

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-000441

DARRYL JERARD MUNGIN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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ISSUE PRESENTED

I.

The PCR court correctly granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the Sate agreed Petitioner did not knowingly and voluntarily waive his right to a direct appeal and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.

II.

The PCR court correctly found Counsel was not ineffective for not withdrawing Petitioner's guilty plea because Petitioner told Counsel he wished to plead guilty and subsequently waived his trial rights and pled guilty before the trial judge. Further, Petitioner failed to present any credible testimony that he would have proceeded to trial but for Counsel following his wishes and arranging an Alford plea.

STATEMENT OF THE CASE

Petitioner was indicted at the February 2016 term of the Charleston County Grand Jury for first degree burglary (2016-GS-10-0620), second degree domestic violence (2016-GS-10-0622), and obtaining goods by false pretenses (third or subsequent property crime) (2016-GS-10-0624). Assistant Public Defender Michael R. Loignon, Esquire, represented Petitioner. Assistant Solicitor Andrew Evans, Esquire, represented the State.

On May 31, 2016, Petitioner appeared with his counsel before the Honorable Thomas L. Hughston, Jr. and pled guilty to second degree burglary as a lesser included offense of first degree burglary, to second degree domestic violence as indicted, and to obtaining goods by false pretenses (third or subsequent property offense) as indicted. During Petitioner's plea hearing, Judge Hughston asked Petitioner, "Would you like to have a jury trial on any or all of these charges?" App. p. 4. Petitioner replied, "No, no, sir." App. p. 4. Petitioner then indicated he wished to plead guilty. App. p. 5. Judge Hughston asked Petitioner, "Are you really guilty?" Petitioner responded, "Yes, sir." App. p. 5. Petitioner again stated he was really guilty of the charges. App. p. 5. Petitioner also indicated he understood that, even under Alford he could still be sentenced to the maximum term of imprisonment. App. pp. 5-6. While Appellant's girlfriend and the victim in the case, Clarissa Butler, contended at the sentencing hearing that Petitioner's actions of breaking into their landlady's home and beating her were not as severe as was portrayed by the State, the solicitor noted the State had multiple witnesses corroborating the State's version of events. See App. pp. 9-12, 19-20. Judge Hughston subsequently sentenced Petitioner to imprisonment for a term of ten years, provided that upon the service of five years the balance would be suspended with five years' probation for the burglary charge. Petitioner

was also sentenced to imprisonment for one year for domestic violence and five years for obtaining goods by false pretenses, with all sentences running concurrently.

On August 4, 2016, Petitioner's counsel filed a notice of appeal. The South Carolina Court of Appeals dismissed Petitioner's appeal on October 31, 2012, as it was not timely served upon the State. The remittitur was sent on August 31, 2016.

On December 7, 2016, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Violation of sentencing guidelines"
2. "Malicious and vindictive prosecution"
 - a. "Coerced into pleading guilty"

Petitioner later filed an amendment, adding the following grounds for relief:

1. Applicant's attorneys provided ineffective assistance of counsel by advising the Applicant to forego his Constitutional Right to a jury trial and plead guilty.
2. Applicant's attorneys provided ineffective assistance of counsel by promising a sentence if the Applicant entered a guilty plea.
3. Applicant's attorneys provided ineffective assistance of counsel by failing to fully investigate the case prior to the guilty plea.
4. Applicant's attorneys provided ineffective assistance of counsel by failing to meet with the Applicant a sufficient amount to adequately advise the Applicant and prepare for a resolution.
5. Applicant's attorneys provided ineffective assistance of counsel by failing to discuss strategy for a trial including potential defenses.
6. Applicant's attorneys provided ineffective assistance of counsel by failing to withdraw the guilty plea after the Applicant's comments to the Court, the Applicant's prior comments to his attorneys, and the victim's recantation of the facts.
7. Applicant's attorneys provided ineffective assistance of counsel by failing to perfect the appeal of the conviction.

The State filed its Return on June 21, 2017. An evidentiary hearing into the matter was convened on Tuesday, December 5, 2017, at the Charleston County Courthouse in Charleston, South Carolina before the Honorable Michael G. Nettles. Applicant was present at the hearing and represented by Rodney Davis, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented the State.

