

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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CERTIORARI TO LEXINGTON COUNTY  
The Honorable R. Lawton McIntosh, Circuit Court Judge

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JULIUS POWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Is there probative evidence to support the post-conviction relief court's finding that Petitioner was entitled to appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?
- II. Is there probative evidence to support the post-conviction relief court's determination Petitioner failed to meet his burden of proving his plea counsel failed to conduct an adequate investigation?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Petitioner was indicted at the April 2007 term of the Lexington County Grand Jury for burglary- 1<sup>st</sup> degree (07-GS-32-1126), kidnapping (07-GS-32-1127), and armed robbery (07-GS-32-1128). Lowell E. Bernstein, Esquire, represented him. On May 24, 2007, Petitioner pled guilty to burglary- 2<sup>nd</sup> degree, kidnapping, and armed robbery. He was sentenced by the Honorable Casey L. Manning, to confinement for fifteen (15) years, eighteen (18) years, and eighteen (18) years, respectively, concurrent. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief on December 4, 2007, and an amended application on January 20, 2010. The State made return on May 1, 2008. An evidentiary hearing was held on February 5, 2010 at which time Petitioner was present and represented by Tricia A. Blanchette, Esquire. The State was represented by A. West Lee, Assistant Attorney General. The post-conviction relief court issued an order dated March 3, 2010, granting a review pursuant to White v State, 263 S.C. 110, 208 S.E.2d 35 (1974), but denying all other claims.

Petitioner filed and served notice of appeal. A Petition for Writ of Certiorari as well as an Anders Brief Pursuant to White v State was submitted on Petitioner's behalf by Appellate Defender Robert M. Pachak. By order dated October 28, 2010, this Court issued an order substituting Tricia A. Blanchette, Esquire, as appellate counsel for Petitioner and permitting Petitioner to withdraw the previously filed Anders Brief Pursuant to White v. State and Petition for Writ of Certiorari and to submit a substitute

petition and brief. Petitioner thereafter filed and served an Initial Brief of Appellant Pursuant to White v. State and Amended Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

## ARGUMENT I

**Is there probative evidence to support the post-conviction relief court's determination Petitioner did not knowingly and voluntarily waive the right to an direct appeal?**

The post-conviction relief court determined that Petitioner did not knowingly and voluntarily waive his right to a direct appeal and was entitled to a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). On appeal, Petitioner asserts the finding is supported by probative evidence and that this Court should conduct the White v State review.

The record before this Court reflects that the plea judge advised Petitioner during the guilty plea proceeding that he had the right to appeal after the guilty plea and that the appeal must be pursued within ten (10) days. (App. p. 18). Petitioner testified that he and his wife asked plea counsel to appeal but counsel refused to appeal, stating there were no grounds for appeal. (App. p. 61-62). The record also reflects that plea counsel recalled that he was contacted by Petitioner or Petitioner's wife about an appeal but could not recall if the request was made within time to permit him to file and serve the notice of appeal. (App. p. 143). No appeal was taken from Petitioner's guilty plea and sentence.

Based upon the record before this Court, there appears to be probative evidence to support the post-conviction relief court's conclusion that Petitioner did not knowingly and voluntarily waive the right to a direct appeal.

## ARGUMENT II

**Is there probative evidence to support the post-conviction relief court's determination that Petitioner failed to meet his burden of proving his trial failed to conduct an adequate investigation?**

Petitioner asserts that his trial counsel failed to conduct an adequate investigation to ensure that his plea was knowing and voluntary. Specifically, Petitioner complains on appeal that his plea counsel failed to request additional funding to extend the services of a private investigator and failed to adequately investigate shoe print evidence and the investigative report or interview a potential alibi witness, Vickie Amick, John Vesey, and the owner of the pawn shop where a weapon stolen from the victims was located by law enforcement officers. He contends the post-conviction relief judge erred in finding that he failed to meet his burden of proof relating to this claim. (See App. pp. 212- 213). Respondent submits probative evidence exists to support the post-conviction relief court's findings that Petitioner failed in his burden of proving ineffective assistance of plea counsel. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Petitioner has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representa-

tion within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, 466 U.S. at 668. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test to evaluate 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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington, 466 U.S. at 668. 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 v. State, 300 S.C. at 117-18, 386 S.E.2d at 625, *citing* Strickland v. Washington, 466 U.S. at 668. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). With respect to guilty plea counsel, Petitioner must show that 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

