

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas
The Honorable William H. Seals, Jr., PCR Judge
The Honorable Thomas A. Russo, Trial Court Judge

S.C. SUPREME COURT

Appellate Case No. 2019-001497

ROBERT JACKSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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¹ *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

PETITIONER’S STATEMENT OF ISSUES ON CERTIORARI

- I. Did the post-conviction relief (PCR) judge correctly grant Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974)?

- II. Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to the assistant solicitor’s impermissible comments on Petitioner’s right to remain silent during his closing argument, and where Petitioner was prejudiced because the solicitor’s comments (1) suggested Petitioner was guilty merely because he exercised his right to remain silent after his arrest and (2) were specifically tied to Petitioner’s exculpatory story, which a reasonable jury could have believed?

RESPONDENT’S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. The PCR court correctly granted Petitioner a belated appellate review pursuant to *White v. State*.

- II. The PCR court correctly determined Petitioner failed to establish he was entitled to relief based on trial counsel’s failure to object to a portion of the State’s closing argument referencing his post-arrest silence where there is no reasonable probability the result of the proceeding would have been different had counsel objected.

STATEMENT OF THE CASE

On June 2, 2015, the Florence County Sheriff's Office received a tip that drug activity was occurring at the Cruizer's convenience store in Florence, by an individual in a burgundy Nissan Altima. (App. 124). When Investigator Jason Pate arrived on scene, a burgundy Nissan Altima was occupied by an individual, ultimately found to be Petitioner, with his legs "hanging out" of the vehicle. (App. 124, l. 15-18; 130, l. 9-12). Upon approaching the vehicle, Pate saw in plain view a pill bottle with a suspiciously torn label in the side compartment door of the vehicle. (App. 124). Thereafter, Pate asked Petitioner for his driver's license. (App. 124, l. 23- 125, l. 4). While Petitioner was obtaining his driver's license, Pate noticed a plastic bag in Petitioner's shirt pocket. Petitioner immediately admitted the plastic bag contained heroin. (App. 125, l. 1-9). Based on this finding, Investigator Angel Clark who subsequently arrived on scene, searched Petitioner's vehicle and ultimately located additional heroin in the console and floorboard of the vehicle. (App. 151).

In August 2017, the Florence County Grand Jury indicted Petitioner for trafficking in heroin and possession of controlled substance-second offense (2017-GS-21-1033). B. Scott Suggs and John R. Ethridge, Esquires, represented Petitioner. Assistant Solicitor Ryan White, Esquire prosecuted the case. On September 15, 2017, Petitioner proceeded to trial before the Honorable Thomas A. Russo.

During trial, Petitioner testified on his own behalf and testified he used heroin for pain management due to pain resulting from his leg amputation and other medical issues, and that is why he was in possession of the bindles of heroin in his shirt pocket. (App. 275-276). Petitioner also maintained he frequently allowed known drug dealers to borrow his car for a fee, and that he recently lent his car to an individual named Lynn Grimsley, who was, according to Petitioner, the

owner of the pills found in the car door. (App. 269, 270). Petitioner also testified he was with a different individual² immediately prior to Petitioner's encounter with the officers, but that this unnamed individual went into the convenience store. Petitioner testified the drugs found in the floorboard and console belonged to this unidentified individual. (App. 269, 273-74).

The jury found Petitioner guilty as indicted. Judge Russo sentenced Petitioner to imprisonment for concurrent terms of twenty-five years for trafficking in heroin and one year for possession of a controlled substance. Petitioner did not appeal his conviction or sentence.

On January 31, 2018, Petitioner filed a PCR application alleging he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Not a lawyer requesting a public defender"
2. "New found evidence: my lawyer didn't allow my witness"

On June 19, 2019, Petitioner submitted an Amended PCR application, asserting the following allegations:

1. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Petitioner;
2. Counsel was ineffective for failing to adequately prepare for trial;
3. Counsel was ineffective for failing to move to sequester witnesses;
4. Counsel was ineffective for failing to object to the Solicitor's impermissible comment on Petitioner's right to remain silent during the closing argument of the State; and
5. Counsel was ineffective for failing to file a notice of appeal on behalf of Petitioner, thus denying Petitioner appellate review.

An evidentiary hearing into the matter was convened on June 28, 2019, at the Florence County Courthouse before the Honorable William H. Seals, Jr. Jonathan D. Waller, Esquire, represented Petitioner. Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. B. Scott Suggs, Esquire, and John R. Ethridge, Jr., Esquire, also testified.

² Petitioner did not provide the name of this alleged individual to the jury.

At the evidentiary hearing, Petitioner proceeded solely with the allegations set forth in his amended application. By Order dated August 29, 2019, and filed September 4, 2019, Judge Seals denied Petitioner's PCR claims and granted Petitioner belated appellate review pursuant to *White v. State*.

