

RECEIVED

SEP 20 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2016-CP-02-1894

Kenneth Bryant Evans II, #308918, Appellant,

v.

State of South Carolina, Respondent.

PETITION FOR A WRIT OF CERTIORARI

Robert R. Thuss, Esq.
Thuss Law Office LLC
7001 St. Andrews Rd. #193
Columbia, SC 29212
(803) 640-1000
Attorney for Petitioner

Other Counsel of Record:
Julie A. Coleman, Esq.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
803 734-3737
Attorney for Respondent

INDEX

Questions Presented 1

Statement of the Case 1

Argument

 I. Counsel was ineffective in failing to move for reconsideration or to withdraw the
 plea 3

 II. Counsel was ineffective in failing to prepare a defense, and failing to meet with
 and spend sufficient time with Petitioner to prepare a defense 6

Conclusion.....10

QUESTIONS PRESENTED

1. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to move to withdraw the plea or to move for reconsideration of the plea?
2. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in properly preparing a defense, and failing to meet with and spend sufficient time with the petitioner to prepare a defense?

STATEMENT OF THE CASE

Petitioner was indicted by the January 2016 term of the Aiken County Grand Jury for Possession of a Weapon During Commission of a Violent Crime (2016-GS-02-00017), Trafficking Methamphetamine (2016-GS-02-00018), Possession of a Pistol with an Obliterated Serial Number (2016-GS-02-00019), Unlawful Carrying of a Pistol (2016-GS-02-0020), and Harassment, first degree (2016-GS-02-0021). On April 14th, 2016, the petitioner pled guilty to Harassment, second degree, Trafficking Methamphetamine, 28-100 grams second offense, and Possession of a Pistol with an Obliterated Serial Number. The remaining charges were *nolle proseed*. Applicant was sentenced to sixteen years' imprisonment for trafficking methamphetamine, five years' imprisonment for possession of a pistol with an obliterated serial number, and thirty days' imprisonment for harassment, to run concurrently. On April 19th, 2016, Petitioner timely filed a notice of appeal. The South Carolina Court of Appeals dismissed the appeal for

Applicant's failure to provide a sufficient explanation for appealing a guilty plea as required by Rule 203(d)(1)(B)(iv) SCACR.¹ The Remittitur was issued on July 20, 2016.

On August 22, 2016, Petitioner filed an Application for Post-Conviction Relief, alleging

1. My attorney advised me to enter a plea based on an informal meeting in chambers with the solicitor and judge. I was advised the judge gave an advanced indication of sentencing, and that I would receive a sentence of more than seven, but less than fifteen years. My attorney advised me I would likely receive eight or nine years. At the plea, the judge sentenced me to sixteen years for trafficking, and five years for firearm possession. This sentence did not conform with the judge's advance indication. My attorney did not object, or move for reconsideration or withdrawal of the plea contemporaneously, or within 10 days after sentencing.

2. My attorney did not properly prepare my defense, and spent little time with me until he advised me I needed to plead guilty or the solicitor would call the case to trial. I had asked for copies of discovery and they were not provided to me. I did not see or hear from my attorney for months, and only spoke with him briefly on the phone, after I'd call and ask to see him. I was told the State had not provided discovery, but later learned, when I did finally receive copies of some of the discovery, after sentencing, that my attorney had in fact received the discovery.

3. My attorney did not file a motion to suppress evidence, although he had grounds to do so, and I requested that he do so.²

The Respondent filed its Return on December 16th, 2016, and the matter was heard on May 26th, 2017. On June 22nd, 2017, the PCR Court denied Petitioner relief in its Order of Dismissal, and the Order of Dismissal was filed June 30th, 2017. On July 10th, 2017, Petitioner timely filed and served a Notice of Motion and Rule 59(e) Motion for Reconsideration of Order of Dismissal. On September 21st, 2017, Petitioner filed and served Evans' Memorandum in Support of Petition for Reconsideration (hereinafter

¹ Plea Counsel mailed a Notice of Intent to Appeal dated April 15th, 2016, the day after the plea, with a
² Petitioner did not seek reconsideration of this third allegation of ineffective assistance, and this question is not before the Court. *Evans' Memorandum in Support of Motion for Reconsideration*. App. p. 126. However, Petitioner did and will argue this supports Question Two.

“Memo in Support”). On March 16th, 2018, the Court filed its Order Denying Motion to Reconsider. On April 6th, 2018, Petitioner filed his Notice of Appeal.

