2010 - 154527

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2007-CP-32-4377

Julius Powell,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. WHETHER THE LOWER COURT PROPERLY GRANTED THE PETITIONER A BELATED DIRECT APPEAL PURSUANT TO WHITE V. STATE, 263, S.C. 110, 208 S.E.2D 35 (1974).

II. WHETHER THE LOWER COURT ERRED IN FINDING THAT PLEA COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE AND PREJUDICIAL TO THE PETITOINER WHEN PLEA COUNSEL FAILED TO CONDUCT A REASONABLE INVESTIGATION TO ENSURE THAT THE PETITIONER'S PLEA WAS KNOWINGLY AND VOLUNTARILY ENTERED.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, the reviewing court gives great deference to the lower court's findings of fact and conclusions of law. McCrary v. State, 317 S.C. 557, 455 S.E.2d 686 (1985). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

STATEMENT OF THE CASE

During the April 2007 term of the Lexington County Grand Jury, the Petitioner was indicted for Burglary, First Degree (2007-GS-32-1126), Kidnapping (2007-GS-32-1127) and Armed Robbery (2007-GS-32-1128). App. p. 215. On May 24, 2007, the Petitioner entered a guilty plea to Burglary, Second Degree, Kidnapping and Armed Robbery in front of the Honorable L. Casey Manning. App. p. 1. The Petitioner was represented by Lowell Bernstein, Esquire. The Honorable L. Casey Manning sentenced the Petitioner to concurrent terms of fifteen (15) years for Burglary, Second Degree, eighteen (18) years for Kidnapping and eighteen (18) years for Armed Robbery. The Petitioner did not appeal his plea or sentence.

The Petitioner filed an Application for Post Conviction Relief in Lexington County on December 4, 2007. App. p. 37. The State submitted a Return on or about May 1, 2008. App. p. 50. The Petitioner, through appointed counsel, submitted an Amendment to Application for Post Conviction Relief on January 20, 2010. App. pp. 47-8. By way of this Amendment, the Petitioner added the following specific allegations to his original allegation of "ineffective assistance of counsel" and "guilty pleas were not knowing, voluntary and intelligent" and specifically requested a belated direct appeal:

1. Ineffective assistance of trial counsel and involuntary guilty plea, specifically but not limited to the following grounds:

    a. Failure to properly prepare and investigate the case.

        i. Counsel failed to thoroughly review the discovery with the Applicant prior to his plea.

        ii. Counsel failed to meet with the Applicant and properly prepare for trial and/or plea.

        iii. Counsel failed to conduct an independent investigation or speak with any witnesses.

iv. Counsel failed to utilize the investigative work conducted by Lee Connelly and obtain additional funding for her to complete her investigation.

v. Counsel failed to look into the Applicant's alibi defense or speak with his alibi witness.

vi. After informing the Applicant that his co-defendant's would testify against him, counsel failed to prepare for potential impeachment of the Applicant's co-defendants

b. Failure to provide effective assistance of counsel during the plea phase.

i. Counsel advised the Applicant that he could plead no contest but the plea was a straight up guilty plea.

ii. Counsel did not properly prepare himself or the Applicant for mitigation.

2. The Applicant is also alleging that counsel failed to file a direct appeal as was requested by the Applicant. Therefore, the Applicant is requesting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

An evidentiary hearing into the matter was held on February 5, 2010 at the Lexington County Courthouse in front of the Honorable R. Lawton McIntosh. App. p. 55. The Petitioner was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by A. West Lee, Assistant Attorney General.

At the beginning of the hearing, Petitioner's counsel called Lee T. Connelly, Private Investigator, to the stand. The Petitioner testified on his own behalf and PCR counsel admitted eleven exhibits. Lowell Bernstein, Esquire, also testified during the evidentiary hearing. The lower court also had before it a copy of the Application, the Respondent's Return, the Petitioner's Amendment, the records of the Lexington County Clerk of Court concerning the subject conviction, and the Petitioner's records from the South Carolina Department of Corrections.

