. 162, 176, 122 S.Ct. 1237, 1246 (2002). An actual conflict of interest occurs:

> when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984).

There is no evidence that counsel was laboring under an actual conflict in this case. Counsel represented Petitioner on charges arising out of two unrelated incidents. App. p. 72-73. The first incident involved a home invasion and armed robbery with two co-defendants – one of which was Jay Tubbs.[2] The second incident involved an attempted armed robbery in the Starlight Movie Theater with a different co-defendant – Petitioner's step-brother, Alex McBride. App. p. 77. Mr. McBride was represented by Attorney Sarah Drawdy. Id. After discussing the matter with Petitioner,[3] Counsel agreed to cooperate with Attorney Drawdy during Petitioner's and Mr. McBride's preliminary hearing for the Starlight Movie Theater case. App. p. 77-78. Attorney Drawdy subsequently began representing Mr. Tubbs on the home invasion case. App. p. 78-79.

Nothing this case gives rise to an actual conflict of interest. There is no evidence that suggests counsel owed a duty to either of these co-defendants, or that his loyalty was otherwise divided. In fact, the PCR Court found that counsel took every precaution to ensure his work with Attorney Drawdy did not harm Petitioner's case. App. p. 159. Because counsel was not acting under an actual conflict, certiorari should be denied.

The PCR Judge also correctly concluded that there was no evidence in the record that counsel's limited cooperation with Attorney Drawdy adversely impacted the adequacy of his representation. App. p. 158-59. Petitioner has not pointed to any specific adverse act or omission resulting from the alleged conflict. There is no evidence or testimony to the effect that counsel divulged confidential information or took any other actions detrimental to Petitioner's interests during the course of his cooperation with Attorney Drawdy. Instead, counsel merely

[2] The other co-defendant was Chis Brown. Guilty Plea Tr., p. 16.
[3] App. p. 78.

testified that he had been concerned that Mr. Tubbs may have said something concerning the Starlight Move Theater case when interviewed by law enforcement and Attorney Drawdy.[4] App. p. 80. Petitioner has not presented any evidence – as is his burden – that counsel's concerns came to fruition. Further, counsel reviewed the statements of Petitioner's co-defendants. App. p. 102-03. There is no evidence that anything Mr. Tubbs told law enforcement was derived from counsel's limited cooperation with Attorney Drawdy.[5] Accordingly, because there is no actual evidence that counsel was working under an actual conflict of interest that adversely affected the adequacy of his representation, certiorari should be denied.

b). Counsel's cooperation with Attorney Drawdy did not constitute ineffective assistance of counsel.

Petitioner also failed to meet his burden to prove counsel was ineffective for cooperating with Attorney Drawdy. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

[4] It appears from the record that Mr. Tubbs may have already implicated Petitioner and Mr. McBride in the Starlight Movie Theater incident to law enforcement prior to Attorney Drawdy's representation of him. App. p. 78. The record does not indicate that Mr. Tubbs was directly involved in the commission of that offense.

[5] Nor did Attorney Drawdy's actions, standing alone, violate Petitioner's Sixth Amendment right to counsel. See, e.g., Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) ("the Rules of Professional conduct have no bearing on the constitutionality of a criminal conviction").

Second, counsel's deficient performance must have prejudiced Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). With respect to guilty plea counsel, Applicant must show that 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, 106 S.Ct. 366 (1985).

Petitioner has not presented any evidence that counsel was deficient in cooperating with Attorney Drawdy during the preliminary hearing, or that he was prejudiced as a result. There is nothing in the record to suggest the counsel's cooperation with Attorney Drawdy was objectively unreasonable, particularly where – as here – it does not appear that Attorney Drawdy represented Mr. Tubbs in the other unrelated case at the time of the cooperation. Counsel testified that Attorney Drawdy began to represent Mr. Tubbs following the preliminary hearing. App. p. 78-79. Effective assistance of counsel does not require clairvoyance. See Thornes v. State, 310 S.C. 305, 426 S.E.2d 764, 765 (1993) ("Defense attorneys have never been required to anticipate or discover changes in the law, or facts which did not exist, and the time of the trial"). The relevant time frame for analysis is when the alleged ineffectiveness occurred. Id. at 310, 426 S.E.2d at 766.

Counsel also took steps to mitigate any potential harm as a result of the previous cooperation by requesting that Attorney Drawdy recuse herself and moving to quash the indictments.[6] Accordingly, counsel's limited cooperation with Attorney Drawdy was not objectively unreasonable and certiorari should be denied.

Finally, Petitioner failed to meet his burden to prove prejudice. Petitioner has failed to produce one iota of evidence that counsel's cooperation with Attorney Drawdy induced his guilty plea, or otherwise calls into question the outcome of the proceeding. Certiorari should denied.

c). Issue Preservation

Petitioner also argues counsel was ineffective for 1) allowing Petitioner to waive attorney client privilege, and 2) moving to quash the indictment rather than suppress Mr. Tubbs' testimony. These allegations were not raised at the lower level, and are not properly before this Court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal"). In any event, Respondent submits each is unsupported by any evidence in the record and that certiorari should be denied.

[6] Petitioner's argument that counsel was ineffective in moving to quash the indictment rather than move to have Tubbs' testimony suppressed is discussed *infra*, § c.

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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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:

Tommy Arthur Thomas, Esquire
PO Box 88
Irmo, SC 29063

This 10th day of November, 2016

DEONNA ROGERS
LEGAL ASSISTANT