

The Supreme Court of South Carolina

Eric Joshua Turner,

Petitioner,

v.

State of South Carolina,


Respondent.

ORDER

Counsel has submitted a petition pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 210 (1988), and moves to be relieved. We deny the petition to be relieved and direct the parties to address the following question:

Was plea counsel ineffective for failing to object when the State breached the plea agreement by attacking petitioner's mitigation evidence during the plea hearing?

Petitioner shall serve and file a petition on this question within thirty (30) days of the date of this order. Thereafter, respondent shall have thirty (30) days to serve and file its return.


C. J.
FOR THE COURT

Columbia, South Carolina

March 29, 2012

cc: Appellate Defender Susan Barbar Hackett
Eric Joshua Turner #13068-071
Assistant Attorney General Karen Ratigan

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

RECEIVED

APR 29 2011

S.C. Supreme Court

ERIC JOSHUA TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

TRISTAN M. SHAFFER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

When petitioner provided assistance in the prosecution of his codefendants' cases, was plea counsel ineffective in failing to seek enforcement of a promise to renegotiate the State's recommended sentence if his information turned out to be useful?

STATEMENT

Procedural History

On August 22, 2006, petitioner pled guilty to 2 counts of trafficking methamphetamine and one count of trafficking marijuana before the Hon. Alexander Macaulay. App. 3. Petitioner was represented by Christopher Posey. App. 3. The State was represented by Susan Porter. Sentencing was deferred. At a sentencing hearing on November 19, 2007, petitioner was sentenced to 18 years concurrent for each charge. For that hearing the State was represented by Jennifer Evans. App. 19.

Petitioner filed for post conviction relief (PCR). The Judiciary hearing was heard on May 25, 2010 before the Hon. Robin Stilwell. App. 77. Petitioner was represented by Caroline Horlbeck, and the State was represented by Karen Ratigan. App. 77. The PCR court denied relief in an order dated August 2, 2010. App. 114-122.

This petition follows.

Factual History

Despite the fact that Petitioner was only 25 years old when he pled guilty in this case, Petitioner was a long-time marijuana user. He first smoked pot in sixth grade. He grew up in a home that overlooked his drug use if not facilitated it. App. 27, ll. 12-18. Petitioner dropped out of school after only finishing the ninth grade. App. 6, ll. 19.

In the years preceding his arrest, Petitioner associated with his brother John “Jay Jay” Turner. App. 13, ll. 25 – App. 14, l. 5. Jay Jay and his wife Kelly Turner were methamphetamine (meth) dealers. Jay Jay needed help transporting the meth from a lab; so, he began pushing the drug on Petitioner. App. 28, ll. 1-4. Once Petitioner became addicted to the drug, Jay Jay began using Petitioner as his drug “mule.” Petitioner would pick up the meth from

a lab and deliver them to Jay Jay. For transporting the meth, Jay Jay would quench Petitioner's cravings for the drug. Jay Jay became a rich man from distributing the meth petitioner transported; whereas Petitioner had nothing to show for the work he did for his brother other than a serious meth addiction. App. 10, l. 20 – App. 11, l. 2.

On March 18, 2005, Petitioner had just received some meth from Jay Jay to transport to Scotty Pope, but before delivering the meth Petitioner spent the night in a hotel room. App. 14, ll. 15 –18; App. 15, ll. 2-5; App. 138. A search warrant was executed on the hotel room. Law enforcement found 105 grams of Meth and 105 grams of Marijuana. App. 14, l. 24 – App. 15, l. 4. Petitioner was also in possession of a firearm¹. Petitioner began cooperating² with the State, but later stopped. Petitioner was charged with trafficking. Petitioner was also indicted for a federal firearms charge.

Around a week and half before the plea, plea counsel was hired to represent Petitioner. App. 82 l. 19 – App. 83, l. 7. At that point, Petitioner was not cooperating with the State's prosecution of "Operation Ice Cream." App. 83, l. 21 – App. 84, l. 1. Assistant Attorney General Susan Porter agreed to recommend Petitioner be sentenced to 18 years if he provided evidence against his codefendants. App. 103, ll. 19-25. Petitioner was planning on pleading to his federal firearms charge and wanted the state and federal sentences to run concurrent. Porter agreed to let Petitioner proceed with his state plea and defer sentencing. Porter promised plea counsel that she would "renegotiate" for a less than 18 year sentence if the information Petitioner provided turned out to be valuable. App. 84, ll. 12-15. Petitioner relied on Porter's oral promise

¹ This weapon was the basis of Petitioner's federal charge.

to renegotiate and pled guilty. After the plea, Petitioner provided the State with information and went into federal custody. App. 25, l. 22 – App. 26, l. 3.