At the conclusion of the evidentiary hearing, the Honorable R. Lawton McIntosh requested that PCR counsel submit a proposed Order Denying Post Conviction Relief and

Granting White v. State Appeal. On March 3, 2010, the Honorable R. Lawton McIntosh signed the Order, which was filed on March 5, 2010. The Petitioner, through appointed counsel, filed a timely Notice of Appeal, and the Petitioner's appeal was transferred to the Office of Appellate Defense. On or about July 20, 2010, Robert M. Pachak, Appellate Defender, submit an Initial Anders Brief of Appellant Pursuant to White v. State, a Petition for Writ of Certiorari, and an Appendix.

On October 14, 2010, undersigned counsel submitted a Motion for Substitution of Counsel, Substitution of Brief of Appellant, and Substitution of Petition for Writ of Certiorari. On October 28, 2010, this Court issued an Order granting the Petitioner's Motion for Substitution, from which this Petition follows.

ARGUMENT

I. The Lower Court Properly Granted the Petitioner a Belated Direct Appeal Pursuant To White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), the Petitioner requested a belated direct appeal. In Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009), the South Carolina Supreme Court cited to Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) and held:

> [C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

The Supreme Court also noted that absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Jones, 382 S.C. at 596, 677 S.E.2d at 23 (citing Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). "One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal." Jones, 382 S.C. at 596, 677 S.E.2d at 23 (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

At the evidentiary hearing, the Petitioner testified that he and his wife requested that plea counsel file a timely direct appeal. App. p. 115. In response, plea counsel testified that he did recall that the Petitioner and his wife requested that an appeal be filed, but he could not specifically recall "how the circumstances went on that." App. p. 143, lines 12-18.

As a result, the lower court found that the Petitioner established that he requested that counsel file his direct appeal, which amounts to an extraordinary circumstance warranting a belated direct appeal. See Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). The lower court further found that plea counsel was unable to specifically recall the Petitioner's

request for a direct appeal, so the Petitioner's testimony was not refuted. Therefore, the lower court concluded that the Petitioner did not knowingly and voluntarily waive his right to a direct appeal and that he is entitled to a belated review of his conviction.

It is clear that the lower court properly applied the law and made specific findings of fact and conclusion of law in granting the Petitioner's request for a bleated direct appeal. The Petitioner would respectfully request that this Court uphold the findings of the lower court due to the clear evidence in the record to support such findings. See Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984) (Holding that the existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling.).

II. The Lower Court Erred in Finding that Plea Counsel's Performance Was Not Ineffective and Prejudicial to the Petitioner When Plea Counsel Failed to Conduct a Reasonable Investigation to Ensure that the Petitioner's Plea Was Knowingly and Voluntarily Entered.

It is well established that a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "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).

Pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), a guilty plea may not be accepted unless it is voluntarily and understandingly made. In a PCR stemming from a guilty plea, an Applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an Applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the Applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

In Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009), this Court clarified the prejudice requirement set forth in Hill. This Court reasoned that to meet the prejudice requirement, an Applicant must show "some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful" to Applicant and that would have affected either counsel's advice or Applicant's decision to take the plea. Stalk, 383 S.C. 559, 563, 681 S.E.2d 592, 594-5.

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). At the evidentiary hearing, the Petitioner took the stand and recalled that Stanley Myers, Esquire, was appointed to his case approximately one month after his arrest. App. p. 87. The Petitioner testified that that Mr. Myers was actively preparing his case for trial, and he obtained indigent funds for Lee T. Connelly, Private Investigator, to work on the his case. App. pp. 87, 89. The Petitioner recalled meeting with Ms. Connelly two times and going over the discovery and case documents with her. App. p. 89. He further recalled providing her with a timeline of his activities at or around the time of the alleged crime and with the name and contact information for his alibi witness. App. pp. 96, 177.