On appeal, this Court must affirm the circuit court's grant of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C.158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Petitioner complains that plea counsel failed to look into shoe print lifts taken from the victim's residence and failed to look into information contained in an investigative report and the victim's statement. He complains because his attorney did not personally interview a potential alibi witness, Vicki Amick, John Vessy or the pawn shop owner before he entered his guilty plea. Petitioner presented the testimony and investigative report of a private investigator at the post-conviction relief hearing who had initially been retained by the defense to investigate the case before Petitioner's guilty plea and who conducted additional investigation for the post-conviction relief case. With the additional investigation for the post-conviction relief hearing, the investigator determined that the potential alibi witness was deceased, the victim, other co-defendants, and Vicki Amick could not be located, and the shoe print impressions and that all of the evidence in the possession of the investigating law enforcement agency was destroyed after Petitioner entered his guilty plea. Basically, all of the matters Petitioner claims should have been further explored by plea counsel prior to the guilty plea yielded nothing beneficial for Petitioner to present at the post-conviction relief hearing. Instead, Petitioner asked the post-conviction relief court and now asks this Court to speculate that he suffered prejudice from counsel's failure to personally explore these matters or retain an investigator to do so prior to the guilty plea. Respondent submits that this Court should decline to presume deficient performance or prejudice from a record silent as to what the additional exploration would have yielded and the impact that evidence might have had upon Petitioner's case and his decision to enter a guilty plea. Prejudice from trial counsel's failure to call witnesses or conduct investigation cannot be shown when the witnesses do not testify and the evidence is not produced at the post-conviction relief

hearing. See Dempsey v. State, 363S.C. 365, 610 S.E.2d 812 (2005); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4<sup>th</sup> Cir.1990), cert. denied, 499 U.S. 982 (1991). The Petitioner's mere speculation as to what the evidence might have been or that it simply would have been helpful, without more, cannot satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Petitioner admitted at the post-conviction relief hearing that he could only provide speculation. (App. pp. 161- 165). Petitioner's testimony that he would not have entered the guilty plea had the additional exploration been conducted is simply not credible when he does not know what the investigation would have yielded. Also, Petitioner's testimony from the post-conviction relief hearing relating to the answers given to the plea judge during the guilty plea proceeding reveal that Petitioner will state under oath whatever is needed to get what he wants. (App. pp. 114 - 115). To reverse the post-conviction relief judge in this matter would provide Petitioner a windfall to which he is not entitled.

Nevertheless, the State submits that the additional exploration and expenditure of funding for investigation at the point Petitioner elected to enter the plea was not warranted. Plea counsel testified that based upon his experience, the information provided to counsel by Petitioner and the prosecutor, counsel's review of the State's evidence and possible defenses, the posture of the case and potential punishment, it was counsel's opinion that the additional investigation suggested by Petitioner was not warranted before Petitioner's guilty plea. The State submits that counsel's treatment of this issue to be reasonable. See Dempsey v. State, 363S.C. at 365, 610 S.E.2d at 812.

The record before this Court reflects that Petitioner was represented by an experienced criminal trial practitioner with more than sixteen years of practice in the area of criminal law. (App. p. 124). Counsel was appointed to represent Petitioner a few months before the guilty plea and after Petitioner's original counsel was deployed. Prior to plea counsel's appointment, Petitioner was represented by an initial attorney who obtained funding and used the services of a private investigator to conduct an investigation for the defense. The prior attorney obtained all discovery material. The private investigator reviewed the discovery material with Petitioner and received a time line from Petitioner as to his whereabouts during and around the time of the crime. Petitioner suggested an alibi witness for investigation and the investigator interviewed that witness and provided the results of that interview and other investigative matters to Petitioner and counsel. (App. p. 121). After the appointment, Petitioner's subsequent counsel (plea counsel) met with Petitioner's original attorney, discussed that attorney's investigation, opinions, and impressions of the case and obtained the original attorney's file, including all of the work conducted by the private investigator. (App. p. 125-126). Plea counsel had at least six documented meetings with Petitioner at the detention center, also met with Petitioner at the courthouse on occasion and had numerous telephone conversations with Petitioner and Petitioner's wife about the case. (App. p. 126-127; 133; 144). Plea counsel and Petitioner discussed the charges, potential sentences, State's evidence, Petitioner's constitutional rights, potential defenses and investigative results, and the guilty plea offer. (App. p. 144-146). Plea counsel requested discovery material again from the State to ensure that he had received all of the evidence from the State. (App. p. 125, 127). Plea counsel reviewed with Petitioner all of the discovery material,

the results of the investigation by the investigator, and everything in the file, including information provided by prior counsel. (App. p. 127-128). After reviewing the file and all of the evidence and discussing the matter with Petitioner, it was plea counsel's opinion that a guilty plea to avoid a life sentence might be the most beneficial resolution of the case for Petitioner and the means by which to avoid the possibility of a life sentence. (App. p. 128-129). Plea counsel stated that all funding allocated for the private investigator had been exhausted prior to his appointment but that he had been provided with all of the information gathered by the investigator. (App. pp. 128, 130, 149) Plea counsel testified that, had the matter proceeded to trial, he would have sought additional funding for the investigator but did not see the advantage of the additional investigation by a private investigator into the matters alleged by Petitioner at that point based upon his experience, the information known to him at the time, his review of the evidence, discussions with Petitioner, the State's witnesses and possible defenses. (App. p. 130).