Petitioner was scheduled to be sentenced for his State charges on November 19, 2007. A few days before the hearing, plea counsel spoke to Porter. Porter refused to renegotiate the plea, but she promised not to “hammer on the facts” or rebut his mitigation. App. 106, ll. 6-7.

At the sentencing hearing, plea counsel *never* asked the court to hold the State to their promise to “renegotiate” if the information became useful. Porter did not speak at the hearing and instead Jennifer Evans represented the State. Evans recommended 18 years and hammered on the large amount of weight involved in the case. App. 35, l. 12 – App. 37, l. 22. Plea counsel attempted to inform the sentencing court that Petitioner’s drug addiction made him a pawn in Jay Jay’s scheme, but Evans rebutted his mitigation once again hammering on the large quantities of meth. Petitioner was sentenced to the full 18 years.

In his PCR hearing, plea counsel testified to the following:

“[Porter] said ‘well, let’s go ahead and do the pleas, go ahead and sign the plea agreement and we will renegotiate if his information proves to be useful and valuable.’” App. 84, ll. 12-15.

To rebut this testimony the State called Porter and she gave the following testimony:

“Q. Was there any agreement that if he provided specific information about Kelly Turner that you would revisit that 18- year offer?

A. No. What was discussed between [plea counsel] and I is that, pursuant to his plea agreement, we would ask him to plead guilty, to testify against Kelly Turner. He was not the only individual that was going to testify against her. Her husband [Jay Jay] was also going to testify against her and some other individuals. But specifically, that was part of the original plea agreement.” App. 104, ll. 1-11.

² The State would later question his cooperation. App. 23 ll. 9-16

Then the State tried to broaden Porter's testimony to rebut if the recommendation was open to renegotiation for any reason. Porter failed to give an affirmative "no" to this question, instead she escaped the issue by saying:

"I said that [plea counsel] could argue. I expected him to argue for less than 18 years. But our recommendation would be 18 years."
App. 104, ll. 22-24.

Even though plea counsel testified to that Porter told him she would renegotiate and Porter did not directly address the issue of renegotiation, the PCR court found:

"Both plea counsel and Porter testified the recommendation was for eighteen (18) years and that a lesser sentence was never promised..."
App 119.

The PCR court denied relief.

ARGUMENT

Prior to his plea the State promised him they would renegotiate their sentencing recommendation if his information turned out to be helpful. After his plea, Petitioner became a witness for the State in "Operation Ice Cream." With petitioner's help, the State secured convictions on many of those involved in a substantial methamphetamine distribution ring in the upstate. However, when petitioner was to be sentenced, the State refused to honor its agreement and renegotiate their sentencing recommendation.

To establish a claim of ineffective assistance of counsel, Petitioner must prove that plea counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). However, it is *not* required that plea counsel's deficiency "more likely than not altered the outcome," Petitioner merely must show that the result "reasonably likely" would have been different. *See Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, 791 (2011). On review of a PCR claim, the PCR court's findings will be upheld if there is any evidence of probative value sufficient to support them. *See Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). When a petitioner presents sufficient evidence of a plea agreement, unless the State presents probative evidence showing an absence of a plea agreement, it is error for the PCR court to rely on the State's mere arguments that no plea agreement exist. *See Custodio v. State*, 373 S.C. 4, 12, 644 S.E.2d 36, 40 (2007).

The PCR court found that there was never a promise to renegotiate the State's recommendation. App. 119. However, there is no evidence of probative value to support this finding. Plea counsel clearly testified that Porter agreed to renegotiate the recommendation if

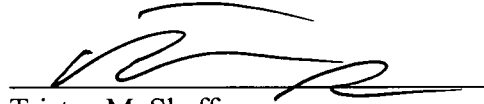
Petitioner's information turned out to be useful. App. 84, ll. 12-15. Porter's evasive answer concerning the issue is not evidence that the agreement was not made. Porter's statement that she told plea counsel he could argue for less than 18 does not mean she did not *also* tell him she would renegotiate. Porter never says that she did not tell plea counsel she would renegotiate the sentence. Therefore, there is no evidence the PCR court erroneously found that there was not agreement to renegotiate.

