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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001986

DERRICK EUGENE VELASQUEZ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE ISSUES

Did the post-conviction relief court properly determine Counsel was not constitutionally ineffective for failing to obtain a continuance in Petitioner's case to allow for substitution of counsel even though Counsel moved for a continuance twice on Petitioner's behalf, the trial court, in its discretion, properly denied both motions as the State and Counsel were prepared to go forward and the Court believed Petitioner was attempting to create an unnecessary delay in his case?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Newberry County Clerk of Court. During its July 2015 term, the Newberry County Grand Jury indicted Petitioner for trafficking in crack cocaine (10g or more, but less than 28g), third offense (2015-GS-36-270) and trafficking cocaine (400g or more) (2015-GS-36-269). Assistant Public Defender Charles Verner of the Eighth Circuit Public Defender's Office represented Petitioner ("Counsel"). Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solicitor's Office prosecuted the case.

On August 3, 2015, Petitioner's case was called by the State before the Honorable Eugene C. Griffith, Jr. Prior to selecting a jury, Petitioner moved for a continuance on the grounds the case was relatively new, he was attempting to retain private counsel, and Petitioner felt the data regarding the traffic stop was insufficient. (App. 4-12.) The State informed Judge Griffith that Petitioner's case had previously been continued in July. (App. 8.) The court held the insufficiency of the data was a legal matter and should not be the basis for the continuance. (App. 8.) Ultimately, the court decided to hold Petitioner's motion for continuance in abeyance until after jury selection and pretrial motions. (App. 11-12.)

After jury selection, Counsel made three suppression motions and, after lengthy pretrial hearings, all motions were denied. Petitioner moved again for a continuance on the grounds that he wanted to hire a new lawyer. (App. 155-156.) The court denied the motion because it believed Petitioner was attempting to delay his case. (App. 156.) The following day, Petitioner pled guilty before Judge Griffith to the lesser included offense of trafficking in cocaine (more than 28g but less than 100g), second offense, and a reduced charge of trafficking in crack (10g-28g), second offense. The State recommended a fifteen year sentence as part of the plea

agreement based on the weight of the drugs involved in the incident and Petitioner's criminal history. Judge Griffith sentenced Petitioner to imprisonment for fifteen years on each charge to run concurrently.

Petitioner filed a notice of appeal, which was served on Counsel August 17, 2015. Counsel filed a Motion to Allow Late Filing stating he discovered Petitioner wanted to appeal on August 17, 2015. On September 2, 2015, the South Carolina Court of Appeals issued an order stating it cannot extend the time for service of the notice of appeal, denying Petitioner's motion and dismissing the appeal. The remittitur was sent September 18, 2015.

Petitioner filed his application for post-conviction relief on March 7, 2016, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to obtain the field drug test kit analysis, otherwise known as the Scott's Reagent Test.
 - b. Counsel failed to obtain a continuance.
 - c. Counsel failed to challenge legally insufficient empirical data.
 - d. Failing to file an appeal.
 - e. Having a conflict with his co-defendant.
2. Due Process Violations
 - a. There was woefully insufficient evidence submitted by the Newberry Sheriff's Office.
 - b. Incomplete discovery submitted by the Solicitor.
 - c. Only given one hour to prepare a motion to suppress by the Judge.
3. Denied equal protection under the law because his case was called for trial more quickly than others similarly situated were.

An evidentiary hearing into the matter was convened on June 6, 2017, at the Laurens County Courthouse before the Honorable G. Thomas Cooper, Jr. Petitioner was present at the hearing and represented by Wayne Floyd, Esquire. Assistant Attorney General Judah N. VanSykel of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner

testified on his own behalf. Counsel also testified. By order filed August 31, 2017, Judge Cooper denied Petitioner's application in its entirety finding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant his post-conviction relief application. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

On May 1, 2015, officers with the Newberry County Sheriff's Department conducted a safety checkpoint on Highway 76 near Pete Harris Road. (App. 160.) Petitioner and the driver (co-defendant) passed through the checkpoint in a rental vehicle. (App. 160.) The driver was unable to provide a license and officers detected an odor of marijuana coming from the vehicle. (App. 160.) Officers had Petitioner and driver step out of the vehicle. (App. 160.) After taking Petitioner out of the vehicle, Petitioner either produced marijuana or showed the officers marijuana in the car. (App. 160.) Thereafter, Petitioner was patted down for safety purposes. (App. 160-161.) At that time, officers located crack cocaine in Petitioner's right front pocket. (App. 161.) During a search of the vehicle, officers located a backpack that contained over 400grams of powder cocaine that was compressed in a block like shape. (App. 161.)

