STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001350

Billy Joe Griggs, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar # 102524

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. **Should this Court deny review where the PCR court correctly found Counsel was not ineffective where Petitioner's sentence was properly enhanced pursuant to S.C. Code Ann. § 44-53-470(a)(4) because Petitioner had three prior qualifying drug convictions?**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Petitioner was indicted during the November 2013 term of the Chesterfield County Grand Jury for possession with intent to distribute a controlled substance (2013-GS-13-0591). Franklin B. Joyner, Jr., Esquire, represented Petitioner. Assistant Solicitor Adam Foard represented the State. Petitioner proceeded to a jury trial and was found guilty as indicted. On November 13, 2013, the Honorable Clifton Newman sentenced him to a term of imprisonment of thirteen years.

Petitioner filed a timely notice of appeal on March 13, 2014. Petitioner filed a PCR application on February 2, 2015, while his direct appeal was pending before the South Carolina Court of Appeals. Petitioner withdrew his direct appeal and the South Carolina Court of Appeals dismissed his appeal on January 13, 2015. The remittitur was issued on February 4, 2015.

In his application for post-conviction relief, Petitioner alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Trial Counsel failed to investigate the facts
    b. Trial Counsel failed to put up a meaningful defense
    c. Trial Counsel deprived Applicant the right to present adverse witnesses in his defense

Respondent made its Return on December 2, 2016, requesting that an evidentiary hearing be held. A hearing was convened on January 9, 2017, at the Marlboro County Courthouse before the Honorable G. Thomas Cooper, Jr. Petitioner was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General Valerie Garcia Giovanoli represented Respondent.

Judge Cooper issued an order of dismissal on March 31, 2017 and filed April 3, 2017. Petitioner filed a timely notice of appeal. On October 16, 2017, a petition for a writ of certiorari was filed on Petitioner's behalf by Tommy A. Thomas, Esquire. This return follows.

STATEMENT OF FACT

Relevant Facts from Trial

At the start of trial, a discussion regarding Petitioner's enhanced charges ensued between the trial judge, Counsel and the Assistant Solicitor. (App. p. 27, l. 25 – p. 34, l. 15). Counsel began by putting the State's plea offer on the record, which offered Petitioner to plead to a first offense with a recommendation from the State of a three year sentence. (App. p. 27, l. 25 – p. 28, l. 8). The trial judge then confirmed the penalty for Petitioner's third or subsequent drug charge was five to twenty years and non-parolable. (App. p. 28, ll. 9-14). Petitioner was sworn and the trial judge informed him of the plea offer and that he faced five to twenty years if he proceeded to trial and was convicted. (App. p. 28, l. 17 – p. 29, l. 10). Petitioner indicated he understood, but he was confused why he was being charged with a third offense because he had not been in trouble in twenty years. (App. p. 29, ll. 10-14).

The trial judge sought clarification from the Assistant Solicitor, who explained that although some of Petitioner's prior drug offenses were not within ten years, the enhancement would still apply because Petitioner had the following prior drug convictions:

1. Unlawful drugs – 1981 – three year sentence suspended to eighteen months;
2. Trafficking in cocaine – 1984 – ten year sentence;
3. Possession with intent to distribute cocaine – 1990 – four month sentence; and
4. Possession of cocaine – 1992 – sentence not cited.

(App. p. 31, ll. 1-17). Counsel then cited the enhancement statute in South Carolina as § 44-53-370(a)(4)[1]. When defining the applicable enhancement statute to the trial judge, Counsel correctly stated, "if the offender at any time has been convicted of a second or subsequent violation of the Controlled Substance Statute relating to narcotic drugs or hallucinogenic drugs

that he is – that he is eligible to face an enhancement sentence." (App. p. 21, l. 24 – p. 32, l. 4). Petitioner reiterated he did not know his sentence could be enhanced with convictions so far back in time. (App. p. 32, ll. 5-16).

Counsel continued to inform the trial judge he advised Petitioner there was a ten year limit for marijuana convictions, but for any other drug, a third or subsequent offense would not have a time limit on prior convictions. (App. p. 32, l. 24 – p. 33, l. 5). Petitioner told the trial judge, "I understand it now." (App. p. 33, ll. 10-11). The trial judge took care to explain to Petitioner the ramifications of his decision to reject the plea offer and proceed to trial, explaining despite a three year plea offer to a first offense, he could be sentenced to twenty years if convicted by the jury. (App. p. 33, ll. 14-25). Petitioner told the trial judge, "I'll roll the dice. I'll take my chances." (App. p. 34, ll. 11-12).