While on the stand, the Petitioner explained that Mr. Myers was relieved as counsel since he was being deployed to Iraq, and Lowell Bernstein, Esquire, was appointed to his case. App. pp. 88, 90, 199. The Petitioner remembered meeting with Mr. Bernstein two times and that he informed Mr. Bernstein about Ms. Connelly's investigation and requested that he work with her on his case. App. pp. 90-91, 107. He also recalled that he informed counsel about his alibi witness and Ms. Connelly's meeting with her, but counsel failed to follow up with his alibi witness or Ms. Connelly regarding the matter. App. pp. 121-123, 181.

The Petitioner also testified that counsel failed to review the discovery with him and prepare for trial. App. p. 91. Specifically, the Petitioner testified about the Lexington County Sheriff's Office Investigative Report dated July 5, 2006. App. pp. 100, 194. The Petitioner pointed out that the report contained the following information, which he asked counsel to further investigate:

1. A size 9-10 Fila shoe print was obtained from the back door of the victim's residence;

2. The victim saw a white station wagon parked down the road after the robbery and at the neighbor's house (residence of Freddie Henderson and Donna Powell);

3. The taller suspect yelled "Shawn or Deshawn let's go;"

4. Officers spoke to Christina at the neighbor's home about her white station wagon;

5. Officers received information from the victim that Vicki Amick, friend of victim's wife, kept her children at John Vesey's home. Ms. Amick was informed that Mr. Vesey was approached by a black male about purchasing a hand gun and he referred him to "Big John's Pawn Shop" to sell the gun;

6. Officers went to the pawn shop and obtained records that established that Freddie Henderson had pawned the weapon stolen from the victim's residence;

7. Henderson was arrested and gave a statement that implicated the Petitioner.

The Petitioner testified that counsel failed to look into any of the information contained in the investigative report. App. pp. 100-107, 109-110. The Petitioner also indicated that he asked counsel to look into the information contained in the victim's statement, but he did not. App. pp. 106-107. The Petitioner testified that he asked counsel to determine if results were obtained for the shoe print lifted from the victim's residence and the shoe's taken from Henderson's residence, but counsel failed to investigate this matter. App. pp. 105. The Petitioner also testified that he requested that PCR counsel obtain the services of Lee Connelly to investigate these evidentiary matters. After obtaining her services, Petitioner explained that Ms. Connelly was informed by the Lexington County Sherriff's Department that all the evidence from his case had been destroyed. App. pp. 105, 198.

At the conclusion of his direct testimony, the Petitioner acknowledged that his primary allegation was that plea counsel failed to properly prepare and investigate his case. App. p. 117, lines 2-7. He further acknowledged that but for counsel's deficient performance he would not have accepted the plea and would have gone to trial. App. p. 117, lines 12-15.

When called to the stand, Lee T. Connelly explained that she worked as a private investigator and that she had the opportunity to work with Stanley Myers, Esquire, on the Petitioner's case prior to his deployment. App. p. 61. She testified that she exhausted the indigent funds obtained by Mr. Myers and there was more that needed to be investigated in the case. App. pp. 61, 76. She further testified that she was not contacted by Mr. Bernstein regarding the Petitioner's case, but she would have been willing to discuss and/or work with him on the case. App. p. 61.

Ms. Connelly recalled meeting with the Petitioner at Lexington County Detention Center and preparing a report, which contained a timeline of his activities at the time of the alleged crime. App. pp. 63, 177. She further recalled that the Petitioner informed her that he was at his sister Donna Powell's home, in the same neighborhood as the victim, on July 4th to bring her a rent payment since she was facing eviction. Therefore, Ms. Connelly obtained eviction documents from Lexington County to verify the information she obtained from the Petitioner. App. pp. 67, 183.

Ms. Connelly also remembered that the Petitioner informed her that he was at the home of Deborah Stephenson during the time of the alleged crime. App. p. 63 She testified that she had the opportunity to meet with Ms. Stephenson one time at Olive Garden and she prepared a report dated November 1, 2006. App. pp. 64-65, 181.

