

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Court of Common Pleas

The Honorable George F. McFaddin, Post-Conviction Relief Judge
The Honorable D. Craig Brown, Trial Judge

Appellate Case No. 2019-000709

RECEIVED

Apr 23 2020

S.C. SUPREME COURT

Jeffrey Thomas Brown, #338329,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED ON CERTIORARI

PETITIONER'S QUESTION PRESENTED

Whether the PCR court erred in denying Petitioner relief, where trial counsel worked for the attorney who represented Petitioner's codefendant, where the codefendant testified against Petitioner at trial, and where trial counsel therefore had a conflict of interest and neither told Petitioner nor sought a waiver?

RESPONDENT'S QUESTION PRESENTED

Did the PCR court correctly find Petitioner failed to establish he was entitled to post-conviction relief based on a purported conflict of interest, where no actual conflict of interest existed because although another attorney in his firm represented Petitioner's testifying codefendant, both attorneys were appointed and paid through individual contracts with the Florence County Public Defender's Office; the codefendant's attorney had no supervisory capacity over trial counsel on this case; and trial counsel was not even aware of who codefendant's attorney was until the morning of trial?

STATEMENT OF THE CASE

Jeffrey Thomas Brown (Petitioner) is incarcerated in the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Petitioner was indicted at the March 2013 term of the Florence County Grand Jury for one count of attempted armed robbery (2013-GS-21-0320).¹ Petitioner was represented by Daniel T. Jordan (Counsel), Esquire. At a jury trial before the Honorable D. Craig Brown on September 19, 2013, Petitioner was convicted of one count of attempted armed robbery. Judge Brown sentenced him to fifteen years' imprisonment.

Petitioner filed a timely notice of appeal. The appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division pursuant to Anders v California, 378 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction on February 4, 2105. State v. Brown, Op. No. 2015-UP-062 (S.C. Ct. App. 2015). The remittitur was returned to the circuit court on February 20, 2015.

Petitioner filed an application for post-conviction relief (PCR) filed on March 27, 2015. Respondent made its Return and Motion for a More Definite Statement on September 7, 2016. Through PCR counsel, Petitioner amended his application on February 1, 2018. An evidentiary hearing into the matter was convened on April 6, 2018, at the Florence County Courthouse before the undersigned. Jonathan D. Waller, Esquire, represented Applicant. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's original counsel at trial, Daniel Jordan, Esquire (Counsel), also testified, along with William "Jay" Jordan, Esquire, who represented Petitioner's

¹ Petitioner was also indicted on three counts of breaking and entering a motor vehicle and one count of second-degree burglary. Those charges were ultimately dismissed.

codefendant. By written order filed April 22, 2019, the PCR court denied Petitioner's claims and dismissed his application for relief with prejudice.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief. On December 20, 2019, Petitioner, through counsel, filed a petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

Around 4:45 a.m. on the morning of October 31, 2012, a man entered the Kangaroo Express gas station in Johnsonville, armed with a knife. App. pp. 41-43. One of the clerks on duty, Teresa Swanson (Swanson), testified the man demanded she put money into the plastic bag he was carrying. App. pp. 41, 43-44. Both Swanson and a second clerk, Michael Christian (Christian), recognized the man as a customer Christian had waited on about an hour earlier. App. pp. 48, 59. Swanson hit the store's panic button and grabbed a club from under the counter, causing the man to flee. App. p. 45. Swanson and Christian followed the man outside and watched him get into the passenger's side of a white pickup truck, which then drove off. App. pp. 47, 61-62.

Swanson identified Petitioner on the surveillance video from inside the store, and the investigating officer testified she provided law enforcement with Petitioner's name. App. pp. 48, 68. Swanson and Christian also identified Petitioner as the attempted armed robber at trial. App. pp. 46, 61. Swanson testified she noticed Petitioner in the store again two days after the attempted robbery, and she alerted law enforcement. App. pp. 49-50. When law enforcement placed Petitioner under arrest, he had a pocketknife in his pocket. App. pp. 69-70.

Petitioner's codefendant, his stepbrother, Matthew Venters (Venters), also testified for the State and identified Petitioner as the robber. App. pp. 81-82. Venters admitted to being the getaway driver of the white pickup truck and testified he knew Petitioner was planning to rob the Kangaroo when he dropped Petitioner off there. App. pp. 80-82.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

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, 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. 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). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner 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). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

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. 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. 668.

ARGUMENT

The PCR court correctly found Petitioner failed to establish he was entitled to post-conviction relief based on a purported conflict of interest, where no actual conflict of interest existed because although another attorney in his firm represented Petitioner's testifying codefendant, both attorneys were appointed and paid through individual contracts with the Florence County Public Defender's Office; the codefendant's attorney had no supervisory capacity over trial counsel on this case; and trial counsel was not even aware of who codefendant's attorney was until the morning of trial.