After the jury found Petitioner guilty, the trial judge proceeded to sentence Petitioner. (App. p. 137-151). The Assistant Solicitor read Petitioner's "extensive criminal history" to the trial judge. (App. p. 138, l. 6 – p. 139, l. 22). The Assistant Solicitor further remarked Petitioner was the "textbook definition of a drug dealer," having been repeatedly convicted of drug crimes and repeatedly received prison terms, probation, and drug treatment. (App. p. 140, ll. 2-8). Based on Petitioner's repetitive criminal conduct, the Assistant Solicitor asked that Petitioner be sentenced to the maximum twenty years. (App. p. 140, ll. 9-15). In mitigation on behalf of Petitioner, Counsel asked for the minimum five year sentence, reiterating Petitioner's last drug conviction was in 1992. (App. p. 140, l. 17 – p. 141, l. 19). In response to the claim Petitioner

[1] Notably, there is no subsection four in § 44-53-**370**(a), but there is a subsection four in § 44-53-**470**(A).

had been "clean" since his 1992 conviction, the Assistant Solicitor added that Petitioner had two additional drug charges pending before the court. (App. p. 141, l. 21 – p. 142, l. 3).

Petitioner addressed the court, lamenting he "[felt] like [he] paid for" his prior drug crimes when he "spent ten years in prison."[2] (App. p. 142, l. 6-12). The trial judge went over Petitioner's prior drug record to which Petitioner responded, "The reason I'm not sure is like I said it's been a long time ago. **I'm not sure exactly what the charge was.**" (App. p. 145, ll. 4-18). The trial judge reminded Petitioner of the earlier conversation and Petitioner's decision to "roll the dice" in a clear cut case. (App. p. 150, ll. 6-17). But, despite the State's request for the maximum twenty years to be imposed and Petitioner's lengthy prior criminal record, the trial judge sentenced Petitioner to thirteen years. (App. p. 151, ll. 20-23).

Relevant Facts from PCR Hearing

Although not pleaded in his PCR application, Petitioner proceeded on an allegation he was improperly sentenced and/or Counsel was ineffective in failing to object to improper sentencing. Petitioner testified regarding his prior drug record. During direct examination, Petitioner testified that before this arrest, he had not had a drug conviction since 1989. (App. p. 161, ll. 3-4). Applicant testified he believed the trial judge used § 44-53-370 for enhancement incorrectly, but the correct section was § 44-53-470(A)(3). (App. p. 172, ll. 16-24). On cross examination, Petitioner reaffirmed his last drug conviction was in 1989. (App. p. 191, ll. 14-19). However, Petitioner expressed confusion over his prior criminal record. He testified his PCR counsel's "secretary" got a 1992 trafficking in cocaine charge expunged off his record to allow him to go from Levell II to Level I lockup. (App. p. 191, l. 20 – p. 192, l. 16). Petitioner then

testified the charge was thrown out because he testified against another criminal defendant. (App. p. 192, l. 17 – p. 193, l. 1). The PCR judge sought clarification and PCR counsel informed the PCR judge his office helped Petitioner get the charge dismissed and the arrest expunged. (App. p. 193, ll. 11-21). PCR counsel further clarified he thought the charge "was the one that we had assisted and that it was a non-conviction, but clearly [the NCIC report] shows that it is a, that it was a conviction." (App. p. 194, ll. 7-16).

Continuing cross-examination, Petitioner admitted to all the other various marijuana and non-drug related convictions about which he was questioned from the same NCIC report. (App. 195, l. 5 – p. 196, l. 1). In a final attempt to clarify Petitioner's version of his drug record, the State went over each drug conviction individually. Petitioner admitted to: a 1981 unlawful drug conviction[3] for which he received a three year sentence suspended to eighteen months' probation; a 1984 trafficking in cocaine conviction for which he received ten years; a 1990 possession with intent to distribute (PWID) cocaine charge Petitioner claimed was dropped to simple possession for which he received four months; and a 1992 possession of cocaine conviction. (App. p. 197, ll. 2-24).

On re-direct examination, Petitioner denied the 1992 possession of cocaine conviction referring to his South Carolina Department of Corrections ("SCDC") records which shows offenses for which he completed a sentence **within SCDC**, but not all convictions. (App. p. 203, ll. 2-23).

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[2] Petitioner later told the trial judge he only actually served four years and nine months of the ten year sentence. (App. p. 145, ll. 10-13).