Ms. Connelly testified that PCR counsel contacted her about the Petitioner's case and obtained indigent funds for her to follow up on her original investigation of the case. App. p. 67. Ms. Connelly explained that she tried to locate Ms. Stephenson to further investigate the Petitioner's alibi defense, but she discovered that Ms. Stephenson was deceased. App. pp. 68-69.

Ms. Connelly identified probate documents she obtained from Richland County, which reflected Ms. Stephenson's date of death as October 6, 2007. App. pp. 68-69, 183.

Due to the information contained in the police reports and at PCR counsel's request, Ms. Connelly also explained that she went to Big John's Pawn Shop and obtained records pertaining to Freddie Henderson. App. pp. 71-72. She testified that the records reflected that Freddie Henderson came to the pawn shop three times and only pawned one gun, the gun at issue in the case. App. p. 72. She also found out that Lexington County Sherriff's Department took the gun on July 10, 2006. App. p. 72. She testified that she did not speak to the pawnshop owners as part of her original investigation of the Petitioner's case. App. p. 72.

Also at PCR counsel's request, she explained that she met with John Vesey. App. pp. 72-73. Ms. Connelly further explained that Mr. Vesey remembered taking a black male to the junk yard and the black male told him that his son had gotten a gun from his neighbor and he was afraid his son would hurt himself with the gun. App. p. 73. She also explained that Mr. Vesey did not remember anyone named Vicki Amick. App. pp. 73-74. Ms. Connelly noted that her attempts to locate Ms. Amick were unsuccessful. App. p. 74.

Finally, Ms. Connelly testified that she contacted the Lexington County Sheriff's Department to look into the matter involving the shoe print and confiscated shoes. App. p. 74. Ms. Connelly identified and counsel admitted the response she received indicating that the evidence was destroyed. App. pp. 75, 198.

Even though it is well established that a defense attorney has a duty to perform a reasonable investigation and this Court has held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case; here, the lower court found that plea counsel's failure to investigate was permitted since counsel was

not preparing the case for trial. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649. The Petitioner submits and would urge this Court to find that the lower court's finding is based upon an erroneous application of the law and there is no evidence of probative value to support the finding that counsel performed a reasonable investigation. See Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984) (Holding that the existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling.).

While on the stand, plea counsel explained that he reviewed the documents he received from Mr. Myers and the Solicitor's Office and determined that there were not "any other areas that needed to be delved into or investigated." App. p. 131. Counsel further explained that due to the overwhelming evidence "there was nothing that I should have reasonably looked into." App. p. 133, lines 15-20. When asked by PCR counsel to define what amounted to overwhelming evidence, counsel responded that he could not remember all the evidence and later stated that overwhelming was "an adjective that I used that probably wasn't proper." App. pp. 133, 138, lines 18-25.

Turning to the specific issues that the Petitioner alleged counsel should have investigated, plea counsel continued with his theme that he did not look into anything because it was not necessary. Plea counsel candidly admitted that he did not go to the pawn shop, and he did not speak with the Petitioner's alibi witness. App. pp. 132-133. He testified that he may have spoken to the victim, but he could not specifically recall. App. p. 135. He further testified that he thought he the shoe print was inconclusive, but he did not have a report to verify that memory. App. p. 132. In sum, he could only remember speaking with the Petitioner about the case and reviewing the file. App. pp. 130, 135.

