

STATE OF SOUTH CAROLINA
In The Supreme Court

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MAY 15 2013

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2012-212410

Gary Michael Piper, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

SUZANNE H. WHITE
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not deficient in the cross-examination of Jennifer Gregg as to the source of her reward payment, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Petitioner at the February and June 2007 terms of General Sessions for failure to stop motor vehicle when signaled by officer (07-GS-42-0544), pointing and presenting firearms at persons (07-GS-42-2716), murder (07-GS-42-2718), and two counts of attempted armed robbery (07-GS-42-2717, -2719). E. Joshua Schultz, Esquire, and Richard H. Welchel, Esquire, represented the Petitioner.

On November 29, 2007, Petitioner pled guilty to failure to stop and was convicted of the remaining charges by a jury. The Honorable Thomas W. Cooper, Jr. sentenced the Petitioner to confinement for forty-five (45) years for murder, twenty (20) years on each count of attempted armed robbery, and five (5) years each for pointing and presenting and failure to stop, all sentences running concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. An Anders brief was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Piper, Op. No. 2010-UP-013 (S.C. Ct. App. filed January 21, 2010). The Remittitur was issued on February 8, 2010.

The Petitioner subsequently filed a PCR application on August 24, 2010. The Respondent made its Return on or about April 9, 2011. An evidentiary hearing into the matter was convened on April 2 and 3, 2012, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Stephen C. Wofford, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Following the hearing, The Honorable J. Derham Cole denied the PCR application by

written Order dated June 15, 2012. The Applicant filed a *pro se* 59(e) Motion, dated June 29, 2012. Judge Cole dismissed the Motion on January 22, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court properly held that Counsel was not deficient in the cross-examination of Jennifer Gregg as to the source of her reward payment, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.

Petitioner was charged with murder, attempted armed robbery, presenting a firearm, and failure to stop, following an incident in which Petitioner entered a home during an attempted robbery for drugs and money, shooting and killing the victim. (App. p. 154). Following the shooting, the Petitioner fled the scene in a vehicle with another accomplice and then six days later, Petitioner was approached at his home by police and he fled in his SUV. (App. p. 155). After wrecking his SUV, Petitioner ran into the bushes and was apprehended by the police. (App. p. 155). Petitioner was determined to be a suspect because of information provided to the police by his ex-girlfriend. (App. p. 156). The Petitioner alleged Counsel was ineffective for failing to cross-examine Jennifer Gregg (Gregg) regarding the fact that she supplied information to authorities not as a mere concerned citizen, and as a result, Counsel failed to properly and fully attack Greg’s credibility in the eyes of the jury.

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating 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, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner testified that Counsel failed to impeach Gregg with the evidence of a memorandum that appears to indicate that Gregg was paid for her information from the Spartanburg Sheriff's Office as a confidential information, rather than Crime Stoppers. (App. p. 563-4; 619). Petitioner testified he was not satisfied with the way Counsel cross-examined Gregg and although he asked her about receiving the \$2,000, Counsel never followed up on that line of questions. (App. p. 566-7). Petitioner testified that had Counsel used the memorandum to impeach Gregg, her credibility would be damaged and would have affected how the jury viewed

her testimony. (App. p. 569-70).

Counsel testified that he did argue bring out on cross-examination that Gregg was paid two thousand dollars. (App. p. 611-12). Furthermore, Counsel testified that he attacked Gregg's credibility regarding prior drug use, and her motivation for turning in Petitioner to Crime Stoppers. (App. p. 613, lines 11-13). Gregg testified at trial that she called Crime Stoppers and ended up speaking with the detective involved with the case about Petitioner, but acknowledged that she was paid for the information. (App. p. 284). Gregg acknowledged during cross-examination that she had abused prescription pills in the past and that she was upset when she found out that Petitioner had cheated on her. (App. p. 286; 291-2). Gregg also acknowledged that she received \$2,000 from Crime Stoppers for the information she provided about Petitioner. (App. p. 29; 299). Counsel testified that he decided to not enter into evidence jail house tapes of conversations between Petitioner and Gregg because not only would the defense lose the right to argue last, but Counsel felt that the tapes would be more prejudicial than advantageous to Petitioner based on his own statements on the tapes. (App. p. 611).

Respondent submits that the PCR court was correct in finding that Counsel aggressively cross-examined many of the State's witnesses, including Gregg. (App. p. 629). The Court also found that Petitioner failed to present any testimony showing Gregg's answers at trial would have been different or that a different approach to cross-examination would have been beneficial to the defense. (App. p. 629). The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d

1439, 1449 (7th Cir. 1995). The PCR Court also found that the information provided by Petitioner at the hearing, including information regarding the jailhouse conversations and Crime Stoppers' tip, would not be sufficient to have altered the outcome of Petitioner's trial. (App. p. 629).

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
SC Bar #78225

By: 
ATTORNEYS FOR THE RESPONDENT

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May 15, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Circuit Case No.: 2010-CP-42-4481
Appellate Case No.: 2012-212410

GARY MICHAEL PIPER,

Petitioner,

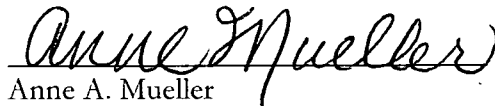
v.

STATE OF SOUTH CAROLINA,

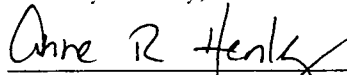
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Breen R. Stevens, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 15th day of May, 2013.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
15th day of May, 2013.

 (L.S.)

Notary Public for South Carolina.
My Commission Expires: 7/18/2017



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

May 15, 2013

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Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

**RE: Gary Michael Piper v. State of South Carolina
Circuit Court Case No: 2010-CP-42-4481
Appellate Case No.: 2012-212410**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: Breen R. Stevens, Esquire (w/enclosure)