[3] S.C. Code Ann. § 44-53-370.

Counsel also testified regarding the enhancement issue. Counsel clarified that during the trial, the discussion with the trial judge regarding § 44-35-370 was regarding the offense under which Petitioner had been charged and would be sentenced. (App. p. 212, ll. 1-16). Counsel testified section 370 includes the sentencing for a first, second, and third or subsequent drug offense. (App. p. 212, ll. 9-11). Counsel continued to explain that during the discussion at trial, he also explained section 470, which describes when an offense can be categorized as a second or subsequent offense. (App. p. 212, ll. 18-22).

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). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey, 363 S.C. at 368, 610 S.E.2d at 814).

In a PCR action, the applicant bears 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 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 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. 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 prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within

the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR court did not err in finding Counsel not ineffective where Petitioner's sentence was properly enhanced pursuant to S.C. Code Ann. § 44-53-470(a)(4) because Petitioner had three prior qualifying drug convictions.

The post-conviction relief court did not err in denying relief because Petitioner's sentence was properly enhanced pursuant to § 44-53-470(A)(4) of the South Carolina Code and therefore, Counsel was not ineffective. Petitioner argues he was improperly enhanced because § 44-53-470(A)(4) requires a ten year limit on prior convictions that can be used for enhanced sentencing.

Petitioner was charged and convicted of possession with intent to distribute a controlled substance, pursuant to S.C. Code Ann. § 44-53-370(b)(2) which states, in relevant part,

> (a) Except as authorized by this article it shall be unlawful for any person:
> (1) to manufacture, distribute, dispense, deliver, purchase, aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase, or possess with the intent to manufacture, distribute, dispense, deliver, or purchase a controlled substance or a controlled substance analogue;
> [...]
> (b) A person who violates subsection (a) with respect to:
> [...]
> (2) any other controlled substance classified in Schedule I, II, or III, flunitrazepam or a controlled substance analogue, is guilty of a felony and, upon conviction, [...] [f]or a third or subsequent offense, or, if the offender previously has been convicted two or more times in the aggregate of a violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender is guilty of a felony and, upon conviction, must be imprisoned not less than five years nor more than twenty years, or fined not more than twenty thousand dollars, or both.

§ 44-53-370 describes the offense of possession with intent to distribute a controlled substance and the penalties imposed for first, second, and third or subsequent offenses. § 44-53-470 defines how drug offenses are to be categorized as first, second, and third or subsequent offenses. In relevant part and at the time Petitioner was sentenced, subsections (A)(3) and (4) read:

> (A) An offense is considered a second **or** subsequent offense if:
>
> [...]
>
> (3) for an offense involving a controlled substance other than marijuana pursuant to this article, **the offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision**, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs; and
>
> (4) for an offense involving a controlled substance other than marijuana pursuant to this article, **the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision**, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.

S.C. Code Ann. § 44-53-470 (June 2, 2010 – April 20, 2016) (Emphasis added).

The statute is plain and unambiguous. The phrase, "at any time" can only be interpreted as once a criminal defendant has been convicted of a second or subsequent drug offense (other than marijuana), the ten year time limit for the prior convictions to be considered for sentence enhancement is not applicable. S.C. Code Ann. § 44-53-470(A)(4). Conversely, as stated in subsection (A)(3), if a criminal defendant has only one prior drug conviction (other than marijuana), there is a ten year limit within which that conviction can be relied upon for sentence enhancement. S.C. Code Ann. § 44-53-470(A)(3).

At trial, the State relied upon the following prior drug convictions to enhance Petitioner's sentence:

5. Unlawful drugs – 1981 – three year sentence suspended to eighteen months;
6. Trafficking in cocaine – 1984 – ten year sentence;
7. Possession with intent to distribute cocaine – 1990 – four month sentence; and
8. Possession of cocaine – 1992 – sentence not cited.

(App. p. 31, ll. 1-17). Curiously, Petitioner did not contest these prior drug convictions at trial. Instead, Petitioner was not "sure exactly" what the charges were. (App. p. 145, ll. 4-18). However, Petitioner was very sure when he denied certain convictions and claimed others were expunged or dropped. (App. p. 161-192). Accordingly, the PCR court found Petitioner not credible.[4] (App. p. 265). This Court must give great deference to the PCR courts credibility findings. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. Drayton v. Evatt, 312 S.C. 4, 11 430 S.E.2d 517, 521 (1993) (citing S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses.").