ARGUMENT

I. Counsel was ineffective in failing to move for reconsideration or to withdraw the plea

The Order of Dismissal provided the following applicable law:

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

(App. p. 107). Petitioner argues that plea counsel's performance was deficient under the *Strickland* test and South Carolina precedent and professional norms based on the facts presented. Addressing Question One, Petitioner questions plea counsel's performance

because plea counsel did not contemporaneously raise and object to the judge's higher than indicated sentence and move to withdraw the plea or move for reconsideration; nor did plea counsel file a post-trial motion to withdraw or reconsider the sentence. The

Order of Dismissal summarizes plea counsel's testimony:

Plea Counsel testified that he negotiated a plea offer with the Solicitor of a fifteen year sentence, but Applicant did not accept it. He stated that Applicant pled guilty without recommendations or negotiations. He testified that on April 13, 2016, he spoke in chambers with the plea judge and the Solicitor, and the judge indicated that he would likely give more than seven years but less than fifteen years. He stated that this indication was based on the information that Plea Counsel conveyed to the plea judge in chambers, which did not include the information that the narcotics officers and Applicant's wife, the victim, were going to testify at the plea. Plea Counsel stated that he believes the plea judge gave Applicant a higher sentence after he heard the victim and the narcotics officers speak at the plea. Plea Counsel stated that there was no reason to object to the plea court's sentence because it was within the statutory sentencing range and it was in the plea judge's discretion.

Plea Counsel testified that he did not promise Applicant any sentence, including the 7-15 year estimate the judge had indicated in chambers. He said he explained to Applicant what the judge told him in chambers, but he explained the minimum and maximum sentence and did not promise any particular sentence would be imposed. Plea Counsel stated that Applicant did not ask him to file a motion to reconsider. He stated that Applicant asked him immediately after the guilty plea to file an appeal, and he filed a notice of intent to appeal shortly after. Plea Counsel testified that he was prepared to go to trial, although there was no defense they could use. He stated that he did not believe they would have been successful if he had made a motion to suppress the evidence.

(App. p. 109-110). But, plea counsel testified that on the way out of the courtroom, immediately after sentencing, Petitioner was upset and they spoke about it, and plea counsel asked Petitioner if he wanted plea counsel to file his appeal, that he was entitled to an appeal. (App. p. 96, l. 21 – p. 97, l. 11). Plea counsel denies Petitioner asked him to move to withdraw the plea or move for reconsideration. Petitioner testified he did ask, on direct examination, and again on cross-examination. (App. p. 85, l. 14 – p. 86, l. 13).

The plea occurred on April 14th, 2016. On April 15th, 2016, plea counsel signed and mailed a Notice of Intent to Appeal and Rule 203(B) Explanation, which was received by the Aiken County Clerk of Court on April 19th, 2016. (App. p. 147). Petitioner also testified he immediately wrote letters requesting reconsideration and all discovery, and that letter was mailed immediately and also received by the Aiken County Clerk of Court on April 19th, 2016. (App. p. 72, l. 13 – p. 74, l. 7: App. p. 141). Petitioner read the letter into the record. In his Memo in Support, Petitioner raised concern over plea counsel’s performance following the plea under these facts:

Mr. McMillian’s Rule 203(B) Explanation raises concern. Taking McMillian’s testimony that Evans asked McMillian to appeal as credible, and that McMillian states in his Rule 203(B) explanation that “he does not have a good faith basis to believe that any issues are properly before the Court of Appeals, and the undersigned did not object to the sentence or file a motion to reconsider the sentence:” would McMillian not have had an obligation to advise Evans that direct appeal was fruitless, and that plea reconsideration or withdrawal would be proper? The Plea Transcript is clean and free from error, and McMillian so attested. That necessary discussion between attorney and client about options other than a groundless direct appeal is conspicuously absent!

(App. p. 128).