Even though plea counsel believed that Petitioner detrimentally relied on Porter's promise to renegotiate, he never asked the sentencing court for specific performance. Therefore plea counsel was ineffective and relief should have been granted. *See Custodio*, 373 S.C. at 12, 644 S.E.2d at 40.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that this court grant him relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tristan M. Shaffer', is written over a horizontal line.

Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of April, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

ERIC JOSHUA TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

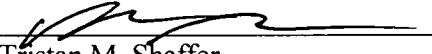
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Joshua Turner states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 25, 2010. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Eric Joshua Turner.

Respectfully submitted,


Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of April, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

ERIC JOSHUA TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and on Eric Joshua Turner, #307096, at Butner Low FCI, P.O. Box 999, Butner, NC 27509, this 29th day of April, 2011.



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of April, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.



ALAN WILSON
ATTORNEY GENERAL

May 2, 2011

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

RECEIVED

MAY -2 2011

S.C. Supreme Court

Re: Eric Joshua Turner v. State of South Carolina
2008-CP-23-8783

Dear Mr. Shearouse:

I am in receipt of the Petition for Writ of Certiorari in the above-captioned case which has been filed pursuant to the procedure set forth in Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Please accept this letter in lieu of a formal return. The Respondent has no objection to the Petition of Tristan M. Shaffer, Esquire to be relieved as counsel.

If a formal return is required, the Respondent requests an opportunity to brief the issues as requested by the Court.

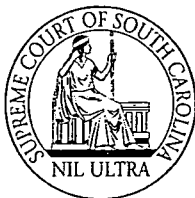
If there are any questions or comments, please feel free to contact me.

Sincerely,

Karen C. Ratigan
Assistant Attorney General

KCR/jacc

cc: Tristan M. Shaffer, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 2, 2011

Eric Joshua Turner #13068-071
Butner Low FCI
P O Box 999
Butner, NC 27509

Re: Turner, Eric Joshua v. The State

Dear Mr. Turner:

Your counsel has submitted a Petition for Writ of Certiorari indicating that this appeal is without merit and moves to be relieved as your counsel. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The records of this Court reflect that counsel served you with a copy of the Petition & Appendix on April 29, 2011.

You may, within forty-five (45) days of the date of this letter, file with this Court a pro se response to the Petition filed by your counsel. In this response, you may raise and argue any issues you believe the Court should consider in this appeal. Upon receipt of your pro se response or the expiration of forty-five (45) days, the matter will be submitted to the Court for its consideration.

If you do decide to file a pro se response, the response must be either typewritten or legibly hand printed, and must have at least a one inch margin on all sides. Further, you will need to only submit one copy of your response, and this copy should not be stapled or bound in any manner.

Very truly yours,

Daniel E. Shearouse
33

CLERK

DES/jj

cc: Appellate Defender Tristan M. Shaffer
Assistant Attorney General Karen Ratigan

The Supreme Court of South Carolina

Eric Joshua Turner, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Robin Stilwell
Greenville County
Trial Court Case No. 2008-CP-23-08783

ORDER

For good cause shown, the request for an extension until April 29, 2011 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Srenda J. Shealy*
Clerk
Chief Deputy

Columbia, South Carolina

March 31, 2011

cc: Appellate Defender Tristan M. Shaffer
Assistant Attorney General Karen Ratigan

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

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MAR 30 2011

S.C. Supreme Court

ERIC JOSHUA TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

3

The undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. Petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by two prior orders of this Court.