Regardless of Petitioner's claims and credibility, even with the three prior drug convictions to which Petitioner admitted – unlawful drugs (§ 44-53-370), trafficking in cocaine, and possession of cocaine – Petitioner was eligible for sentencing enhancement pursuant to § 44-53-470(A)(4).[5]

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[4] The record is littered with bases for this credibility finding. Most notably, was State's Exhibit 1 introduced at the PCR hearing, a disc containing a phone conversation between Counsel and Petitioner in which Petitioner told a totally different version of events than the version he told to the PCR judge during his testimony. (App. p. 177, ll. 3-18; p. 235, l. 15 – p. 236, l. 1).

[5] Even with only *two* qualifying drug convictions outside the ten year limit, Petitioner would still be a third offender based on the plain language of § 44-53-470(A)(4).

Walters v. State, 371 S.C. 591, 641 S.E.2d 434 (2007), is instructive. Walter pled guilty to possession of crack on September 26, 2000, for an offense that occurred on July 28, 2000. Id. at 592, 641 S.E.2d at 435. Thereafter, Walter pled guilty to distributing crack on March 21, 2001, for an offense that occurred on July 26, 2000. Id. Pursuant to § 44-53-470, Petitioner was sentenced as a second offender. Id. In finding Walter was properly treated as a second offender, this Court held, "[u]nder § 44-53-470, the timing of the crimes is irrelevant to the determination of a subsequent offense so long as there is a prior conviction." Id. at 593, 641 S.E.2d at 435.

While Petitioner concedes the § 44-53-470 was subsequently modified since Walter, the modifications have no effect on the facts of this case. The purpose of § 44-53-470 is still the same – to enhance penalties for repeat offenders. The substantive change to § 44-53-470 in the 2005 amendment created ten year time limit within which you could consider a possession conviction for sentence enhancement. The substantive changes to § 44-53-470 in the 2010 amendment created different rules for all marijuana offenses, returning to include possession offenses as any other drug offense for enhancement purposes, and applying the ten year limit only to first offenses when a defendant is being considered a second offender. However, there were still no time limits with regard to second and subsequent offenses.

Regardless, the statement in Walters still holds true to § 44-53-470(A)(4) for third or subsequent offenses. The timing of the crimes is irrelevant so long as there is a prior conviction. Here, Petitioner has *at least* three prior qualifying drug convictions. The timing is irrelevant.

Petitioner cites Robinson v. State, 387 S.C. 568, 693 S.E.2d 402 (2010). In Robinson, the appellant pled guilty to four drug offenses on the same day – PWID crack and PWID crack

within proximity of a park or school committed on April 30, 1999, and possession of crack and possession of marijuana committed on February 17, 2000. Id. at 571, 693 S.E.2d at 403. Thereafter, Robinson was tried and convicted of trafficking in crack and PWID crack within the proximity of a college or university and sentenced as a third offender. Id. This Court affirmed the application of § 44-53-470 in sentencing Petitioner as a third offender. This Court found despite the fact Petitioner entered guilty pleas to incidents from two separate offense dates on the same day, the offenses that occurred later in time, possession of crack and possession of marijuana, constituted second offenses since Robinson was also convicted of PWID crack. Id. at 578, 693 S.E.2d at 407.

Petitioner distinguishes Robinson from the case at bar because Robinson's convictions were not over ten years old. However, § 44-53-470 did not have a ten year limit at the time Robinson was sentenced. Similarly, no ten year limit applies to the facts of Petitioner's case. Robinson reinforced the legislature's intent that repeat offenders must face more severe consequences. Although § 44-53-470 has been through numerous changes, the language remains plain and unambiguous, "[a]n offense is considered a second or subsequent offense if:[...] the offender has **at any time** been convicted of a second or subsequent violation of a controlled substance offense provision." S.C. Code Ann. § 44-53-470(A)(4) (Emphasis added). With various applications of the enhancement statute to Petitioner's case, depending on what convictions one believes exist (the record versus Petitioner's self-serving testimony), the outcome is the same, Petitioner was a third or subsequent offender. As such, his sentence is lawful and Counsel was not ineffective for not objecting to the imposition of a lawful sentence.

The PCR court did not err in denying Petitioner relief.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
S.C. Bar # 102524

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

October 19, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County
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The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

2015-CP-13-0061
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BILLY JOE GRIGGS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

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 in the United States mail, postage prepaid:

Tommy A. Thomas, Esquire
PO Box 88
Irmo, SC 29063

This 18th day of October, 2017

MALLORY MORRIS
Legal Assistant for Respondent