

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002238

WILLIAM ANDREW LEE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION OF CERTIORARI
PURSUANT TO AUSTIN v. STATE**

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S.C. SUPREME COURT

ATTORNEYS FOR RESPONDENT

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Because Petitioner failed to establish that his trial counsel’s failure to move for a reconsideration of sentence was ineffective assistance of counsel, the post-conviction relief court properly denied relief.

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STATEMENT OF ISSUE

Did the post-conviction relief court properly deny post-conviction relief to Petitioner for failing to establish trial counsel was constitutionally ineffective for not moving for a reconsideration of sentence when Petitioner's co-defendant subsequently received a lesser sentence?

STATEMENT OF THE CASE

On January 8, 2008, Petitioner William Andrew Lee arrived at a car wash in Spartanburg County, South Carolina. (App. p. 81). While there, Petitioner and Mr. Darrell Ray attempted to rob a customer of the car wash at gunpoint. (App. p. 82). The victim, Mr. Harvey Wells, was also armed and was able to prevent the robbery. (App. p. 81). During the incident, Mr. Wells was shot at least twice. (App. p. 82). After calling 9-1-1 and giving information to identify his assailants, Mr. Wells died from his injuries. (App. p. 82). Mr. Ray surrendered himself to law enforcement on January 10th, leading to the eventual arrest of Petitioner. (App. p. 343). Petitioner admitted to being at the scene, but indicated that it was Mr. Ray who attempted to rob and shot the victim. (App. p. 85-86).

During its May 2008 term, the Spartanburg County Grand Jury indicted Petitioner for attempted armed robbery (2008-GS-42-2432) and murder (2008-GS-42-2433). (App. p. 481-486). Deputy Solicitor Derrick Balsa represented the State of South Carolina at trial. (App. p. 1). Petitioner was represented by Mr. Frank Adams, Esquire. (App. p. 1). The State presented that Petitioner was guilty under “the hand of one, hand of all.”(App. p. 82-83). The trial began on February 2, 2009, before the Honorable Thomas A. Russo of the South Carolina Circuit Court. (App. p. 1). During trial, Petitioner’s co-defendant testified on behalf of the State. (App. p. 188).

On February 3, 2009, Petitioner was convicted by a jury for murder and attempted robbery. (App. p. 320). Petitioner was sentenced immediately following his conviction by Judge Russo. (App. p. 321). During the sentencing hearing, Judge Russo stated the following concerning Petitioner’s possession of a gun during the crime:

THE COURT: And I’m going to consider the fact that, at least as far the evidence presented, that - - that you were not armed yourself when this occurred, and that you did not fire the - - shots which killed Mr. [Wells].

(App. p. 324). Judge Russo followed up this assertion with the following clarification:

THE COURT: But, when you decide that you're going to commit a crime, and you decide you're going to steal from somebody - - and that's just the whole theory behind the hand of one being the hand of all.

If two people are going to rob a store, and one person kills the clerk, they're both guilty of murder. And this is just a textbook case of that.

But I'm going to take into consideration that you didn't fire the fatal shot, nor were you armed during the commission of the crime. ***And that's the only thing that - - that prevents me from - - from just giving you a straight life sentence.***

(App. p. 324-325)(emphasis added). Petitioner was sentenced to thirty-five (35) years for murder and ten (10) years for attempted armed robbery. (App. p. 325). The two terms were ordered to run consecutively. (App. p. 326).

Petitioner filed a timely notice of appeal and was represented by Senior Appellate Defender Joseph L. Savitz, III of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. In an unpublished opinion, The South Carolina Court of Appeals affirmed Petitioner's conviction. (App. p. 356). The Remittitur was sent on August 2, 2011. (App. p. 358).

On April 3, 2012, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of trial and appellate counsel. (App. p. 368) Respondent made its return on February 26, 2013, requesting an evidentiary hearing. (App. p. 369-374). Petitioner filed an amended application for post-conviction relief on March 11, 2013, alleging ineffective assistance of trial counsel based upon, in part, on "trial counsel's failure to petition the Court for Motion to Reconsider."¹ (App. p. 375-376).

¹ Petitioner included five (5) allegations of ineffective assistance of counsel in his March 11, 2013, amended application for post-conviction relief. All were denied, but only the "failure to petition the Court for Motion to Reconsider" allegation is being presented in the petition for writ of certiorari.

On June 27, 2013, an evidentiary hearing was held on Petitioner's application before the Honorable R. Lawton McIntosh, Circuit Court Judge. (App. p. 377). Petitioner was represented by Kenneth P. Shabel, Esquire. (App. p. 377). At the hearing, Petitioner testified on his own behalf. (App. p. 381-405). Petitioner's trial counsel, testified on behalf of Respondent. (App. p. 405-417). At the hearing, Petitioner testified that his co-defendant was sentenced after Petitioner's trial. (App. p. 387). The co-defendant received a sentence of thirty (30) years for murder and twenty (20) years for attempted armed robbery, concurrent. (App. p. 489-490). Petitioner's trial counsel testified that he does not file a motion for reconsideration of sentence as a standard practice and he did not have a reason to file one on behalf of Petitioner. (App. p. 411-412). There was no testimony presented at the evidentiary hearing that Petitioner requested his trial counsel to file a motion for reconsideration of his sentence at any time.

By written order of dismissal signed September 25, 2013, the post-conviction relief court denied and dismissed the application, finding Petitioner failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of Petitioner. (App. p. 435). The post-conviction relief court also found Petitioner was not prejudiced by trial counsel's performance, finding no evidence that the outcome of the proceedings would have changed based upon any of the allegations of deficiency.