2. Counsel is filing the initial brief of appellant and designation of matter in the case of *State v. David A. Goins* today. Additionally, Counsel will be filing the petition for writ of certiorari and accompanying appendix in the case of *State v. Nathaniel Bradley* (in the COA) on Friday, April 1, 2011, and is working on the petition for writ of certiorari and accompanying appendix in the case of *Lorenzo Curry v. State*, also due on Friday, April 1, 2011. Counsel is also working on the initial brief of appellant and designation of matter in the case of *State v. Steven Burton*, due in one week. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Mykel*

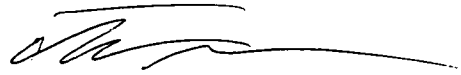
Watkins on March 21, 2011. Counsel filed the initial briefs of appellant and designations of matter in the cases of *State v. Terrelle Chandler* and *State v. Adrian Eaglin* on March 3, 2011. Counsel filed the return to petition for writ of certiorari in the case of *Ayree Henderson v. State* on February 21, 2011. Counsel filed the initial briefs of appellant and designations of matter in the cases of *State v. Willie Moore* and *State v. Norman Hayes* on February 7, 2011. Additionally, in January, 2011, Counsel filed the initial briefs of appellant and designations of matter in the cases of *State v. Jeremy J. McClinton* and *State v. Brian A. Clarke*. Also, in January, 2011, Counsel filed the petition for writ of certiorari and accompanying appendix in the case of *Colie Green v. State* as well as the return to petition for writ of certiorari in the case of *Constanzus Williams v. State*.

3. This request is made in good faith, and not for purposes of delay.

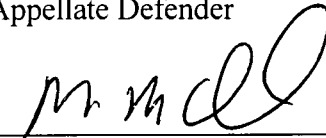
4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



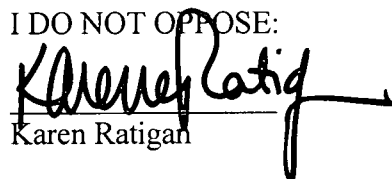
Tristan M. Shaffer
Appellate Defender



Robert M. Dudek
Chief Appellate Defender

March 30, 2011

I DO NOT OPPOSE:



Karen Ratigan

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

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FEB 28 2011

S.C. Supreme Court

ERIC JOSHUA TURNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

(2)

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. Petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one prior order of this Court.

2. Counsel plans to file the petition for writ of certiorari and accompanying appendix in the case of *State v. Nathaniel Noel Bradley* on Wednesday, March 2, 2011. Additionally, Counsel will be filing the initial briefs of appellant and designations of matter in the cases of *State v. Adrian Eaglin* and *State v. Terrelle Chandler* on Thursday,

March 3, 2011. Counsel filed the return to petition for writ of certiorari in the case of *Ayree Henderson v. State* on February 21, 2011. Counsel filed the initial briefs of appellant and designations of matter in the cases of *State v. Willie Moore* and *State v. Norman Hayes* on February 7, 2011. Counsel filed the initial brief of appellant and designation of matter in the case of *State v. Jeremy J. McClinton* on January 28, 2011. Counsel filed the initial brief of appellant of appellant and designation of matter in the case of *State v. Brian A. Clarke* on January 24, 2011. Also, Counsel filed the petition for writ of certiorari and accompanying appendix in the case of *Colie Green v. State* on January 21, 2011. Counsel filed the return to petition for writ of certiorari in the case of *Constanzus Williams v. State* on January 12, 2011.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Tristan M. Shaffer
Appellate Defender

February 28, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

ERIC JOSHUA TURNER,

PETITIONER,

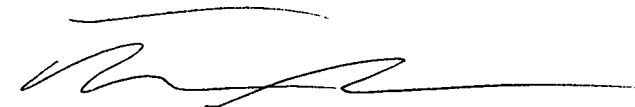
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

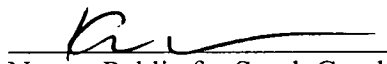
The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Karen Ratigan, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 28th day of February, 2011.



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of February, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

January 28, 2011

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JAN 28 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Eric Joshua Turner v. The State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Karen Ratigan, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Tristan M. Shaffer
Appellate Defender

TMS/kam

cc: Karen Ratigan, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

November 29, 2010

RECEIVED

NOV 29 2010

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Eric Joshua Turner v. State of South Carolina

11/29/2010

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

September 15, 2010

RECEIVED

SEP 15 2010

S.C. SUPREME COURT

Ms. Theresa Johnson
Circuit Court Reporter
Post Office Box 2812
Greenville, SC 29602

Dear Ms. Johnson:

Our office has been requested to perfect the appeal arising out of:

Eric Joshua Turner v. State of South Carolina Case #: 08-CP-23-08783

County: Greenville Date of Trial: May 25, 2010

Presiding Judge: Robin B. Stilwell

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

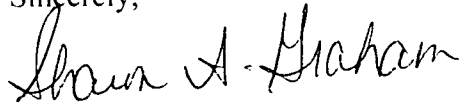
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Theresa Johnson
September 15, 2010
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Sharon A. Graham".

