STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. J. Cordell Maddox, Circuit Court Judge
Appellate Case Tracking No. 2018-001115

Antonio Ochoa-Tavera, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

I. The court properly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

II. The PCR court properly found Petitioner failed to establish his right to effective assistance of counsel was violated when trial counsel properly prepared Petitioner for trial and allowed Petitioner to make the ultimate decision regarding whether to testify at trial.

STATEMENT OF THE CASE

Procedural History

In November 2014, the Greenville County Grand Jury indicted Applicant for Trafficking Methamphetamine (2014-GS-23-9505). Scott D. Robinson, Esquire represented the Applicant. Assistant Solicitor Joyce Monts, Esquire prosecuted the case. On February 9, 2015, Applicant to trial before the Honorable Daniel D. Hall and a jury. The jury found Applicant guilty. On February 11, 2015 Judge Hall sentenced Applicant to twenty-five years imprisonment for trafficking methamphetamine, 200-400 grams. Applicant did not appeal his conviction or sentence.

Petitioner filed his application for post-conviction relief (PCR) on July 16, 2015. After a return by the State, an evidentiary hearing was held on April 16, 2018. After hearing testimony, the Honorable J. Cordell Maddox issued an Order of Dismissal and Grant of Appeal Pursuant to White v. State. Petitioner timely served and filed his Petition for Writ of Certiorari and an Anders brief pursuant to White v. State. This Return follows.

ARGUMENT

I. The court properly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

The PCR court properly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), when Petitioner did not knowingly and intelligently waive his right to a direct appeal. Counsel for the State conceded Petitioner's entitlement to a belated appeal. There is evidence to support the PCR court's decision to grant the belated direct appeal and this Court should grant the Petition for Writ of Certiorari as to this Question and consider Petitioner's belated direct appeal.[1]

[1] The State will respond to Petitioner's Anders Brief of Appellant Pursuant to White v. State in a separate informal return.

II. The PCR court properly found Petitioner failed to establish his right to effective assistance of counsel was violated when trial counsel properly prepared Petitioner for trial and allowed Petitioner to make the ultimate decision regarding whether to testify at trial.

The PCR court properly denied Petitioner relief and found counsel was not ineffective when he properly prepared Petitioner for trial and allowed Petitioner to make the ultimate decision regarding whether to testify at trial. There is evidence from both the PCR hearing as well as Petitioner's trial supporting the PCR court's determination trial counsel allowed Petitioner to make the ultimate decision regarding whether to testify at trial after explaining his thoughts to Petitioner.

Standard of 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).

Merits

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; 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 trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure

of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant 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 an 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; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

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 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; 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. at 696-97.

Petitioner asserted counsel failed to prepare him for trial and advised him not to testify even though his testimony would have been beneficial. The PCR court found counsel properly allowed Petitioner to make the ultimate decision on testifying at trial. Further, the court broadly concluded Petitioner failed to prove trial counsel "committed either errors or omissions in his representation" of Petitioner. These findings are supported by the PCR hearing and trial.

First, the issue of whether trial counsel properly prepared Petitioner is not preserved for review on appeal. The issue was not specifically addressed by the PCR court so it is not properly before the court. 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.").

On the merits, the issue also fails. Trial counsel testified he met multiple times with Petitioner and brought a bilingual assistant with him to ensure Petitioner understood what was being discussed. Trial counsel indicated Petitioner signed for discovery at least twice. He explained: "we went over any discovery we had, any witnesses, the charges, penalties, defenses, all that kind of information." He continued: "Explained to him the law regarding trafficking, regarding actual and constructive possession, mere presence, conspiracy, aiding and abetting, the hand of one is the hand of all, that kind of stuff." (App. 481). It is clear based on his testimony, trial counsel acted reasonable in preparing Petitioner for trial and in preparing trial as a whole.

