

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge
2008-CP-40-7794

Gerald Smith,

Petitioner,

VS

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Probative evidence supports the PCR court's denial of relief where Petitioner failed to follow the plea bargain so counsel would be unable to enforce the agreement and where counsel's performance did not fall below professional norms and where the sentencing court took into consideration Petitioner's assistance and lack of assistance in his co-defendant's prosecution.

STATEMENT OF THE CASE

Petitioner pled guilty before the Honorable Clifton Newman on November 15, 2004. Sentencing was deferred at that time. Applicant then appeared before the Honorable Reginald Lloyd on October 13, 2005 and sentenced to twenty-seven years imprisonment. Plea counsel then filed a motion for reconsideration and after a hearing on the motion on October 19, 2005, Judge Lloyd lowered the sentence to twenty-four years imprisonment on October 20, 2005.

Petitioner appealed the conviction and sentence. The appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Smith, Op. No. 2008-UP-226.

Petitioner filed an application for post-conviction relief (PCR) on October 28, 2008. Following a hearing on the application on December 8, 2009, Judge Manning denied relief by order dated May 4, 2010. A subsequent Rule 59(e) motion was denied on June 10, 2010. Petitioner filed a petition for writ of certiorari and the State filed its return. This Court granted certiorari. The State's Brief of Respondent follows.

STATEMENT OF FACTS

Petitioner Smith was originally charged with murder. In exchange for allowing Smith to plead guilty to the lesser offense of voluntary manslaughter, Smith was to make a proffer to the prosecution. The sentence was deferred until the prosecution of the co-defendant. App. p. 3, lines 7-13.

Smith and his co-defendant were charged with the brutal death of their oxycontin dealer, H.B. Sharpe. Sharpe was struck in the head about a dozen times with a rebar (basically, an iron bar) found in his trailer. A neighbor saw a grey Toyota pickup truck. Ronnie Edwards, who found the dead body, suggested to law enforcement they should talk to Smith. Law enforcement checked Smith's DMV records and discovered that Smith owned a grey Toyota pickup truck. App. pp. 9-15.

Law enforcement was already on their way to interview Smith when Smith's co-defendant, Areheart, provided law enforcement with a tip. Areheart claimed Smith came over to his residence and started burning clothes and wanted to hide his truck in Areheart's garage. Smith explained he wanted to hide the truck because he claimed he had warrants for his arrest for bad checks. According to Areheart, they decided to buy oxycontin from Sharpe, but when they arrived, they encountered two men in a van who said Sharpe was shot. Smith "feaked out" and they went to check Smith out of his motel room, which was near Sharpe's residence. Then they went back to Areheart's residence. Smith was so upset that he drove erratically and hit a well. They needed to call a plumber to fix the problem. App. pp. 15-17.

The State indicated at the guilty plea that the plumber would verify he arrived to find something burning. Smith and Areheart told the plumber it was yard debris. App. p. 17.

Based on this information, law enforcement picked up Smith and towed his truck. Smith gave five statements to law enforcement. The first claiming no involvement, the second claiming that he drove Areheart to Sharpe's and waited outside. In the third, he put himself inside the trailer. In the last statement, Smith claimed Areheart started an argument with Sharpe because Sharpe would not sell him anymore Oxycontin. Smith admitted hitting Sharpe over the head with the rebar and then Areheart took over and killed Sharpe. App. pp. 17-19.

The proffer

Smith claimed at the proffer that he went to Sharpe's with Areheart, but was nervous about it because he knew that Areheart and Sharpe had some arguments in the past. When they arrived, Areheart got in an argument with Sharpe. Smith hit Sharpe and then Smith went outside. Then Areheart came out and was agitated as they rode in the truck to a bridge. Smith proffered that Areheart threw something out, that at the time, he thought was the weapon, but Smith was not sure it was the weapon. When they arrived back at Areheart's, Areheart proceeded to burn various items. Smith assumed they were Areheart's clothes because Areheart got blood on his clothes at Sharpe's trailer. App. pp. 20-25.