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court
Attorney General's Office

Law Office of Lawrence W. Crane

101 WHITSETT STREET
GREENVILLE, SOUTH CAROLINA 29601

LAWRENCE W. CRANE, ESQ.
ELIZABETH P. WIYGUL, ESQ.
CAROLINE M. HORLBECK, ESQ.

TELEPHONE (864) 235-2900
FAX (864) 467-1916
TOLL FREE (800) 852-0899

August 30, 2010

Via Regular Mail

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

RECEIVED

AUG 31 2010

S.C. SUPREME COURT

Re: ERIC J. TURNER v. State


Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,


Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA
In the Supreme Court

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENHAMER

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
THE HONORABLE Robin B. Stilwell

2010 AUG -9 A 11:26

CA No. 2008-CP-23-8783

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AUG 31 2010

S.C. SUPREME COURT

ERIC J. TURNER,

APPELLANT,

vs.

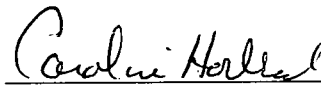
STATE OF SOUTH CAROLINA

RESPONDENT.

NOTICE OF APPEAL

Appellant ERIC J. TURNER, appeals from the Order of the Honorable Robin B. Stilwell Circuit Court Judge clocked August 4, 2010.

Respectfully submitted,



Caroline M. Horlbeck, Esq.
101 Whitsett St
Greenville, SC 29601

Date: August 9, 2010

Other Counsel of Record: Karen Ratigan, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE SUPREME COURT

Eric J. Turner)
)
)
Appellant,)

C.A. No. 2008-CP-23-8783

-vs-)

CERTIFICATE OF SERVICE

State of South Carolina,)
)
)
Respondent.)
_____)

This is to certify that I am an employee in the law office of Lawrence W. Crane, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French
S.C. Office of Appellate Defense
1205 Pendleton St., Suite 306
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Karen Ratigan, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211


Caroline M. Horlbeck

Greenville, South Carolina

Aug. 30, 2010

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP2308783

Eric Joshua Turner vs. South Carolina State

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AUG 31 2010

CHECK ONE:

S.C. SUPREME COURT

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

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BANKRUPTCY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 4th day of August, 2010, and a copy mailed first class this 4th day of August, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

✓ Caroline M.W. Horlbeck Law Offices Of Lawrence
W. Crane 101 Whitsett Street Greenville, SC 29601

Karen Ratigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Eric Joshua Turner,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2008-CP-23-8783

ORDER OF DISMISSAL

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 S.C. SUPREME COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 21, 2008. The Respondent made its return on April 2, 2009, and an amended return on September 11, 2009. An evidentiary hearing into the matter was held on May 25, 2010, at the Greenville County Courthouse. As the Applicant is in federal custody, he was not present at the hearing but was represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant's plea counsel, Christopher T. Posey, Esquire, testified at the hearing. Also testifying were the Applicant's father, John Turner, and the Chief of Prosecution for the State Grand Jury, Susan O. Porter, Esquire. The Court had before it transcripts of the guilty plea and sentencing hearings, the records of the State Grand Jury Clerk of Court, the application for post-conviction relief and the Respondent's amended return.

PROCEDURAL HISTORY

The Applicant is presently confined in the Federal Correctional Institution in Fort Dix, New Jersey. The Applicant was indicted at the December 2005 term of the State Grand Jury for trafficking methamphetamine (conspiracy) (2005-GS-47-21, count 1), trafficking

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methamphetamine, more than 100 grams (2005-GS-47-21, count 5), possession with intent to distribute (PWID) marijuana (2005-GS-47-21, count 6), and PWID marijuana within proximity of a school (2005-GS-47-21, count 7). He was represented by Christopher T. Posey, Esquire.

