STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

RECEIVED
MAY 30 2018
S.C. SUPREME COURT

Appellate Case No. 2017-001684

Gregory Daniel Price — Petitioner,

v.

State of South Carolina — Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny Petitioner's application for relief where Petitioner alleged plea counsel failed to secure credit for time served in Maryland while facing Maryland charges for attempted first-degree murder, first-degree assault, and armed robbery?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the May 2009 term of the Spartanburg County Grand Jury for possession of cocaine base (2009-GS-42-02694) and two counts of distribution of cocaine base (2009-GS-42-02697, -02698).

Petitioner secured release on bond on terms filed with the Spartanburg County Clerk of Court on February 16, 2009. Petitioner thereafter left the state. Petitioner failed to appear in Court and a bench warrant was issued for his arrest on February 8, 2012. (Appx. 102). He was arrested in Howard County, Maryland on July 24, 2013, for conduct occurring in that state.[1] (Appx. 74; 103-10). The Maryland charges were dismissed on May 19, 2014, at which time Petitioner was served a warrant for his fugitive status in South Carolina. (Appx. 76, ll. 2-7). Petitioner waived extradition on May 20, 2014, and was thereafter transported to South Carolina on June 4, 2014. (Appx. 76, ll. 8-16).

Petitioner was subsequently charged with two counts of forgery, value less than $10,000 (2015-GS-42-02773, -02775). James A. Cheek, Esquire, represented Petitioner, and Grady B. Anthony, of the Seventh Circuit Solicitor's Office, prosecuted the case.

On August 4, 2015, Petitioner waived presentment and pled guilty to the forgery charges.[2] Petitioner also pled guilty to possession of cocaine base. Finally, Petitioner entered an Alford[3] plea to both counts of distribution of cocaine base. The Honorable L. Casey Manning sentenced Petitioner to imprisonment for concurrent terms of seven years for each count of

---

[1] To wit: attempted first-degree murder, first-degree assault, armed robbery. (Appx. 103).
[2] Applicant was sentenced pursuant to the law as it existed at the time the crimes were committed: December 2009. Accordingly, Applicant pled to forgery, value less than $5,000.
[3] North Carolina v. Alford, 400 U.S. 25 (1970).

distribution and five years on each of the other charges.[4] Petitioner did not appeal his pleas or sentences.

Petitioner filed his application for post-conviction relief on July 6, 2016 (2016-CP-42-02489). He alleged the following grounds for relief in his application:

1. Ineffective Assistance of Counsel, in that:
    a. "Plea counsel made erroneous prejudicial statement to Judge Manning, stating that Applicant had been running for 7 years."
    b. "Applicant only received partial credit for 446 days credit due to the lack of plea counsel's investigation and overall ineffectiveness in presenting to the Court that Applicant has been in pre-trial detention since July 24, 2013 and held on detainers until August 4, 2015."
    c. "Plea counsel was aware of State's recommendation of 0-10 year plea offer. However, plea counsel never relayed plea offer to Applicant[.]"
    d. "Plea counsel understood that Applicant never received his Rule 5 (motion for discovery) and but for this, Applicant would not have [pled] guilty. [] Plea counsel failed to effectively represent Applicant by not relaying this denial of due process to Judge Manning in [mitigation] of sentencing."
2. "Denial of Due Process"

Respondent made its return on May 1, 2017, and an evidentiary hearing into the matter was convened on June 26, 2017, before the Honorable Robin B. Stilwell. Applicant was present at the hearing and represented by Susannah C. Ross, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and James A. Cheek, Esq., also testified. By written order dated July 27, 2017, and filed July 28, 2017, Judge Stilwell denied and dismissed the application.

This appeal follows.

[4] Assuming no extraordinary haste by the Supreme Court, Petitioner will no longer be in custody by the time it considers this matter.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, ___, 810 S.E.2d 836, 389 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. 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, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE PETITIONER IS NOT ENTITLED TO CREDIT FOR TIME SERVED IN MARYLAND SUBJECT TO CHARGES INCURRED IN MARYLAND WHILE FUGITIVE FROM SOUTH CAROLINA, AND BECAUSE COUNSEL ARTICULATED A STRATEGIC BASIS FOR NOT SEEKING TIME CREDIT THAT WOULD HAVE BEEN CONTESTED BY THE STATE

Where a defendant skips bail and, years later, is denied bond from serious charges in another state, that defendant is not entitled to apply that period of pre-trial incarceration against his anticipated future term of confinement for charges he faces in South Carolina; as such, Petitioner was entitled to credit for only 476 days of pre-trial incarceration and the PCR court properly denied relief where Counsel did not ask for the 299 days spent in jail in Maryland.

A convicted person's entitlement to credit for time served is set forth by statute:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence.
>
> In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest.
>
> Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (paragraph breaks added). Primary to the determination of time served is the question of when an incarcerated person commenced the service of his or her

sentence. See Robinson v. State, 329 S.C. 65, 68, 495 S.E.2d 433, 435 (1998) (Court first endeavors to determine when a convict commenced the service of his sentence where he sought credit for time served in federal custody). A person commences service of their sentence when they submit to the custody of the South Carolina Department of Corrections. Id. An incarcerated person may constructively be in SCDC custody where he or she is held in another jurisdiction pursuant to a detainer. Id. at 71, 495 S.E.2d at 436-37; cf. Delahoussaye v. State, 369 S.C. 522, 633 S.E.2d 522 (2006) (holding escapee not entitled to credit regardless of detainer). Foreign jurisdictions are without authority to modify or place conditions on a sentence imposed in South Carolina, and vice-versa. Robinson, 329 S.C. at 68-69, 495 S.E.2d at 435.

