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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO HORRY COUNTY

Court of Common Pleas
William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000524

KRISTY MERRIT RICH,

Petitioner,

v.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERIORARI

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Attorney General

MEGAN HARRIGAN JAMESON
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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

I.

Evidence supports the PCR court's ruling that Petitioner waived her right to appeal the denial of her first PCR application.

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the May 2012 term of the Horry County Grand Jury for kidnapping and first degree burglary. Laura L. Hiller, Esq. represented Petitioner. On September 13, 2012, Petitioner pled guilty as indicted before the Honorable W. Jeffrey Young. On October 12, 2012, Judge Young sentenced Petitioner to imprisonment for concurrent terms of 25 years on each charge. Petitioner did not appeal her plea or sentence.

Petitioner filed an application for post-conviction relief on October 4, 2013 (2013-CP-26-06669). She alleged, among other grounds, that her attorney failed to appeal her guilty plea against her wishes. An evidentiary hearing into the matter was convened on February 3, 2015, before the Honorable G. Thomas Cooper, Jr. Petitioner was present at the hearing and represented by Kenneth Blaine Massey, Esq. By written order dated March 17, 2015, and filed March 25, 2015, Judge Cooper denied and dismissed the application. Petitioner did not appeal the final order of the Court.

Petitioner filed a second PCR application on November 2, 2015. Petitioner alleged, among other grounds, that her first PCR attorney failed to appeal the dismissal of her PCR application against her wishes. The Court convened an evidentiary hearing into the matter on Wednesday, November 29, 2017, at the Horry County Courthouse in Conway, South Carolina before the Honorable William H. Seals. Petitioner was present at the hearing and represented by Steven W. Fowler, Esq. The court heard testimony from Petitioner and her first PCR attorney, Kenneth Massey.

Petitioner testified she was led to believe her attorney would file an appeal on her behalf, and that he told her sister he was “working on something.” App. 121. Petitioner testified she asked her attorney to appeal the dismissal “in a timely manner,” but he never did. App. 123. On cross-examination, Petitioner claimed she wrote a letter to Counsel about a month after they went to court. App. 124. Petitioner testified her sister was involved in assisting her in the matter and had stayed in contact with Counsel. App. 121.

PCR counsel testified he informed Petitioner of her right to appeal. Ap. 127. He sent the dismissal order to Petitioner and her sister, and Petitioner called him “a month and a half, two months later, after her sister had called me. Because I always talked to the sister first.” App. 126. He denied Petitioner or her sister ever prompted him to file an appeal from the prior PCR. App. 127.

The PCR court took the matter under advisement and ruled in a written order dated February 15, 2018. App. 129; 138. The Court found Petitioner “was fully apprised of her right to appeal from an adverse result in a PCR action by both Counsel and by the Order of Dismissal itself.” App. 137. The court further found Petitioner “simply failed to request Counsel seek an appeal in a timely manner, thereby waiving her right.” App. 137. Petitioner now seeks review of this factual finding.

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, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an Petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an Petitioner 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, 466 U.S. 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 Petitioner 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 petitioner 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, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced the petitioner 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, 466 U.S. 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

I.

Evidence supports the PCR court's ruling that Petitioner waived her right to appeal the denial of her first PCR application.

“A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived.” Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citing King v. State, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992)). If the PCR court finds an applicant was denied his or her right to appeal, the applicant can petition for certiorari and the South Carolina Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. Id.

This petition comes down to the standard of review. The question whether Petitioner waived her right to appeal the denial of her first PCR application is a question of fact. 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).

PCR counsel, Kenneth Massey, testified he informed Petitioner of her right to appeal. Ap. 127. He further testified that he sent the dismissal order to Petitioner and her sister, but didn't hear from them for a month and a half or two months. App. 126. He denied Petitioner or her sister ever prompted him to file an appeal from the prior PCR. App. 127. The lower court clearly believed counsel. The lower court also found Petitioner was advised of her right to appeal and the applicable time limits by the order of dismissal. Ap. 137. This evidence supports the lower's court's finding that she waived her statutory right to appeal.

Furthermore, the original PCR court correctly concluded Petitioner's underlying PCR claims are meritless. App. 91-97. The record of the first PCR hearing establishes Petitioner voluntarily waived her right to a jury trial based on the competent and reasonable advice of her plea attorney. Therefore, she has suffered no prejudice. Certiorari should be denied.

CONCLUSION

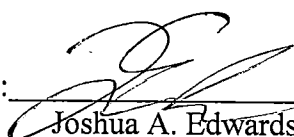
For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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BY: 
Joshua A. Edwards
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ATTORNEYS FOR RESPONDENT

January 14, 2019

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CERTIFICATE OF SERVICE

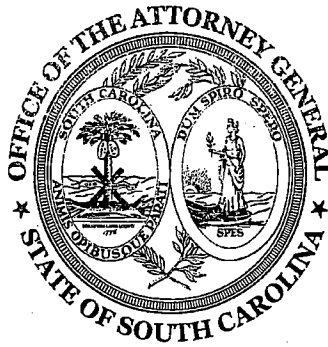
The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by courier two (2) copies addressed to:

Taylor D. Gilliam, Esquire
PO Box 11589
Columbia, SC 29201

This 14th day of January, 2019.



MALLORY MORRIS
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

January 14, 2019

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S.C. SUPREME COURT

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

RE: Kristy Merrit Rich v. State of South Carolina
Appellate Case No. 2018-000524
Lower Court Case No. 2015-CP-26-7861

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
S.C. Bar No. 101188

JAE/mm
Enclosures

cc: Taylor D. Gilliam, Esquire