On August 22, 2006, the Applicant pled guilty before the Honorable Alexander S. Macaulay to two (2) counts of trafficking methamphetamines (28-100 grams), PWID marijuana, and PWID marijuana within proximity of a school. Sentencing was deferred to a later date.

On November 19, 2007, the Applicant appeared for sentencing. Judge Macaulay sentenced the Applicant to concurrent terms of eighteen (18) years on each count of trafficking methamphetamines, second offense and eighteen (18) years for PWID marijuana, third offense. Judge Macaulay also levied a consecutive sentence for PWID marijuana within proximity of a school of ten (10) years imprisonment, provided upon payment of costs and assessments the balance would be suspended with probation for five (5) years. These sentences were to be concurrent with the Applicant's federal sentence. The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. “[G]rossly underestimated Petitioner’s sentencing exposure.”
 - b. Failed “to offer the petitioner any advise or guidance as to the offer and its consequences.”
 - c. Failed “to bring to the court’s attention of the agreed sentence the parties reached with the prosecution prior to pleading guilty, and hold the government to its promised sentence of 10-12 years.”
2. Breach of the plea agreement.
3. Involuntary guilty plea:
 - a. Relied upon the promise of a 10-12 year sentence when he entered his guilty plea.
4. Unreasonable sentence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel/Involuntary Guilty Plea

The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant 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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct.

1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

Plea counsel testified he was retained 1-2 weeks before the plea hearing. Plea counsel testified he received the discovery materials and reviewed them with the Applicant. Plea counsel testified the Applicant initially refused to cooperate with the State. Plea counsel testified Susan Porter – the assistant attorney general in charge of this case – made a plea offer of eighteen (18) years that was contingent on the Applicant’s cooperation. Plea counsel stated he reviewed this offer with the Applicant. Plea counsel stated the Applicant agreed to cooperate against his sister-in-law, Kelly Turner. Plea counsel stated it was decided the Applicant would plead guilty and provide his assistance before he was sentenced. Plea counsel stated the Applicant cooperated with SLED regarding Kelly and would have testified against another co-defendant, but that individual pled guilty. Plea counsel testified that prior to the Applicant’s sentencing hearing, he tried to renegotiate the plea recommendation with Porter. Plea counsel testified Porter would not change the recommendation but agreed he could try and ask for a lesser sentence in court. Plea counsel testified Porter said the State would not rebut his mitigation. Plea counsel stated he asked the plea judge to levy a 10-12 year sentence but asserted he never told the Applicant he would receive a lesser sentence than that recommended. Plea counsel testified he did not say anything in mitigation that was not truthful, but that Jennifer Evans¹ (who was handling the plea while Porter was in the courtroom) then told the plea judge the Applicant was a bad person. Plea

¹ This Court notes that, at the time, Jennifer Evans was the Chief of Prosecution at the South Carolina Attorney General’s Office. As she passed away in 2009, she was unavailable to testify about her understanding of the agreement reached between plea counsel and the State.

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counsel stated both that Porter did not rein Evans in and that he did not object. Plea counsel admitted, however, that an objection would not have changed the outcome of the sentencing hearing.

John Turner, the Applicant's father, stated plea counsel told them there was "a good chance" the Applicant would receive a 10-12 year sentence if he cooperated with the State. John Turner stated plea counsel, however, did not promise this sentence.

Susan Porter testified on behalf of the State. While Porter is now the Chief of Prosecution at the South Carolina Attorney General's Office, she was the assistant attorney general in charge of prosecuting the Applicant's case (and the entire State Grand Jury operation). Porter testified she conveyed a plea recommendation of eighteen (18) years to plea counsel in April 2006. Porter testified that, prior to the plea hearing, she told the Applicant that he would receive the eighteen (18) year recommendation if he cooperated, was debriefed and would testify at subsequent trials. Porter stated she never said that if the Applicant provided information on Kelly, they would revisit his sentence. Porter stated she told plea counsel he could argue to the plea judge for a sentence less than the eighteen (18) year recommendation, but that the recommendation would not change. Porter stated that while she was present at the sentencing hearing, Jennifer Evans represented the State before the court. Porter stated plea counsel made comments in mitigation that were not supported by the facts and that Evans countered those comments. Porter testified she would have told Evans to back off if she believed Evans was too harsh. Porter testified, regardless, that Evans' comments did not preclude plea counsel from seeking a lesser sentence.