Petitioner filed a second application for post-conviction relief on June 26, 2014, alleging ineffective assistance of PCR counsel, based upon, in part, counsel's "failure to seek appellate review on first application/order of dismissal."² (App. p. 450-451). Respondent filed its Return and Partial Motion to Dismiss on November 18, 2016. (App. p. 450-455). An evidentiary hearing

² In his second application for PCR, Petitioner also included allegations of ineffective assistance against his trial and appellate counsel. These allegations were denied and have not been presented in this petition for writ of certiorari.

was held in front of the Honorable Edward W. Miller, Circuit Court Judge, on February 1, 2017, in Spartanburg County, South Carolina. (App. p. 456). By written order submitted on September 28, 2017, Judge Miller ruled Petitioner was entitled to a direct appeal of his previous post-conviction relief application. (citing Austin v. State, 305 S.C. 453 (1991)) (App. p. 456).³

³ Respondent is not challenging the grant of belated appellate review pursuant to Austin v. State.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts trial counsel was constitutionally ineffective for failing to move for a reconsideration of his sentence. However, the post-conviction court properly denied Petitioner relief, as Petitioner presented no evidence of deficiency on the part of his trial counsel and no evidence that Petitioner was prejudiced by his trial counsel's performance.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant 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). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C.

at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner asserts the trial court exercised its discretion in sentencing arbitrarily, or for reasons clearly untenable or unreasonable. Petitioner asserts that during the sentencing hearing, the trial court's comments on Petitioner's actual involvement in the incident was an indication that the Petitioner would receive a lighter sentence. Two days after Petitioner was sentenced, his co-defendant received a sentence from the same circuit court judge that would result in fifteen (15) fewer years of confinement than his own. Petitioner asserts that when trial counsel failed to make a motion for reconsideration of his sentence based upon his co-defendant's lighter sentence, trial counsel was deficient and prejudice the Petitioner.

Petitioner believes that he is in a similar situation as the defendant in Boan, and has suffered a violation of due process. Boan v. State, 388 S.C. 272 (2010). In Boan, the trial court made an oral pronouncement, on the record, that he would be sentencing Defendant to twenty (20) years of incarceration, but later issued a written order sentencing Defendant to thirty (30) years. Id. The South Carolina Supreme Court held that trial counsel's failure to make a motion for clarification of sentence was deficient performance, and the mistake by the judge prejudiced the Defendant. Id.

Petitioner was convicted of murder and attempted armed robbery. For his murder conviction, Petitioner was subject to S.C. Code § 16-03-20 (A), which carries a sentencing range of a minimum thirty (30) years to life imprisonment. For his attempted armed robbery conviction, Petitioner was subject to S.C. Code § 16-11-330 (B), which carries a sentencing range of not more than twenty (20) years imprisonment. Both sentences were within the statutory limitations for the

specific crimes. There is no evidence that the trial court gave any indication of what sentence Petitioner was going to receive. The trial court indicated that the fact Petitioner was not the shooter was the only thing preventing Petitioner from receiving a life sentence. For the murder conviction, the trial court gave the petitioner just five (5) years above the mandatory minimum sentence and well within the statutory sentencing range. There is no evidence that the trial court made a mistake while sentencing Petitioner, as was the case in Boan.

As for trial counsel's failure to make a motion for reconsideration, Petitioner has not shown that had trial counsel made a post-trial motion, there is a reasonable probability that his sentence would have been different. The trial court was thorough in his analysis of the Petitioner's case and during the sentencing hearing, the trial court commented multiple times that he would be taking into consideration that Petitioner was not the shooter. The trial court went as far as to say it believed that "it wasn't [Petitioner's] intention for somebody to be killed."

In its order for denying relief, the post-conviction relief court found the Petitioner failed to meet his burden of proof. The post-conviction relief court found that trial counsel was not required to file a motion for reconsideration and the Petitioner failed to establish any prejudice. This finding is supported by the record and should be given great deference by this Court. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (noting appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them); Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating where matters of credibility are involved, appellate courts give deference to the PCR court's findings because the PCR court has "the opportunity to directly observe the [PCR] witnesses"). Therefore, the post-conviction relief court properly denied relief.

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,

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July 3, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002238

William Andrew Lee,.....Petitioner,

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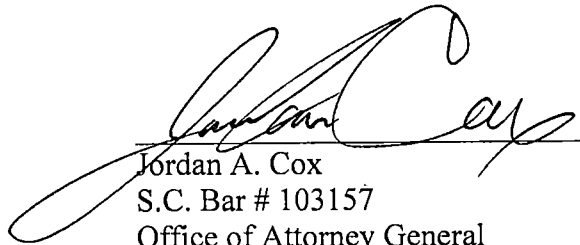
State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Joanna K. Delany, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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This 3rd day of July, 2018.



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July 3, 2018

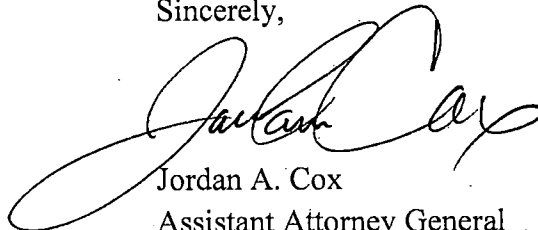
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
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Re: William Andrew Lee, #313779 v. State of South Carolina
Appellate Case No.: 2017-002238
Lower Court Case: 2014-CP-42-2508

Dear Mr. Shearouse:

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

Sincerely,



Jordan A. Cox
Assistant Attorney General
SC Bar #103157

JAC/lm
Enclosures

cc: Joanna K. Delany, Esquire
Trisha Allen, Director - Victim Advocacy Division

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