It is clear that plea counsel's testimony stands in complete contradiction to a finding that he conducted a reasonable investigation, but the State chose to focus on the Petitioner's expression of satisfaction with his attorney and failure to express concerns during his plea colloquy. This Court has found that such "an expression of satisfaction is necessarily conditional." Kolle v. State, 386 S.C. 578, 592, 690 S.E.2d 73, 80 (2010). In Kolle, this Court further explained that "the extent of satisfaction is dependent upon the attorney's diligence and degree of information shared with the client." Id. When asked about his affirmation of satisfaction with counsel at his plea, the Petitioner explained that he was advised by counsel that he must reply in the affirmative to the plea court's questions about his satisfaction with counsel. App. p. 114. He further explained that it was not the truth and he regretted that he had informed the plea court that he was satisfied with Mr. Bernstein. App. pp. 114-115. After explaining his answers at the plea hearing, the Petitioner alleged that plea counsel failed to properly prepare and investigate his case, and but for such deficient performance, he "would have gone to trial." App. p. 117.

It is true that the Petitioner must show both ineffective assistance of counsel and resulting prejudice. As was explained in Stalk, to meet the prejudice requirement, an Applicant must show "some evidence that had counsel done an investigation he would have found a witness or evidence that was helpful" to Applicant and that would have affected either counsel's advice or Applicant's decision to take the plea. 383 S.C. 559, 563, 681 S.E.2d 592, 594-5. In the instant case, the Petitioner did everything possible to meet his burden and show prejudice, but he was unable to call his alibi witness or present evidence due to no fault of his own.

Even though PCR counsel obtained the services of Lee Connelly, due to the passage of time and the destruction of the evidence, she was unable to complete the investigation that was

left unfinished prior to the Petitioner's plea. The Petitioner submits that he suffered irreparable prejudice when counsel failed to properly prepare and investigate because it was clearly demonstrated by the testimony and evidence at the PCR hearing that the investigation can no longer be completed.

First of all, plea counsel was aware of the Petitioner's alibi witness and failed to even attempt to speak with her. Now that she is deceased, the Petitioner is left with one report prepared by Ms. Connelly. Unfortunately, this report does not provide enough information to even attempt to ascertain the strength of the Petitioner's alibi defense, but it does show that more investigation needed to be done on this matter.[1]

Secondly, the witnesses that Ms. Connelly was able to locate could not remember the events in question or simply could not be located. Clearly, it would have been much easier for Ms. Connelly to locate these witnesses and complete her investigation prior to the Petitioner's plea.

Finally, Ms. Connelly attempted to obtain the evidence from the Petitioner's case to determine if testing or further investigation needed to be done, but the evidence was destroyed. The Petitioner submits that this evidence was potentially exculpatory in nature and was not cumulative to other evidence. It must be noted that this evidence was destroyed prior to the Petitioner exhausting his state or federal remedies. The Petitioner submits that this premature destruction of the evidence was at no fault of his and was detrimental to his ability to prepare and present his PCR Action and is ultimately a fundamental denial of due process. See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988); State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995).

[1] At the evidentiary hearing, plea counsel testified that the Petitioner's alibi defense was "weak." App. p. 150.

Even though the prejudice in the instant case may not be typical, the Petitioner urges this Court to recognize the actual prejudice suffered due to counsel's failure to prepare and investigate. If plea counsel had provided effective assistance and properly prepared and investigated the Petitioner's case, it would not matter that his alibi witness is deceased, witnesses could not be located, and the evidence had been destroyed since all these matters would have been already fully investigated and addressed by plea counsel.

In conclusion, the Petitioner would urge this Court to find that the lower court erred in reasoning that plea counsel's failure to prepare and investigate was excusable since the Petitioner did not proceed to trial. It is clear from the record that there was no evidence to support a finding of effective assistance of counsel. It is also clear from the record that plea counsel's failure to prepare and investigate has caused irreparable prejudice to the Petitioner due the destruction of the evidence and death of his alibi witness. Therefore, the Petitioner would further urge this Court to set aside his plea that was not fully knowingly and voluntarily entered due to counsel's failures and allow him to proceed to a new trial.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and allow the Petitioner to proceed to briefing the requested issues under Rule 243(j), SCACR, and/or grant the Petitioner a new trial.

Respectfully submitted,

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This 25 day of February, 2011.