Petitioner asked the PCR judge to consider and apply related South Carolina precedent and ABA Standards for Criminal Practice, which are set forth throughout his Memo in Support. (App. p. 118). Because the plea judge became involved in plea negotiations, Petitioner raised and argued the relevance of *Medlin v. State*, 276 S.C. 540, 280 S.E.2d 648 (1981) and its companion case, *Harden v. State*, 276 S.C. 249, 277 S.E.2d 692 (1981); and *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (S.C. 1993). (App. pp. 119-121; p. 127; p. 129). Because the question involved withdrawal or reconsideration of a plea, Petitioner raised and argued South Carolina precedent

concerning plea agreements in a PCR setting, where a judge's involvement is not at issue; including *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 52 (1988), *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000), *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (S.C., 2009), and others. (App. pp. 121-123). As to *Rolen*, Petitioner wrote:

In *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (S.C., 2009), an ineffective assistance case where plea counsel was deficient for failing to move to withdraw a guilty plea, the Court stated the prejudice analysis does not fit squarely within the traditional guilty plea prejudice framework as set forth in *Hill*.³ The court held "Petitioner was prejudiced by counsel's deficient performance because due to counsel's failure to make a motion, the plea judge was not able to exercise his discretion. Even if the plea judge had denied Petitioner's motion to withdraw his plea, Petitioner could have raised this issue on direct appeal."

(App. p. 122).

Petitioner requested the PCR judge to consider and apply relevant ABA Standards for Criminal Practice, citing *State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct.App. 2013), which summarized South Carolina courts' reference to and application of ABA standards, and while finding the standards are not controlling or dispositive, may be useful or offer assistance in the analysis of an issue. (App. pp. 131-132). Petitioner cited several relevant ABA Standards, including "Preserving the Record," "Interviewing the Client," "Duty to Keep Client Informed and Advised about Representation," "Advising the Client," and "Plea Agreements and Other Negotiated Dispositions." (App. pp. 132-133).

II. Counsel was ineffective in properly preparing a defense, and failing to meet with and spend sufficient time with the petitioner to prepare a defense

Petitioner's Question Two presented concerns plea counsel's contact with Petitioner and preparations and performance of defense counsel obligations. Plea counsel

³ The State cited *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985) standard under "Applicable Law."

testified he was appointed July 20th, 2015. Plea counsel testified his case file notes he met with the Petitioner in person two or three times, but probably more. (App. p. 90, ll. 6-18). Counsel testified his initial contacts concerned amending bond, and after Petitioner was arrested a second time, most of those discussions revolved around getting bond. (App. p. 90, l. 20 – p. 91, l. 10). Counsel testified he filed for a bond hearing in February, then over the course of two or maybe four terms of court Petitioner's case appeared on the trial list and then Counsel and Petitioner began talking about the case. (App. p. 91, ll. 11-16). Counsel testified he met with Petitioner one lengthy time to discuss a motion to suppress evidence, apparently in this time frame after February, 2016. (App. p. 91, ll. 16-18). Counsel testified he met Petitioner March 7th, 2016, and Petitioner was still under the impression that he was going to be tried for trafficking first. (App. p. 92, ll. 19-25). Counsel testified some things came out at the plea that hadn't been conveyed in chambers including his issues with narcotics officers and his wife. (App. p. 94, ll. 5-11). He testified this testimony was proper and he did not see any problem with them addressing the court and there was no reason to object to it. (App. p. 94, l. 12 – p. 95, l. 7).

From plea counsel's testimony in the preceding paragraph, one may reasonably conclude plea counsel met in person with the Petitioner two or three times, possibly more. Although counsel was appointed in July, 2015, his contacts with Petitioner prior to some time in February, 2016 related to bond issues, and he did not begin to discuss the case with Petitioner until some time in February or maybe March. He met with Petitioner one lengthy time to discuss a motion to suppress evidence, and when he did meet Petitioner on March 7th, 2016, Petitioner had not been advised he had been indicted for

trafficking second and was facing a substantially more severe sentence. While there was a lengthy meeting to discuss filing a motion to suppress all of the evidence that was obtained when Petitioner was arrested for DUI, plea counsel decided not to file a motion to challenge to challenge the search, although Petitioner made it clear he wanted the motion filed.

Until the haste-driven day or two before the April 14th plea, plea counsel's testimony was that he and Petitioner discussed the overall case one time, on March 7th. Counsel's testimony that some things came out during the plea that hadn't been conveyed in chambers, in light of the admitted limited interviewing and consultation and time counsel spent with Petitioner, bears on the question of whether there was adequate preparation. If, as counsel testified, these statements influenced sentencing, then it is reasonable to conclude it would be foreseeable and warrant preparation. Plea counsel was aware of the marital discord and divorce and Petitioner's failed cooperation with law enforcement and should have been aware of circumstances surrounding the harassment arrest.

