STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Sumter County
George C. James, Circuit Court Judge

Appellate Case No. 2016-002319

BERNARD MCFADDEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

I. Did the PCR court properly grant Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the evidence showed that although trial counsel filed and served a notice of appeal at Petitioner's request, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR?

II. Did the PCR court properly rule Trial Counsel was not ineffective for failing to object to the admission of his prior conviction where Petitioner did not testify at trial and the prior conviction was not admitted to impeach him, so there was no resulting prejudice?

STATEMENT OF THE CASE

Bernard McFadden ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was true bill indicted at the February 2010 term of the Sumter County Grand Jury for second degree burglary (violent) (2010-GS-43-0257). Petitioner was represented by Willie Brunson, Esquire. Petitioner proceeded to a jury trial before the Honorable W. Jeffrey Young. Petitioner was found guilty as indicted. On November 19, 2010, Judge Young sentenced Petitioner to fifteen years' imprisonment.

A notice of appeal was filed December 15, 2010. The South Carolina Court of Appeals issued an Order of Dismissal on December 31, 2010 for failure to timely serve Notice of Appeal on Opposing Counsel. The remittitur was sent on February 7, 2011.

Petitioner filed a timely application for post-conviction relief on October 20, 2011, alleging that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
   a. Failure to object
   b. Failure to move to limit witness testimony
   c. Failure to investigate
   d. Failure to present additional witness testimony at trial
   e. Failure to properly cross-examine
2. Perjured testimony in violation of the 14th Amendment of the U.S. Constitution; and
3. Wrongly admitted prejudicial testimony in violation of the 14th Amendment of the U.S. Constitution and State v. Golf 525 S.E.2d 246 (S.C. 2000).

Respondent made its Return on May 11, 2012. An evidentiary hearing was convened on April 14, 2015, at the Sumter County Courthouse. Petitioner was present and proceeded *pro se* after relieving counsel Fulton Casey D. Cornwell, Esquire. Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office represented Respondent. At the

evidentiary hearing, Petitioner testified on his own behalf. Also testifying was Trial Counsel Willie Brunson, Esquire. The PCR Court had before it the records of the Sumter County Clerk of Court, the direct appeal records, Petitioner's records from the South Carolina Department of Corrections, the application, the Return, and the trial transcript. The Honorable George C. James, Jr., issued an Order of Dismissal signed October 11, 2016 and filed October 24, 2016, denying the application but granting a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner filed a timely Notice of Appeal on November 11, 2016. Petitioner's Appendix, Petition for Writ of Certiorari, and Anders Brief of Appellant Pursuant to White v. State were filed on September 18, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief 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 post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, *supra*. 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, (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, *supra*. The applicant must overcome this presumption to receive relief. Cherry, *supra*. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR court properly granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the evidence showed that although trial counsel filed and served a notice of appeal at Petitioner's request, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.

Respondent agrees with Petitioner's assertion that he is entitled to a belated review of direct appeal issues. The record indicates Trial Counsel did not file the notice of appeal in a timely manner as required by the appellate court rules. The PCR court found Petitioner's testimony that he told Trial Counsel he wanted to file an appeal was credible. Respondent does not oppose this finding on appeal.

II. The PCR Court properly found Trial Counsel was not ineffective for failing to object to the admission of Petitioner's prior conviction for impeachment where there is no prejudice because Petitioner did not testify at trial and the prior conviction was not admitted.

609(a)(1)

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to object to the admissibility of Petitioner's prior conviction and argue that the conviction was more prejudicial than probative. Petitioner claims that, if Trial Counsel had made this argument, the prior conviction would not have been admissible, and Petitioner would have testified at trial, which may have changed the outcome of the trial. However, probative evidence supports the PCR court's ruling that Trial Counsel was not ineffective for failing to make this argument because there is no prejudice where Petitioner did not testify at trial and the prior conviction was not admitted to impeach him.

Under Rule 609(a)(1) SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies at trial when "the court determines that the probative value of admitting this evidence outweighs its prejudicial value to the accused." Our Supreme Court has adopted a five-factor analysis for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id.

The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed absent an abuse of discretion. State v. Swafford, 375 S.C.

637, 640, 654 S.E.2d 297, 299 (Ct.App.2007) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). [1] To warrant reversal based on the admission of evidence, the complaining party must prove both the error of the ruling *and the resulting prejudice*. State v. Howard, 396 S.C. 173, 177–78, 720 S.E.2d 511, 514 (Ct. App. 2011) (citing Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)) (emphasis added).

In the present case, Petitioner was on trial for second degree burglary for entering a business at night with the intent to steal items from within. Petitioner had a prior conviction for first degree burglary and had been released from prison on this charge within ten years of the current trial. During the trial, Trial Counsel testified that he argued to the judge in chambers that the admission of the prior conviction was more prejudicial than probative because of its similarity to the current charge. App. 626-27. After the discussion, following a lunch break, the trial judge announced his ruling on the record that he would allow the prior conviction to be used for impeachment if Petitioner decided to testify at trial. App. 379. As the PCR noted in its Order of Dismissal, the trial court employed the five-factor balancing test enunciated in Colf, and "despite the fact that [Petitioner] was on trial for burglary, determined the prior burglary conviction would be admitted if [Petitioner] testified, presumably finding that the probative value of the conviction outweighed its prejudicial effect to [Petitioner]." App. 667. The record does not indicate that Trial Counsel objected to the judge's ruling at that time. Petitioner did not testify at trial, and because he did not testify, the prior conviction was not admitted to impeach him.