Plea counsel also stated that he reviewed all of the evidence related to the discovery of the gun stolen from the victim at the pawn shop and determined that additional services of the private investigator would not have been helpful in presenting a defense to the evidence located at the pawn shop at the point Petitioner elected to enter the guilty plea. As to the potential alibi witness Deborah Stevenson, counsel reviewed the evidence and the information gathered by the private investigator from the potential alibi witness in consideration of an alibi defense. Plea counsel reasonably relied upon the interview conducted by the investigator retained by the defense for that purpose. The record reflects the crime occurred around 11:30 p.m. and Ms. Stevenson could not provide Petitioner with an alibi until midnight or thereafter. (App. p. 121). Plea counsel

also looked into the distance between the crime scene and the home of the alibi and determined the witness would not be able to provide Petitioner with a true alibi for the time of the crime. (App. p. 131, 133, 150; 154). The other testimony elicited at the evidentiary hearing and an acknowledgment from Petitioner confirm that fact. (App. p. 162-163). It should also be noted that because there is no indication the case was on the trial roster, plea counsel was yet preparing for trial which might include personal interviews with witnesses in preparation for trial testimony.

As to other possible State or defense witnesses and contrary to Petitioner's claim, plea counsel testified that he spoke with the victim prior to Petitioner guilty plea. Plea counsel related his understanding that the victim was extremely upset and would push for a significant sentence, including a life sentence, at trial. (App. p. 147). The guilty plea proceeding confirms that the victim was very upset and had suffered greatly because of the criminal acts perpetrated. (App. pp. 26 - 29).

Plea counsel also stated that a number of witnesses placed Petitioner at the scene and indicated that Petitioner was the ringleader in the crime. (App. pp. 134 - 135). Plea counsel recalled that some co-defendants were Petitioner's family members, were represented by counsel and were not available to him. (App. p. 134; 150). Plea counsel determined that the co-defendants had provided statements implicating Petitioner and would testify against Petitioner at trial. Plea counsel's preparation would have included a review of these statements when counsel reviewed all discovery material provided by the State. Plea counsel indicated that he received information that one or more of the co-defendants might recant the written statements characterizing Petitioner as the ringleader but that he looked into that issue and was not able to substantiate the recantation. (App.

p. 134-135; see also p. 108). Plea counsel stated that Petitioner's prior record would have rendered Petitioner's testimony at trial problematic but, had the case proceeded to trial, he would have gathered all of the information available and attempted to impeach the co-defendants with prior criminal records, their roles in the crime, and any bargain or benefit gained from testifying against Petitioner at trial. (App. p. 131-132; 134; 151).

Plea counsel acknowledged that he was aware that shoes were seized from a co-defendant and testified that a comparison with the shoes and a shoe print impression lifted from the victim's door resulted in an inconclusive test result. Plea counsel stated that the footprint impression was not a major factor for the defense because the State never contended that Petitioner was the sole perpetrator. Rather, the evidence reflected that more than one intruder or participant invaded the victim's home and the footprint could have been left by someone other than Petitioner. Therefore, a negative or an inconclusive result did not absolve Petitioner of the crime. (App. p. 152-154).

Lastly, counsel testified that he would have proceeded to trial had that ultimately been Petitioner's desire and that preparation for trial might have included his request for additional funding for the assistance of the private investigator. However, Petitioner elected to enter a guilty plea before the matter was placed on the trial docket after discussions with counsel respecting the charges, applicable penalties, his constitutional rights, and the evidence that State would present against him at trial. Petitioner clearly elected to accept the plea offer that reduced his sentence exposure and to avoid the possibility of receiving a life sentence. Petitioner has not presented any evidence that calls Petitioner's decision into question or counsel's advice respecting the guilty plea unreasonable. Accordingly, the record supports the post-conviction relief judge's

conclusion that Petitioner failed to show that plea counsel failed to conduct an adequate investigation.

To the extent Petitioner now asserts that destruction of the evidence in his case by the investigating law enforcement agency violates his Due Process rights, the State submits that issue is not properly before this Court on appeal as it was not raised to or ruled upon by the post-conviction relief court. Nevertheless, in order to establish a due process violation where the State fails to preserve evidence, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. See State v. Cheeseboro, 346 S.C. 526, 538, 552 S.E.2d 300, 307 (2001) see also Arizona v. Youngblood, 488 U.S. 51 (1988). The record is totally devoid of the requisite proof to establish a due process violation from the destruction of evidence in this case, particularly when it occurred after the criminal matter was successfully ended with Petitioner's guilty plea.

## CONCLUSION

For the foregoing reasons, Respondent submits that the Petition should be denied and dismissed. If this Court grants this Petition for Writ of Certiorari, the Respondent would request permission under the rules to fully brief the issue contained herein.

Respectfully submitted,

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