Petitioner subsequently filed a timely Notice of Appeal. On March 26, 2020, Petitioner, by way of Appellate Defender Lara M. Caudy, filed a Petition for Writ of Certiorari. This Return follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

I. The PCR court correctly determined Petitioner did not knowingly, voluntarily, or intelligently waive his right to a direct appeal, and accordingly, properly granted him belated appellate review of direct appeal issues pursuant to *White v. State*.

At the evidentiary hearing, Petitioner testified he and Suggs did not discuss his right to appeal. (App. 381). Petitioner also testified he wanted to file an appeal, but Suggs did not file an appeal. (App. 381). Suggs testified at the evidentiary hearing that he did not handle appeals and he always told his clients that he did not represent clients on appeal. (App. 397). Suggs testified he told his clients early in his representation to be “proactive” and find an appellate attorney. (App. 397). Suggs also testified Petitioner did not sign a waiver or tell him he did not want to file an appeal. (App. 391).

Respondent does not challenge the PCR court’s grant of *White* relief in this case. “Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal.” *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).” *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” *Simuel*, 390 S.C. at 271, 701 S.E.2d at 740 (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted)). Respondent does not challenge the PCR’s grant of *White* relief based on the finding that there was no evidence Petitioner made a knowing and intelligent decision not to pursue a direct appeal³.

³ Petitioner has filed an *Anders* brief pursuant to *White*, and accordingly, Respondent will not be filing a responsive brief unless instructed to do so by the Court.

II. The PCR court correctly determined Petitioner failed to establish he was entitled to relief based on trial counsel’s failure to object to a portion of the State’s closing argument referencing his post-arrest silence where there is no reasonable probability the result of the proceeding would have been different had counsel objected.

Petitioner argues the PCR Court erred in denying Petitioner’s PCR application when, according to Petitioner, the assistant solicitor made an impermissible comment on Petitioner’s right to remain silent during his closing argument, and where, according to Petitioner, Petitioner was prejudiced because the solicitor’s comments (1) suggested Petitioner was guilty merely because he exercised his right to remain silent after his arrest and (2) were specifically tied to Petitioner’s exculpatory story, which a reasonable jury could have believed. Petitioner’s argument is without merit as Petitioner was not prejudiced by any alleged deficiency, and therefore, certiorari should be denied.

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

The proper measure of performance is whether the attorney provided representation 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*, 466 U.S. 668. The applicant 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 in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any 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." *Id.* at 117-18, 386 S.E.2d at 625.

Petitioner Was Not Prejudiced By Any Alleged Deficiency

As the PCR Court properly found, Petitioner was not prejudiced by any alleged deficiency. With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *See Harrington v. Richter*, 562 U.S. 86 (2011).

"Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *see State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.")

As the PCR court properly found, Petitioner has failed to meet his burden proving he was prejudiced by Suggs's failure to object to the statement made during the State's closing argument. Respondent also submits nothing in the record supports Petitioner's argument that he was prejudiced by any alleged deficiency. Petitioner merely makes the conclusory argument on appeal that the statement suggested Petitioner's guilt "merely" because he exercised his right to remain silent after arrest. To the contrary, the State's theory was premised on the significant evidence against Petitioner, including: (1) the fact that the drugs were found in Petitioner's own vehicle; (2) the packaging of the drugs which Petitioner admitted to possessing matched the packaging of the drugs found in the console and floorboard, which Petitioner denied owning; (3) Petitioner provided an unlikely story that another individual ran into the store immediately prior to Petitioner's encounter with the officers, yet provided no identifying information regarding this individual when testifying at trial; and (4) Petitioner provided the unlikely story that he purchased fifty bindles of heroin exclusively for pain management.

Unlike *Doyle v. Ohio*⁴ and many of its progenies cited to by Petitioner, Petitioner's argument stems from a single comment made during the solicitor's closing statement, as opposed to testimony elicited during cross-examination of a petitioner, or a combination of cross-examination testimony and comments made during closing arguments. Moreover, the trial court informed the jury that its job was to consider and evaluate the evidence, and that the evidence consisted of testimony and exhibits, not any statements made by the attorneys during closing arguments. (App. 296, ll. 5-13; 330, ll. 7-10, 20-25).

Additionally, the comment was one comment in a lengthy closing argument. *See State v. Tucker*, 324 S.C. 155 (1996) (Affirming conviction, in part, because the statement made in

⁴ *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 224 (1976).

Solicitor's closing argument was "one isolated event in the entire argument."). Accordingly, Petitioner was not prejudiced by any alleged deficiency, and therefore, certiorari should be denied.

CONCLUSION

Based on the foregoing arguments, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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