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 (2018). On appellate review, courts give great deference 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. Id. at 179, 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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); 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 "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] 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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "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, 386 S.E.2d 624 (1989).

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, 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." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to obtain a continuance in Petitioner's case to allow for substitution of counsel where Counsel moved for a continuance twice on Petitioner's behalf and the trial court, in its discretion, properly denied both motions as the State and Counsel were prepared to go forward and the Court believed Petitioner was attempting to create an unnecessary delay in his case.

Petitioner's allegation that Counsel was constitutionally ineffective because he failed to obtain a continuance in his case so he could hire another attorney is meritless. Counsel requested a continuance from the court on two occasions prior to Petitioner pleading guilty. During his first motion, Counsel stated the continuance was necessary because Petitioner would like more time to prepare the case, new photographs were just provided to Counsel, and Petitioner was attempting to hire another attorney. The court decided to hold the continuance in abeyance until after jury selection and pretrial motions were held. Following the denial of Petitioner's suppression motions, Counsel again moved for a continuance. The court denied the motion believing Petitioner was attempting to create an unnecessary delay in his case. Counsel cannot be found deficient for failing to obtain a continuance as the granting of such motion is solely within the court's discretion. The post-conviction relief court properly found Counsel was not constitutionally ineffective in this case because Counsel moved for continuances twice on Petitioner's behalf and the court, exercising its discretion, denied both motions. The denial of those motions is not a reflection of a deficiency on Counsel's part, but rather the court's belief the continuances were unnecessary. The post-conviction relief court properly denied relief to Petitioner on this ground and this Court should deny certiorari.

Although Petitioner believes he should have been granted a continuance, the plea court properly exercised its discretion in denying both continuance motions. "The denial of a motion for a continuance is within the sound discretion of the trial judge and his ruling will not be

disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant.” Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992) (citing State v. Babb, 299 S.C. 451385 S.E.2d 827 (1989)). “A trial judge’s denial of a motion for continuance will not be disturbed absent a clear abuse of discretion.” State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). This Court has previously held, “reversals of refusal of continuance are about as rare as the proverbial hens’ teeth.” State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

The instant case is analogous to the issue this Court heard in Bozeman. Anthony Bozeman, the petitioner, (“Bozeman”) was arrested for murder in March 1988. Bozeman, 307 S.C. at 174, 414 S.E.2d at 145. A public defender was appointed to represent Bozeman, however, private counsel told Bozeman’s sister he would represent Bozeman if a continuance in the case was granted. Id. Bozeman refused to cooperate with his public defender because he believed he had retained private counsel, however, private counsel never spoke to Bozeman. Id. The public defender made a motion for continuance on the ground that Bozeman believed he had hired private counsel and had refused to cooperate with the public defender. Id. The trial judge denied the motion and Bozeman was represented by the public defender at trial. Id. Bozeman was convicted of the lesser included offense of voluntary manslaughter. Id.

On appeal, Bozeman claimed the trial judge erred in denying his motion for a continuance and the denial of such motion prejudiced him as he was not able to retain private counsel and adequately prepare for trial. Id. This Court held,

[T]he denial of a motion for a continuance did not deny the defendant his right to counsel when defendant was represented by appoint counsel and sought the continuance to obtain other counsel of his choice. Here, counsel was appointed three days after [Bozeman’s] arrest and represented [Bozeman] at the preliminary hearing. [Bozeman’s] right to counsel was not denied at any stage of the proceeding.

Id. at 175, (citing State v. Bennett, 259 S.C. 50, 190 S.E.2d 497 (1972)).

Here, much like in Bozeman, Petitioner asserts his was prejudiced by the denial of the continuance because he was unable to hire the counsel of his choice to represent him. However, Counsel competently represented Petitioner from the beginning of his case and, unlike Bozeman, Petitioner here actually participated in the preparation of his trial. During the post-conviction relief hearing, Counsel testified Petitioner was a “high intensity client” that was “labor intensive.” (App. 216.) Like Bozeman, Petitioner here has failed to show how the outcome of his case would have been different had private counsel represented him at trial. Petitioner testified, “But I don’t think I would have been given 15 years had I had adequate representation.” (App. 267.) However, Petitioner has failed to show what additional witnesses or evidence private counsel could have produced in this matter had the continuance been granted.