This Court notes that at the guilty plea hearing, the Applicant admitted to the plea judge both that he was guilty and that the facts recited by the State were true. (Guilty plea transcript,

p.11; p.16). The Applicant was advised of the maximum sentences he was facing. (Guilty plea transcript, pp.4-5; Sentencing transcript, p.4). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel and had not been coerced in any way. (Guilty plea transcript, pp.8-10; pp.12-13). The Applicant told the plea judge he was giving truthful answers. (Guilty plea transcript, p.16).


This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately explain the plea recommendation. Plea counsel testified he conveyed the eighteen (18) year plea offer to the Applicant. Plea counsel testified he explained to the Applicant that he would have to cooperate with the State in order for that recommendation to be in effect. Plea counsel also testified he told the Applicant he would have to finish serving his state time after his federal sentence was over. This Court finds plea counsel adequately explained the parameters of the eighteen (18) year recommendation to the Applicant. Cf. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). This Court notes that when the recommendation was noted at the sentencing hearing, the Applicant did not object. (Sentencing transcript, p.3; p.7). The Applicant's father even admitted that plea counsel planned to ask for a lesser sentence but that counsel never promised he would receive less than the eighteen (18) years.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have argued a breach of the plea agreement. This Court finds the State did not breach the plea agreement. The Applicant signed a written plea agreement before he pled guilty in which he promised to cooperate with the State. Both plea counsel and Porter testified the recommendation was for eighteen (18) years and that a lesser sentence was never promised to the Applicant. The eighteen (18) year recommendation was further stated on the record at the start of the sentencing

hearing. The terms, therefore, of the agreement were known to the Applicant. See, e.g., State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994) (holding plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement). The Applicant has failed to present any evidence that both parties agreed to sentence recommendation of 10-12 years. While plea counsel may have told the Applicant he would seek such a sentence, counsel testified he never promised the Applicant he would receive less than the eighteen (18) year recommendation. See Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000) (“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.”).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have objected to the State’s comments during the sentencing hearing. Porter and plea counsel had an agreement that while the State would not alter its eighteen (18) year recommendation, there would be no objection to plea counsel’s mitigation if it did not deviate from the facts and evidence. Evans recited the facts of the case and noted the eighteen (18) year recommendation. (Sentencing transcript, pp.5-8). The Applicant agreed with both. (Sentencing transcript, p.8). Plea counsel then provided a lengthy speech in mitigation. (Sentencing transcript, pp.9-17). Evans countered some of the points she perceived as inaccurate. (Sentencing transcript, pp.17-19). Porter testified plea counsel’s mitigation deviated from what they had agreed and that Evans’ comments in response were not inappropriate. This Court finds Porter’s testimony is credible. This Court finds there was no basis for plea counsel to have objected to Evans’ comments. Regardless, Petitioner – who absconded twice while on bond² – cannot prove he was

² Sentencing transcript, p.5.

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prejudiced by the lack of an objection to those comments. Petitioner entered his guilty plea with the full understanding that the State would recommend an eighteen (18) year sentence and that is the sentence he ultimately received.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant

prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

That the application for post-conviction relief be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 2 day of July, 2010.

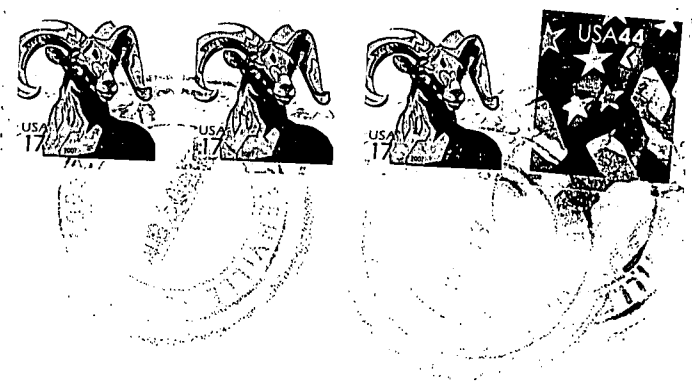


Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

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