After Smith gave this narrative answer, he was examined by the prosecution. He read aloud his fifth statement to law enforcement in which he admitted hitting Sharpe

with the rebar. Areheart then hit Sharpe repeatedly with the rebar when he attempted to fight back. Areheart killed Sharpe. Areheart disposed of the rebar at a bridge. In the statement, Areheart burned the items. App. pp. 31-33.

Smith agreed that this written statement was correct, including the fact that he hit Sharpe with the rebar first. However, Smith told Judge Newman that when he hit Sharpe, it was not that hard, it did not do anything to Sharpe App. p. 36; pp. 42-44. This differed from Smith's fourth statement, in which he admitted hitting Sharpe real hard with the rebar. App. p. 59. Judge Newman accepted the plea and sentencing was deferred.

The sentencing hearing

At the sentencing hearing before Judge Lloyd, the prosecution advised Judge Lloyd that in preparation for trial, they met with Smith and discussed statements from other witnesses that conflicted with Smith's version of events. Smith then began to minimize his own role and placed the blame on Areheart, without demonstrating any problem recalling events. Consequently, Areheart's attorney filed a motion to exclude Smith's testimony and ultimately, the State felt they could not pursue a murder charge against Areheart and allowed him to plead guilty to accessory after the fact. The prosecution felt that Areheart had gotten away with murder due to Smith's unreliability. The prosecution noted Smith had some memory impairment due to his drug addiction, but felt that this was not a factor in Smith's continuously changing version of events. App. pp. 57-61.

The prosecution asked for the maximum sentence. App. p. 64. In response, counsel made a spirited argument that Smith was consistent with law enforcement about his involvement. App. 65-67. Counsel questioned the prosecution's charging decisions in regards to Areheart. App. p.p. 68-69. Smith apologized to the court. App. pp. 68-70. A member of the victim's family told Smith she forgave him. Judge Lloyd sentenced Smith to twenty-seven years imprisonment taking into consideration Smith's efforts to help the prosecution as well as the problems Smith caused with his co-defendant's case. App. p. 71.

The hearing on the motion for reconsideration

At the motion for reconsideration of Smith's sentence, Counsel advised Judge Lloyd that Sharpe kept the rebar to beat people who did not pay up for the illegal drugs. He was a gun-carrying drug dealer. App. p. 73. Counsel continued to argue that memory problems were what made trial preparation difficult, not Smith's willingness to cooperate. App. pp. 74-76.

The State argued in reply that they gave Smith the opportunity to come clean and he changed his version of events yet again in front of Judge Newman. The State observed the following:

Your Honor, I agree with Ms. Sampson that this oxycontin drug absolutely has an impact on people's recollection and ability to remember facts.

However, in this case, Your Honor, every time we would try to refresh his memory with statements provided by other witnesses, he would conveniently be able to remember that it was the co-defendant that did certain things, placing the blame on the co-defendant in certain matters.

And I just don't believe a jury would have believed him. We provided him with every opportunity to fulfill his end of the agreement. . . .

App. p. 86, lines 15-22.

Judge Lloyd sagely discussed his quandary:

Everybody says that – with all due respect about justice and all, I've got a dead person, quite literally, that had his skull caved in, and two defendants who were there, who admit to being there, whose ability to recount what happened either against the other or for their own personal benefit is somewhat impeded by their level of drug use.

App. p. 84, lines 14-20.

Judge Lloyd, who obviously gave the matter serious consideration, called the case the next day and reduced the sentence by three years. In so doing, noted: “[T]his is still a heinous act. And a lot of the circumstances of why we're here now and what you're complaining about is due to your own fault.” App. p. 85, lines 19-22.

The PCR hearing

At the PCR hearing, counsel's testimony reflected that she remained partial to her client, but nonetheless counsel agreed that “when he proffered, there was problems.” App. p. 160, lines 15-24.