In Petitioner's Motion for Reconsideration of the Order of Dismissal, Petitioner complained that the PCR judge gave no weight to Petitioner's testimony. (App. p. 114-115). In this brief argument, Petitioner has focused on plea counsel's testimony on direct examination to support the questions presented, since the PCR judge found this testimony credible. Petitioner cited relevant ABA Standards for Criminal Practice to give context to the question of what professional norms defense counsel should follow. Petitioner's direct examination is recorded from Appendix page 62 to page 82, cross-examination from page 82 to page 87, and re-direct from page 87 to page 89.

Petitioner testified the first time he met plea counsel was in mid-August, 2015 when he went to court to amend bond conditions, and that Petitioner had not had any discussions up to that point with counsel concerning the case. (App. p. 63, ll. 4-20). Petitioner testified between August and early November, 2015, he had no contact or discussions with counsel: he contacted counsel for help with bond review shortly after November 3rd, 2015 when he was arrested for the harassment charge and not given bond, was told by counsel he would, and paid the bondsman additional bond monies but did not have an opportunity to be present at a hearing when the bondsman filed to be relieved from bond. (App. p. 64, l. 15 – p. 65, l. 19). Plea counsel testified most of the discussion revolved around getting bond after the harassment arrest, but he did not file for bond until sometime in February, 2016, because he waited to receive discovery on the harassment charge. (App. p. 91, ll. 8-11). Petitioner has concern over a delay of over two months in filing a short motion for bond review. When Petitioner was asked about plea discussions, he testified the whole time he was mainly talking to counsel about getting bond. (App. p. 65, l. 23 – p. 66, l. 11). Petitioner testified the whole time he was talking with counsel, he was talking about getting a private attorney, and he wanted to get bond to be able to retain and pay for a private attorney. (App. p. 66, ll. 12-15). He testified that when he was transported to court the week he pled, he thought he was being transported for a bond hearing, but suddenly learned the solicitor listed the case for trial and that the solicitor made a 15 year plea offer. (App. p. 66, ll. 15-25). Petitioner testified he did not receive discovery although he requested copies, but if he had received it, he could have participated in his own defense. (App. p. 74, l. 9 – p. 75, l. 1; p. 75, l. 9 – p. 76, l. 4). In his post-plea letter, he requested this discovery. (App. p. 141). These


are the facts that led up to the week of this scrambled plea and respective testimonies, much of which accords coherently. Petitioner and plea counsel do disagree on their testimonies concerning the plea and their respective understandings. However, the testimony concerning contact, communication, information exchanged, preparation, and Petitioner's involvement up to the week of the plea has led Petitioner to present this question and ask this Court whether the issue is "meritless," as the Order of Dismissal concludes. (App. p. 111).

CONCLUSION

Therefore, Petition respectfully asks this Court grant him leave to brief these questions presented and grant this petition for a writ of certiorari.

Respectfully Submitted,

September 19th, 2018


Robert R. Thuss
Thuss Law Office LLC
7001 St. Andrews Rd. #193
Columbia, SC 29212
(803) 640-1000
Attorney for Petitioner

RECEIVED

SEP 20 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2016-CP-02-1894

Kenneth Bryant Evans II, #308918, Appellant,

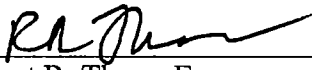
v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Appendix, by depositing a copy of it in the United States Mail, postage prepaid, addressed to Asst. Attorney General Julie A. Coleman, Esq., P.O. Box 11549, Columbia, SC 29211, on September 20th, 2018.

September 20th, 2018



Robert R. Thuss, Esq.
Thuss Law Office LLC
7001 St. Andrews Rd. #193
Columbia, SC 29212
(803) 640-1000
Attorney for Petitioner

Thuss Law Office LLC

Robert Rutland Thuss, Esq.
7001 St. Andrews Rd. #193
Columbia, SC 29212
Rob@ThussLawOffice.com

RECEIVED
SEP 20 2018
S.C. SUPREME COURT

September 20, 2018

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

RE: Kenneth Evans III v. State of South Carolina: 2016-CP-02-1894
Petition for Writ of Certiorari, Appendix, Proof of Service

Dear Mr. Shearouse,

Please see the accompanying Petition, Appendix, and Proof of Service for filing in this post-conviction relief matter.

Sincerely,



Robert R. Thuss, Esq.
Thuss Law Office LLC
7001 St. Andrews Rd. #193
Columbia, SC 29212
(803) 640-1000
Attorney for Appellant

cc: Julie A. Coleman, Esq.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for respondent