South Carolina courts have repeatedly ruled against granting convicts credit for time served in other jurisdictions for crimes committed in those jurisdictions. See Id. (convicted in federal district court in Illinois while out on S.C. appeal bond); State v. Furman, 288 S.C. 243, 341 S.E.2d 795 (1986) (overruled in part by Robinson) (convicted in Georgia while out on S.C. appeal bond); Oglesby v. Leeke, 263 S.C. 283, 210 S.E.2d 232 (1974) (escapee convicted in New York); Delahoussaye, supra (escapee convicted in federal district court in Georgia).

Petitioner received credit for 446 days of pre-sentence incarceration. As already set forth to some extent in the statement of the case, Petitioner's timeline of pre-trial incarceration is as reflected below:

- 1/13/2009 – Petitioner arrested in Spartanburg County, charged
- 2/16/2009 **(34 days later)** – Petitioner bonds out
- 2/08/2012 (1087 days later) – Petitioner fails to appear, bench warrant issued
- 7/24/2013 (532 days later) – Petitioner arrested in Maryland on Maryland charges
- 5/19/2014 *(299 days later)* – Petitioner's Maryland charges dismissed, bench warrant served
- 5/20/2014 **(1 day later)** – Petitioner waives extradition
- 6/04/2014 **(15 days later)** – Petitioner transported to South Carolina
- 8/04/2015 **(426 days later)** – Petitioner pleads

Respondent does not contest that Petitioner was entitled to the durations set forth above in bold text, totaling 442 days after his Maryland charges were dismissed, as well as 34 days before he originally made bond, for a total time served credit of 476 days.[5]

As to the 299 days served in Maryland, Petitioner could only be entitled to credit for that service where he was subject to a South Carolina detainer during that period. The evidence in the record shows Petitioner was not served the bench warrant for his flight from South Carolina until May 19, 2014. As such, contrary to Petitioner's not credible assertions, he was not subject to any detainer until that time and thus not in the constructive custody of SCDC until that time. Prior to May 19, 2014, Petitioner was only held in Maryland's custody because he was charged with exceedingly serious crimes of violence occurring in that state and was very clearly a flight risk, such that bond was appropriately denied. That those charges were later dismissed in Maryland is irrelevant.

It would be a novel rule which would allow a defendant facing charges in one state to abscond to another state and there perpetuate criminal activity secure in the knowledge that any potential sentences incurred as a result could be set-off against those he might face from his prior actions, in effect enjoying a discount rate for criminal enterprise. See also Delahoussaye, 369 S.C. at 529, 633 S.E.2d at 162 ("it would be a novel rule which would allow a sentenced criminal, by the simple expedient of escape, to select the state in which he wishes to serve his incarceration."). Petitioner's argued position would do precisely that, which cannot possibly be the intended purpose of the statute. See State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008) ("A statute's language must be construed in light of the intended purpose of the statute.

[5] The 34 days of pre-bond detention are not the subject of Petitioner's appeal, though it appears they were erroneously not fully included in the calculation of Petitioner's due credit. The undersigned has raised this issue separately to Petitioner's appellate counsel and the Seventh Circuit Solicitor's Office for appropriate correction.

Whenever possible, legislative intent should be found in the plain language of the statute itself.").

Petitioner argues the present matter resembles that considered in Allen v. State, 339 S.C. 393, 529 S.E.2d 541 (2000). The Court in Allen considered credit for pre-trial incarceration arising out of multiple charges and arrests which all occurred in South Carolina. It is entirely inapplicable to the present question before the Court. Petitioner also argues he would not have pled guilty but for plea counsel's assurances that he would have received credit for time served in Maryland, but the cited portion of the appendix makes no mention of Maryland, but only "credit for time served" in a general sense. (Appx. 68, ll. 2-9).

Finally, plea counsel clearly articulated his strategic considerations in weighing whether to ask for the 299 days in question:

> Q. Do you think Mr. Price would have gotten more time for – more credit for time served if you'd [asked] for more?
>
> A. The State would have objected to it. It would have been a legal issue at that time back and forth. With his behaviors and being arrested in Maryland, out of the State of South Carolina without permission to be leaving the state, serious charges, I felt that the Judge would not give him that time. And I felt it would be better to just try to plead for God's grace and mercy as opposed to trying to depend upon any kind of legal argument for The Court on any kind of additional credit for time. Because he wasn't supposed to be in custody in Maryland on any charges. He was supposed to be in the State of South Carolina, working and getting ready and preparing for court.

(Appx. 93-94). Counsel's articulated strategic decision to ditch a potential legal argument in favor of presenting a maximally remorseful plea is entitled to deference and, as such, his conduct should not be deemed ineffective assistance of counsel. See Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

May 30, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-001684

Gregory D. Price, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Johnny Ellis James Jr., certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Victor R. Seeger, Esquire
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 30th day of May, 2018.

Johnny Ellis James Jr.
S.C. Bar # 101260
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

May 30, 2018

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

Re: **Gregory D. Price, #240729 v. State of South Carolina**
Appellate Case No.: 2017-001684
Lower Court Case: 2016-CP-42-2489

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

Johnny Ellis James Jr.
Assistant Attorney General
SC Bar #101260

JEJ/lm
Enclosures

cc: Victor R. Seeger, Esquire
Trisha Allen, Director - Victim Advocacy Division