Counsel was agreeable to have sentencing in front of Judge Lloyd because she had two clients in the past plead before Judge Lloyd where the victim was a drug dealer. They received lower sentences. Counsel understood that Judge Lloyd's view was that “because they were drug dealers . . . they were going to take that chance at being involved in illegal activity, then that's what they get, that was his perspective.” App. p. 168, lines 1-5.

Counsel testified she was surprised when they asked for the maximum, but explained: “I didn’t expect that, but when they did it, I remember going, well, I guess they don’t have to go along with their plea deal because he was not able to go along with his part of it.” App. p. 169, lines 13-20. Counsel recalled chambers meetings where the judge was advised that the original plea agreement was an open plea in which the State was not going to take a position. App. p. 171.

ARGUMENT

Probative evidence supports the PCR court’s denial of relief where Petitioner failed to follow the plea bargain so counsel would be unable to enforce the agreement and where counsel’s performance did not fall below professional norms and where the sentencing court took into consideration Petitioner’s assistance and lack of assistance in his co-defendant’s prosecution.

Smith alleges the PCR court erred in denying relief on the grounds that counsel was ineffective for failing to enforce the plea agreement. However, as counsel testified, she considered the matter and decided that the State was correct about his violation of the plea agreement. App. p. 169, lines 13-20. Accordingly, the record supports that she did not attempt to enforce the plea agreement as a matter of trial strategy and reasonable professional judgment.

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. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The proper measure of attorney performance is reasonableness

under professional norms. Id. In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Id. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Strickland).

"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

In Strickland, the United States Supreme Court declared:

. . . a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is,

the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

In the instant case, the plea agreement was no longer enforceable due to Smith's continuously changing version of events where his culpability waxed and waned. Counsel instead took a tact that maximized the mitigating aspects of Smith's conduct, emphasized the less than savory character of the victim, and minimized Smith's credibility issues.

Counsel provided effective representation in relaying Smith's alleged memory issues, the mitigating factors involved, and his cooperation in making a motion for reconsideration. Counsel's motion for reconsideration was successful as Judge Lloyd lowered the sentence by three years. Counsel also leveraged her experience with Judge Lloyd to pursue a strategy that emphasized that Sharpe was a drug dealer because she was aware Judge Lloyd apparently took a position that violence was an assumption of the risk for those in the illegal narcotics trade and therefore, sentences would be lower for those who did commit acts of violence on drug dealers. That Judge Lloyd did not stick to this reasoning with Smith does not diminish her excellent trial strategy otherwise.

Further, Smith was not prejudiced. It is apparent, based on Judge Lloyd's comments at the motion for reconsideration, that he would consider the plea agreement breeched by Smith's inconsistent statements during the proffer and trial preparation. Indeed, it appears Judge Lloyd was made aware of the prior agreement. App. p. 171. Additionally, Smith failed to show there was a reasonable probability the result would

have been different had counsel brought the matter to Judge Lloyd's attention during the sentencing or reconsideration hearings. Finally, the PCR court found Smith's testimony that but for counsel's alleged deficiency, he would not have pled guilty but gone to trial. App. pp. 207-210. Therefore, probative evidence supports the PCR court's findings. Cherry v. State, 300 S.C 115, 386 S.E.2d 624 (1989).

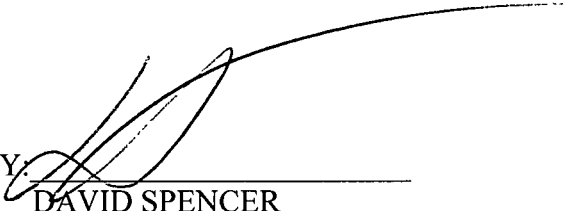
CONCLUSION

For all of the foregoing reasons, this Court should affirm the PCR court's denial of relief.

Respectfully submitted,

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June 21, 2013

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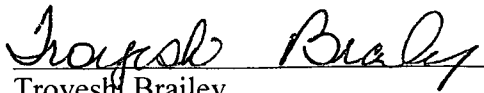
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 21th day of June, 2013


Troyesh Brailey
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