

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lancaster County
Hon. Brian M. Gibbons, Circuit Court Judge
Appellate Case Tracking No. 2016-002357

Dyeshawn Foster,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

- I. Was plea counsel ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the January 2013 term of the Lancaster County Grand Jury for attempted murder (2013-GS-29-0048), unlawful carry of a pistol (2013-GS-29-0051) and possession of a firearm or knife during the commission of a violent crime (2013-GS-29-0052). Mark Grier, Esquire, represented him. On December 9, 2013, Petitioner entered an Alford plea to the lesser included of assault and battery of a high and aggravated nature (ABHAN) and as indicted to the remaining charges. The Honorable J. Ernest Kinard, Jr. sentenced Petitioner to concurrent terms of eighteen years imprisonment for ABHAN and five years imprisonment for the possession of a firearm. Petitioner received time served for the unlawful carry.

A notice of appeal was filed on Petitioner's behalf and an appeal was perfected by Benjamin J. Tripp, Esquire. The South Carolina Court of Appeals dismissed Petitioner's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Foster. 2015-UP-143 (filed March 18, 2015). The Remittitur was issued on April 3, 2015.

On August 26, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 7, 2015. On January 12, 2016, an evidentiary PCR hearing was held before the Honorable Brian M. Gibbons. Nathan Sheldon represented Petitioner at the PCR hearing. J. Croom Hunter represented the State. In a written order filed February 22, 2016, Judge Gibbons denied relief and dismissed the application. A timely notice of intent to appeal was served on November 18, 2016.

On June 22, 2017, PCR counsel filed a petition with the South Carolina Supreme Court pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988), arguing the PCR judge erred in refusing to find that the Alford plea to the lesser included offense of assault and battery of a

high and aggravated nature was rendered involuntary by the fact Petitioner believed if he went to trial and was convicted of attempted murder then he could receive a life sentence. On October 31, 2017, the Supreme Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(1), SCACR. On December 21, 2018, the South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to address the issue currently raised in Petitioner's Petition for Writ of Certiorari. This Return follows.

ARGUMENT

I. Was plea counsel ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder?

The PCR Court did not err in finding Petitioner's plea was knowing, voluntary, and not based on the ineffective assistance of counsel. The PCR court specifically found Petitioner's testimony was not credible and found his plea counsel's testimony to be credible. Counsel indicated he never told Petitioner he could receive life without parole (LWOP) on the single conviction, but instead indicated he faced LWOP because Petitioner also faced another attempted murder charge. Additionally, at the plea hearing Petitioner was properly informed that he was not facing LWOP based on the single conviction. Finally, it is questionable whether the issue is even preserved for review on appeal because the PCR court did not make any specific findings regarding his allegation he was given incorrect information about the sentence he faced and only made a general ruling regarding the voluntariness of the plea.

Initially, it is questionable whether the issue before the Court is preserved for review on appeal. While Petitioner discussed the issue of the incorrect advice of counsel, the PCR court did not specifically rule on that claim. Instead, the PCR court issued a general ruling regarding the voluntariness of the guilty plea. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review.").

The Court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the appellate court affords great deference to a PCR court's credibility

findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and the Court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When 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 (1984); Butler, 334 S.E.2d 813.

In order to establish a claim of ineffective assistance of counsel, Petitioner has the burden of proving “(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel’s deficient performance prejudiced the applicant’s case.” McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, Petitioner must prove “there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have gone to trial.” Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004); see also, Hill v. Lockhart, 474 U.S. 52, 59 (1985) (“[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018) (citing Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991)).

In the instant case, Petitioner claimed his counsel gave him incorrect advice that he faced LWOP on the single attempted murder charge instead of up to thirty years. He asserted that but for counsel's incorrect advice if he had known the correct sentence he faced, then he would have proceeded to trial. (App.72; 79). Petitioner failed to demonstrate how plea counsel was deficient in his representation and in the advice given to Petitioner prior to his plea. He has failed to establish that the information he received from counsel rendered his plea involuntary.

When asked at the PCR hearing whether he told Petitioner a conviction on the charge of attempted murder carried up to life, plea counsel responded:

No. I think what got lost in this is he actually was facing an attempted murder on another charge that kind of precipitated this whole episode. . . . So my point being I had a conversation saying with him about LWOP, and I believe we had a conversation with the family and with Mr. Foster, my recollection is, that were he to be convicted on one and then, you know, he could potentially be LWOP'd on a second violent crime.

(App.52). Counsel clearly explained that he told Petitioner he could face LWOP based on convictions for the two attempted murder charges he faced, but not based solely on the one charge he was facing in this case. The PCR court specifically found this testimony credible, while also specifically finding Petitioner's testimony that plea counsel said he faced LWOP on the current charge to be not credible. (App.87). See Goss v. State, 425 S.C. 101, 107, 820 S.E.2d 373, 376 (2018) ("The PCR court's evaluation of witness credibility is to be afforded great deference.").

Further, the plea hearing transcript indicated Petitioner should have known he was not facing LWOP related to that single charge. After the plea judge explained that Petitioner's plea would count as a strike, the judge stated Petitioner could face LWOP based on his future convictions. His counsel responded: "Yes, Your Honor, he understands that any future criminal

behavior, **not this**, could expose him to the LWOP.” (App.9)(emphasis added). As a result, there is certainly evidence in the record supporting the PCR Court’s finding. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012) (stating the appellate court will affirm the PCR judge’s findings if any evidence of probative value in the record exists to support those findings). Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY:


William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 17, 2019

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Return to Petition For Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 17th day of May, 2019.



WILLIAM M. BLITCH, JR.
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

May 17, 2019

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

Re: Dyeshawn Foster v. State of South Carolina
Appellate Case Tracking No. 2016-002357

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General
S.C. Bar No. 15608

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Victim Advocacy Division (enclosure)

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