Additionally, Counsel indicated Petitioner had received a continuance in July on his case from the Honorable Donald B. Hocker. Counsel also clearly stated to the plea court Petitioner’s case was factually fairly simple. (App. 5.) Although Petitioner believed he needed more time to prepare for trial and to go over new photographs Counsel received, Counsel told the plea court the new photographs “don’t really help me with the case-in-chief. It will be cumulative to what I have already seen in other evidence.” (App. 5.) Counsel went on to tell the plea court the State had complied with discovery and, the only issue Counsel had was the lack of empirical data provided by the State, which the court found to be a legal issue and not an appropriate basis for a continuance. (App. 6.) Petitioner was given the opportunity to address the plea court regarding his continuance motion and he stated, “[W]e just been provided with new information that we need to go over and we haven’t been provided with all of the empirical data. We haven’t been provided the names of whoever submitted the empirical data.” (App. 8.) At no time while

addressing the plea court did Petitioner mention he wanted new counsel or was in the process of hiring private counsel to substantiate his need for the continuance. (App. 8.) The plea court held the continuance in abeyance since Counsel and the State were prepared to go forward because, at that time, Counsel had received full discovery from the State, and the “new information” Petitioner claimed he needed more time with were cumulative photographs Counsel felt were immaterial to their case.

After picking a jury, the plea court held pretrial hearings on numerous suppression motions raised by Counsel. After lengthy testimony, the plea court denied all of Petitioner’s suppression motions and Counsel again moved for a continuance on Petitioner’s behalf. (App. 155-156.) The plea court denied the motion stating, “changing lawyers right before trial is a delayed tactic in some cases and this case is ready, you are ready, your client is ready, we will go forward[.]” (App. 156.) Counsel testified at the post-conviction relief hearing that he had enough time to accurately investigate and prepare Petitioner’s case for trial. (App. 212.)

Petitioner relies on United States v. Gonzales-Lopez, 548 U.S. 140 (2006), to support his argument Petitioner was denied his Sixth Amendment right to counsel by the plea court’s refusal to grant a continuance. However, Gonzales-Lopez is distinguishable from Petitioner’s case because, in Gonzales-Lopez, the Petitioner had formally retained his preferred counsel (“Low”) prior to the start of his trial. Also, the government conceded the petitioner’s Sixth Amendment right was violated because Low was erroneously disqualified from *pro hac vice* admission by the trial court. Id. at 145.

Here, the attorney Petitioner claimed he wanted to retain was never formally hired, despite Petitioner being granted a continuance by Judge Hocker earlier in his case. The plea court did not disqualify any attorney from representing Petitioner, nor did the plea court prevent

Petitioner from securing an attorney of his choice at any time since his arrest; Petitioner just failed to act. Petitioner's case proceeded with competent counsel and, during the plea colloquy, Petitioner testified he was satisfied with Counsel and had enough time with Counsel to discuss his case and plea. (App. 164-165.) Petitioner also failed to have the attorney he claims he wanted to retain testify on his behalf during the post-conviction relief hearing to show efforts were being made to secure his representation. The plea court's denial of Petitioner's continuances were based on the belief Petitioner was delaying his proceedings, not attempting to retain private counsel, which Petitioner's actions do not refute.

The plea court here, much like the trial court in Bowman, properly exercised its discretion in denying Petitioner's motions for continuance as the motions were not based on actual necessity. Petitioner was an active participant in the preparation for his trial, and the "new information" Petitioner believed he needed more time to review were photographs that were inconsequential to his case. Petitioner has failed to show how he was prejudiced by the plea court's decision since all Petitioner provided during the post-conviction relief hearing was his testimony that under "adequate representation" he believed he would be serving less time. However, he has offered no evidence to substantiate this claim. Petitioner has failed to show how he was prejudiced by Counsel's representation and has therefore failed to meet his burden under Strickland. The post-conviction relief court properly denied Petitioner relief on this claim and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. 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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December 14, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001986

DERRICK EUGENE VELASQUEZ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Victor R Seeger, Esquire
S.C. Commission on Indigent Defense- Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 14th day of December, 2018


CARLOTTA L. WEAVER
Legal Assistant



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ALAN WILSON
ATTORNEY GENERAL

December 14, 2018

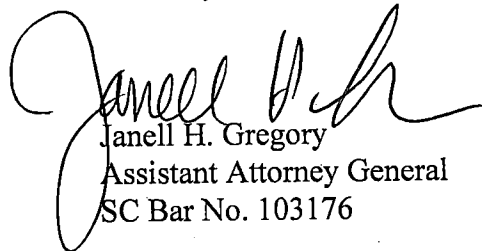
The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Derrick Velasquez v. State of South Carolina
Appellate Case No. 2017-001986
Lower Court Case No. 2016-CP-36-0154

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,


Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/clw
Enclosures

cc: Victor R Seeger, Esquire (2 copies)