[1] Respondent also notes that the trial court's ruling that the prior conviction was admissible would very likely be upheld on appeal, had it been appealed, as Petitioner has shown no abuse of discretion, and the trial court covered the majority of the analysis of the Colf factors on the record at trial.

Although Trial Counsel opined at the PCR hearing that he "probably should have had the argument that we had in chambers again on the record to preserve the issue," App. 627, the PCR court held that Petitioner could show no prejudice from the judge's ruling because he did not testify at trial, so the prior conviction was not used against him. App. 668. The PCR court explained that "[Petitioner] must show prejudice; absent his trial testimony and the introduction of the burglary conviction to impeach his credibility, there is no showing of prejudice stemming from Trial Counsel's failure to argue [against the admission of the prior conviction]". App. 668. The PCR court properly relied on State v. Glenn, 285 S.C. 384, 330 S.E.2d 285 (1985) to support its ruling. Glenn held that "when the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review." Glenn at 385, 330 S.E.2d at 286.

Furthermore, even if Trial Counsel had objected to the admission of the prior conviction on the record, it is unlikely the trial judge would have accepted his argument and changed his ruling, as the testimony from the evidentiary hearing shows the issue was thoroughly argued in chambers, and the judge chose to rule that it was admissible. Additionally, even if Trial Counsel had objected on the record simply to preserve the issue for appellate review, the issue could not have been successful on direct appeal, either. As mentioned above, Glenn holds this issue is not preserved for appellate review where the defendant does not testify at trial. Finally, even if it were properly preserved for appellate review, Petitioner could still show no prejudice, as required by Howard and the preceding case law, because the prior conviction was not used to impeach him.

Another reason Petitioner cannot prove prejudice is the fact that he did not testify at the evidentiary hearing as to what his trial testimony would have been had he not "involuntarily waived" his right to testify. South Carolina Post-Conviction Relief case law requires an applicant to present the testimony of a favorable witness at the evidentiary hearing in order to prove prejudice resulting from that witness's failure to testify at trial. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding that in order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence; the applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.)

Although Petitioner at the evidentiary hearing touched on the subject of what his testimony at trial would have been, he did not present the exact testimony he would have given if he had taken the stand at trial. Petitioner explained:

> But that's, you know, that's something that I felt, you know, the judge should have ruled also that there was no prejudicial than probative. And as a result, I involuntarily waived my right to testify, you know, and explain that Culick had staged a crime scene, that Mr. McDonald had lied about me wanting to or seen blue lights flashing.

App. 577, line 7-13. Petitioner explained that he wanted to tell the jury about the errors in investigation and that the witnesses were lying, but he does not describe how he would have testified to do so. Without his exact testimony, the courts cannot speculate as to what he would have said had he testified at trial and what effect his testimony may have had on the jury or on the outcome of the case.

609(b)

Petitioner further argues the PCR court erred in ruling Trial Counsel was not ineffective for failing to challenge the calculation of his maxout date from prison for the sentence from his prior conviction. This argument is meritless, and was discussed and deemed meritless by both the trial judge and the PCR judge. App. 372-374; App. 533-534.

Rule 609(b) provides that evidence of a prior conviction to impeach a defendant "is not admissible if a period of more than ten years has elapsed since the date of the conviction *or of the release of the witness from the confinement imposed for that conviction*, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect" 609(b) SCRE (emphasis added). Petitioner argues that he was not given credit he was entitled to for time served on his prior 2002 conviction, and if he had been given the proper credit, his maxout date would have been corrected, and the prior conviction would no longer fall within ten years of the current trial. He argues that if Trial Counsel had "explored the credit for time served issue, the prior conviction could have been excluded." PWC 8.

Trial Counsel cannot be deficient for failing to "explore" this issue, as he did not represent Petitioner on the 2002 charge and had no ability to change or recalculate a sentence Petitioner had already served on a prior charge. More importantly, even if the records of his maxout date had been changed, it does not change the fact that Petitioner was released from prison on that charge within ten years of the current trial. The record before the Court supports this fact—Petitioner testified he was released from prison within ten years of the trial. App. 574. According to 609(b), because he was released from confinement for that conviction within ten

years of the trial, there was no issue of remoteness and the conviction was not excluded from being admitted under 609(a) SCRE.

The PCR court also extended its prejudice analysis to this allegation and ruled there was no prejudice for choosing not to investigate this issue, again because Petitioner did not testify at trial, and the prior conviction was not used to impeach him. App. 668 ("This Court can see no reason not to extend the rationale in Glenn to a PCR setting because the fact remains that Applicant must show prejudice; absent his trial testimony and the introduction of the burglary conviction to impeach his credibility, there is no showing of prejudice stemming from Trial Counsel's failure to argue the prior conviction was too remote in time to be introduced.").

Respondent asserts the PCR court's ruling are proper under South Carolina law and are supported by the record before the Court and the testimony presented at the evidentiary hearing. Because probative evidence supports the PCR court's rulings, and because the rulings are correct as a matter of law, this Court should affirm the lower court's ruling and deny the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: _____
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February 2, 2018

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

The Honorable George C. James, Circuit Court Judge

BERNARD MCFADDEN, #199135

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 2nd day of February 2018.

Chandra Squirewell

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ATTORNEY GENERAL

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S.C. SUPREME COURT

February 2, 2018

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

RE: **Bernard McFadden, #199135 v. State of South Carolina**
2016-002319

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: Taylor D. Gilliam, Esquire
Trisha Allen, Victim Advocacy (Letter Only)