As to the decision to testify, trial counsel testified: "Well, I take the position when it comes to testimony by clients, it's their decision." (App.485). Further, he explained that he would offer his thoughts on whether the defendant should testify. In this case, he indicated Petitioner's testimony would not likely add to the defense and that he believe obtaining last argument would be beneficial. (App.485-486).[2] He did not provide erroneous advice, but instead just provided Petitioner with his thoughts on the benefits and consequences of him testifying or not testifying. He certainly was not unreasonable in ensuring Petitioner knew all the ramifications of his decision, and counsel was very clear it was Petitioner's decision.

Significantly, the trial transcript belies Petitioner's argument. At the hearing, trial counsel explains without contradiction by Petitioner: "I have spoken to my client, Mr. Ochoa, this morning and he's not going to testify or present a case." (App.349). The trial court then explains Petitioner's rights:

> You have a right to claim protections guaranteed by our Constitution and that's under what we call the Fifth Amendment.
>
> One of those rights is that no person shall be compelled in a criminal case to be a witness against himself. This means that you cannot be required to testify in this case. You have a right, **if you wish**, to testify on your behalf. However, no one can make you testify. This is what we call a **personal right and no one can waive or give up that right except you. Your lawyer doesn't do it for you. It has to be solely your decision.**
>
> If you decided to testify you would be subject to the same rules that govern every other witness. And if you testified, you would be examined by your lawyer. And a lawyer for the State can cross-examine you on any relevant issue.
>
> In addition, if you have any convictions on your criminal record that involved dishonesty or false statement for crimes that carry more than one year, the court would have to determine whether those are admissible or not.

[2] This trial occurred prior to the Court's decision in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018).

> If **you decide to testify**, then your decision must be **freely, voluntarily, and intelligently made** with the full knowledge of all the protections under our Fifth Amendment and any consequences if you testified.
>
> If **you decide not to testify** I will instruct the jurors that they cannot give the fact that you did not testify any consideration, and that I would instruct the jury that there is to be no prejudice to you because you did not testify.
>
> It's **left entirely up to you** whether or not you testify. You can talk with your lawyer, your family, friends, anybody else, **but the final decision about whether to testify or not testify is left entirely up to you.**

(App. 350-352) (emphasis added). Petitioner indicated he understood what the trial court explained to him, which would include several admonitions that the decision belonged to Petitioner and Petitioner alone. (App. 352). Petitioner indicated he spoke with counsel about the decision, did not need more time to make his decision, and did not wish to testify. (App. 352-353).

After taking a moment to allow Petitioner and his co-defendant to talk with their lawyers, the following colloquy occurred:

Court:	Mr. Ochoa-Tavera, do you intend to present any evidence?
Petitioner:	No.
Court:	And your lawyer has explained that to you?
Petitioner:	Yes.
Court:	And that is your decision?
Petitioner:	Yes.

(App.354-355). Petitioner was explained all the benefits and consequences of his decision whether or not to testify. He was given the thoughts of counsel to assist in making his decision. As he explained to the trial court, and the PCR court found, the decision was ultimately his and he knowingly and intelligently made that decision. As a result, the PCR court correctly determined Petitioner failed to prove counsel was ineffective.

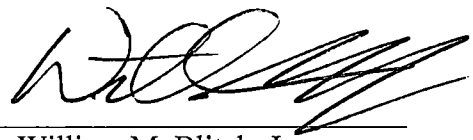
CONCLUSION

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.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

BY: 
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ATTORNEYS FOR RESPONDENT

June 27, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Hon. J. Cordell Maddox, Circuit Court Judge
Appellate Case Tracking No. 2018-001115

Antonio Ochoa-Tavera, Petitioner,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Judy A.C. Carey, 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:

Lara M. Caudy, 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 27th day of June, 2019.

JUDY A.C. CAREY
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 27 2019
S.C. SUPREME COURT

June 27, 2019

Lara M. Caudy, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

Re: Antonio Ochoa-Tavera v. State of South Carolina
Appellate Case Tracking No. 2018-001115

Dear Ms. Caudy:

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. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

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