Petitioner argues the PCR court erred in refusing to grant relief on the basis Petitioner's trial counsel had an actual conflict of interest because a partner at his firm represented Petitioner's codefendant, his stepbrother, who was a testified against Petitioner at trial. PWC p. x. Further, Petitioner argues the PCR court applied the wrong standard because it conducted a prejudice analysis in declining to grant relief. PWC p. x. On the contrary, because the PCR court correctly found no actual conflict existed, in order to be entitled to relief on this issue, Petitioner was required to demonstrate deficiency and prejudice in accordance with the Strickland standard. Thus, the PCR court engaged in the correct analysis and appropriately denied relief, and this Court should deny certiorari.

As this Court has explained, a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). "The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Jordan v. State, 406 S.C. 443, 449,

752 S.E.2d 538, 541 (2013) (quoting Staggs, 372 S.C. at 551, 643 S.E.2d at 692). However, “[t]he mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction,” and in situations in which no actual conflict exists, the traditional Strickland standard of deficiency and prejudice applies. Strickland, 466 U.S. at 692 (“Prejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’”); State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

In this case, the PCR court correctly found no conflict of interest existed. App. p. 200. Jay Jordan (Jordan), who represented Venters, the codefendant, explained the relationship between himself and Counsel.² App. p. 154. According to Jordan, both he and Counsel had contracts with Florence County’s Public Defender’s Office, and both also had a private practice in Jordan’s firm as well. App. p. 154. Jordan testified neither he nor the firm paid any money to Counsel for this case, all money came from Florence County, and he and Counsel received separate W2s – one from Florence County and one from the private practice. App. pp. 155-56. Jordan testified he did not exert any supervisory capacity over Counsel on any of his public defender cases; the firm did not keep public defender files in the office; and all cases were kept separate. App. pp. 155-56. Finally, Jordan testified they did not discuss these cases with each other. App. p. 157.

Counsel testified he did not discuss his relationship with Jordan with Petitioner because he did not believe a conflict existed. App. p. 178. Counsel testified he was not even aware Jordan was the codefendant’s attorney until the morning of trial, and he and Jordan never had any conversations about the two cases. App. p. 182. Counsel also testified he and Jordan created a

² Although Counsel and Jordan share the same last name, they are not related. App. p. 152.

“firewall” around their respective cases and had a policy not to go into the other person’s files, per instructions from the Office of Indigent Defense. App. p. 178.

Accordingly, based on the credible testimony of Counsel and Jordan, the PCR court correctly found no actual conflict existed. App. p. 200. Petitioner suggests Counsel had a “monetary interest in keeping his supervisor content.” PWC p. 6. This assertion has no support in the record as both Counsel and Jordan credibly testified Jordan had no supervisory capacity over Counsel in this case; they did not speak to each other about their respective clients; and Counsel did not expend nor was he paid with funds from the private firm in the course of his work on this case. App. pp. 155-57, 182. Counsel obtained his contract to work as a part-time public defender independently, not through the private law firm, and operated in those cases in a separate capacity from his work in the private firm. App. pp. 155-56.

Most notably, Petitioner has never pointed to any decision or course of action he claims demonstrates Counsel was laboring under a conflict. In fact, Petitioner himself testified “the only thing that bothered [him]” about Counsel’s representation was the issue of “the suppression of the videos at trial.” App. p. 167. However, the other allegations of ineffective assistance raised at the evidentiary hearing were wholly unrelated to the conflict claim, and Petitioner has not pursued an appeal of the PCR court’s decision to deny relief as any of those issues, so the finding Counsel was not ineffective in any other way is now the law of the case. The only argument Petitioner made at the evidentiary hearing regarding the conflict claim was that Counsel “had a monetary interest” in Jordan’s firm. However, Petitioner never connected this interest to any particular decision or piece of advice given by Counsel that demonstrates the alleged conflict “actually affected the adequacy of [Counsel’s] representation,” and Counsel not found to be deficient in any way. Staggs, 372 S.C. at 551, 643 S.E.2d at 692.

Thus, the PCR court correctly found no actual conflict existed because, at most, Petitioner presented evidence only of the *possibility* of a conflict, but no evidence Counsel actively represented the interests of someone other than Petitioner. Gregory, 364 S.C. at 152–53, 612 S.E.2d at 450. Because there was no actual conflict, the PCR court then engaged in the traditional Strickland analysis and found Petitioner failed to prove prejudice because “there was no possible harm to [Petitioner], and there was no collusion or sharing of information between Counsel and Jay Jordan which could have prejudiced [Petitioner].” App. p. 201.

Accordingly, because the PCR correctly found no actual conflict existed nor did Petitioner suffer any prejudice from the alleged conflict, using the appropriate standard of review under the traditional two-pronged Strickland analysis, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court’s denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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