At the June 21, 2017 evidentiary hearing, Petitioner testified he told Counsel he wanted to go to trial and he never told him he wanted to plead guilty. App. p. 59. Petitioner contended Counsel never advised him on whether he should plead guilty or go to trial. App. p. 59. Petitioner stated Counsel talked to him for about two minutes about an Alford¹ plea before entering the courtroom on the day he pled. App. p. 61. Applicant averred Counsel did not get into any details on what an Alford plea was, but that he believed it was an acknowledgement he was innocent and just wanted to put the case behind him. App. p. 61. Petitioner testified he was only given about thirty seconds to decide whether he was going to accept the Alford plea. App. p. 61. Petitioner stated he felt pressured to plead guilty. App. p. 63. Petitioner alleged he had seen nothing from Counsel indicating he was prepared to go to trial. App. p. 62.

During the hearing, Counsel testified he spoke with Petitioner via video chat about four days prior to his court date. App. p. 81. Counsel stated that, while he is unsure if an Alford plea was discussed during that conversation, Petitioner indicated he was prepared to reject the State's plea offer. App. p. 81. When Counsel met with Petitioner at the courthouse, Petitioner indicated he decided to accept the State's plea offer. App. p. 81. Counsel stated he mostly likely discussed pleading under Alford after Petitioner indicated he wanted to accept the State's offer. App. p. 81. Counsel stated, "So most likely that would have been the time when I said well, from what

¹ 400 U.S. 25 (1970).

you're telling me you are not guilty so I can't advise you to plead guilty. We can go to trial or here is another option if you really want to get this done today." App. p. 81. Counsel indicated Petitioner changed his mind about the proper course of action in his mind every day, stating, "It was one day it was file a speedy trial motion, the next day it's I want you to get me a better offer. The next day it's this, get a statement from the victim. He was kind of - - he would change his mind every day how he wanted me to proceed with his case. . . ." App. p. 82. Counsel testified he filed a motion to reconsider petitioner's sentence and that motion was denied by Judge Hughston around a month and a half later. App. pp. 83-84. Counsel was out of the office attending a national criminal defense trial college and immediately filed the appeal upon his return. App. p. 84. Petitioner's appeal was subsequently dismissed as being untimely. App. p. 84.

On January 23, 2018, Judge Nettles issued an Order of Dismissal and Grant of Appellate Review Pursuant to White v. State.² In the Order, Judge Nettles found Counsel provided ineffective assistance of counsel by failing to perfect Petitioner's appeal. Judge Nettles concluded Petitioner did not knowingly and voluntarily waive his right to a direct appeal and was therefore entitled to relief pursuant to White. Judge Nettles also found that Counsel was not ineffective in his advice to Petitioner about foregoing his trial rights and that the record as a whole shows Petitioner voluntarily waived his jury trial rights. Judge Nettles further found Petitioner failed to provide credible evidence that he would have proceeded to trial but for Counsel's advice and that Petitioner was therefore not prejudiced by Counsel's actions. As to Petitioner's contention that Counsel was ineffective for failing to withdraw his guilty plea after his comments to the trial judge and the Victim's recantation, Judge Nettles found, "although it is

² 263 S.C. 110, 108 S.E.2d 35 (1974).

common for victims of domestic violence to later recant their story³, the victim in this case did not recant but simply described the argument that took place. . . . Counsel was not deficient for failing to withdraw the guilty plea, especially considering two other witnesses were available to testify about the allegations against the Applicant.” App. p. 117. Judge Nettles also found Applicant failed to prove he was prejudiced by Counsel’s actions because Petitioner failed to provide any evidence that he wanted to withdraw his guilty plea and proceed to trial on all of his original charges.

On January 29, 2018, Petitioner timely filed a Notice of Appeal, appealing the PCR court’s denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on September 20, 2018. This Return on behalf of the State now follows.

³ During the hearing, Judge Nettles stated, “recantations are inherently unreliable anyway. Seems like this was more just a further explanation than a recantation.” App. p. 100. Judge Nettles also noted, “in my 20 years practicing law in doing criminal defense work, and as far as criminal domestic violence goes in the 12 years I have been on the bench, I would probably say 85, 90 percent of the victims in criminal domestic violence cases recant their testimony because there’s a love relationship there.” App. p. 103.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I.

The PCR court correctly granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the State agreed Petitioner did not knowingly and voluntarily waive his right to a direct appeal and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.

Respondent agrees with Petitioner's assertion that he is entitled to a belated review of direct appeal issues. It is clear from the record Trial Counsel did not file the notice of appeal in a timely manner as required by the appellate court rules. The State agrees Petitioner did not knowingly and voluntarily waive his right to a direct appeal and does not oppose Petitioner receiving relief pursuant to White v. State.

II.

The PCR court correctly found Counsel was not ineffective for not withdrawing Petitioner's guilty plea because Petitioner told Counsel he wished to plead guilty and subsequently waived his trial rights and pled guilty before the trial judge. Further, Petitioner failed to present any credible testimony that he would have proceeded to trial but for Counsel following his wishes and arranging an Alford plea.

Petitioner contends the PCR judge erred in denying him relief because Counsel provided ineffective assistance by failing to withdraw the guilty plea because Petitioner indicated that he desired a jury trial, Petitioner vacillated earlier about whether he wanted to plead guilty or go to trial, and the Victim recanted during the sentencing hearing. This argument lacks merit. The PCR judge correctly found Petitioner was not entitled to post-conviction relief where the record clearly indicates Petitioner wished to plead guilty and voluntarily waived his trial rights, Counsel did not err in declining to withdraw Petitioner's guilty plea when the victim changed her version

of events during sentencing because the State still had multiple witnesses available to corroborate its version of events and there was no credible evidence presented during the plea hearing or during the PCR hearing that Petitioner wished to withdraw his guilty plea and proceed to trial.

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, 442, 334 S.E.2d 813, 814 (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. 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). 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). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of

trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the applicant must show 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, 59 (1985).

In Petitioner's case, Petitioner clearly indicated during the plea hearing that he did not want a jury trial and that he wished to plead guilty to the offense. As was correctly found by the PCR judge, Petitioner voluntarily waived his trial rights and presented no credible evidence during the PCR hearing that indicated he would have proceeded to trial instead of pleading guilty. On the contrary, Counsel testified Petitioner changed his mind on a daily basis as to whether he wanted to proceed to trial or whether he wanted Counsel to get him a better plea offer before ultimately indicating at the courthouse that he wanted to accept the State's plea offer. While the victim did change her story during Petitioner's sentencing hearing, the PCR court astutely noted that domestic violence victims commonly recant due to concerns about their relationship or well-being. Notably, the victim's testimony during the hearing did not constitute a complete recantation. Counsel was not ineffective for withdrawing Petitioner's guilty plea because the State had multiple witnesses prepared to testify consistent with the State's theory of the case. Withdrawing the guilty plea would have been contrary to Petitioner's stated wish to plead guilty and would have exposed Petitioner to the original charges and the possibility of a substantially more severe sentence. Petitioner failed to present any evidence that he would have proceeded to trial on all of his original charges if Counsel had withdrawn his guilty plea. The PCR court thus correctly found Counsel was not ineffective for not withdrawing Petitioner's

guilty plea and that Petitioner was further not prejudiced by Counsel's decision to follow Petitioner's wishes and plead guilty. This Court should deny certiorari.

CONCLUSION

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

Respectfully submitted,

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By: 
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January 18, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED
JAN 18 2019
S.C. SUPREME COURT

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PROOF OF SERVICE

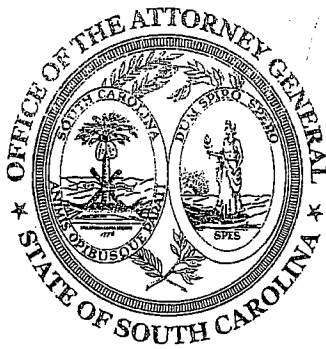
I, V. Henry Gunter, Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Taylor Gilliam, Esquire
South Carolina Commission on Indigent Defense
Office of Appellate Defense,
Post Office Box 11433
Columbia, South Carolina 29211-1433

I further certify that all parties required by Rule to be served have been served. This 18th day of January, 2019.



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ATTORNEY GENERAL

RECEIVED

JAN 18 2019

S.C. SUPREME COURT

January 18, 2019

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

RE: Darryl Mungin v. State of South Carolina
Appellate Case No.: 2018-000441

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
S.C. Bar # 102259

VHG/jaj
Enclosures

cc: Taylor Gilliam, Esquire
Victim Advocacy Division