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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2022-000710

GEORDI JERELL HEYWARD,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

To set aside a presumptively valid guilty plea, a PCR applicant must show counsel's performance fell below an objective standard of reasonableness and this unprofessional conduct caused him to plead guilty unintelligently or involuntarily. Counsel moved to reconsider Petitioner's sentence following guilty plea based on his mistaken belief prosecutor would take no position on sentencing, but chose not to stop plea because pleading guilty was beneficial to Petitioner, Petitioner did not want to proceed to trial, and counsel raised the issue in a post-trial motion. Did the PCR court abuse its discretion by denying relief?

STATEMENT OF THE CASE

During its February 2017 term, a Richland County Grand Jury indicted Petitioner for three counts of trafficking in persons under eighteen (2017-GS-40-0539, -0736, -0737) and contributing to the delinquency of a minor (2017-GS-40-0538). Thereafter, during its July 2017 term, the Richland County Grand Jury indicted Petitioner for second-degree criminal sexual conduct with a minor (2017-CP-40-0540). The charges arose from an incident in which Petitioner and two co-defendants brought three minor victims to a hotel in Richland County, drugged them, held them against their will, and forced them to have sexual relations with various men. Petitioner also had intercourse with one of the minor victims, and refused to stop when the minor told him it hurt. The solicitor alleged Petitioner was the "muscle" who was responsible for keeping the minor victims at the hotel against their wills. Petitioner gave a voluntary statement to law enforcement admitting to having sexual intercourse with the fifteen-year-old child victim.

Petitioner retained Bakari Sellers, Esquire, to represent him on these charges. The case was prosecuted by the Fifth Circuit Solicitor's Office, with Assistant Solicitors Kathryn Luck Campbell, Lamar Fyall, and Nicole Simpson handling the case. Following extensive plea negotiations, a plea agreement was reached on the cusp of trial to resolve all of his pending indictments in exchange for a "straight-up" guilty plea to second-degree criminal sexual conduct with a minor. On October 12, 2017, Petitioner, alongside counsel, appeared before the Honorable Alison R. Lee, circuit court judge, and pled guilty as indicted to second-degree criminal sexual conduct with a minor. Pursuant to the plea agreement between the State and Petitioner, the State dismissed the three counts of human trafficking and contributing to the delinquency of a minor, and agreed the sentence he received was to run concurrently to any probation revocation he received for two strong armed robbery convictions and a criminal conspiracy conviction for which

he was currently on probation to be handled at a later date.[1] After a thorough colloquy with Petitioner, Judge Lee accepted his plea and sentenced him to fifteen years of imprisonment.

On October 18, 2017, Petitioner, through counsel Sellers, filed a motion to reconsider his sentence, asserting the State had violated the terms of the plea agreement by asking the Judge Lee to impose a sentence between fifteen to twenty years imprisonment when he believed the terms of the agreement were that the State would not seek any specific sentence because the plea was "without recommendation." A hearing on this motion was convened December 4, 2017, before Judge Lee. At this hearing, Petitioner, though counsel Sellers, presented Judge Lee with two email exchanges between himself and the State regarding the plea offers (dated September 7, 2017 and October 4, 2017). Counsel, on behalf of Petitioner, argued that the plea offer contained a term requiring the State to remain silent as to sentencing recommendations, a term he asserts that was carried over from an earlier plea offer to which Petitioner counteroffered, followed by another counteroffer from the State and then acceptance by Petitioner of this final counteroffer. He argued that "basic tenants of contract law" prevented the State from now arguing this term of silence was not included in the offer, as well as made public policy arguments as to why the offer as he understood it to be should be upheld. Sellers did not ask to withdraw Petitioner's plea; rather, he asked that Petitioner be resentenced. (App.39). In contrast, the State argued that no such term was included in the plea agreement, either in written or oral communications, and the plea was straight-up, allowing both Petitioner and the State to argue for what sentence each believed to be appropriate based on the facts and circumstances of the case. Following argument from both parties, Judge Lee orally denied the motion on the record, stating she sentenced Petitioner to fifteen

[1] Petitioner was represented by Assistant Public Defender Robert L. Bank, Jr., on those probation revocation matters, which were not resolved at the plea. Mr. Bank was present at the plea hearing.

years based on the victim impact statements and Petitioner's prior record and status as a probationer for violent crimes for which he was awaiting a revocation hearing. Judge Lee also found the emails did not indicate the agreement was for the State to remain silent as to sentence at the plea and that such a term was not part of the plea agreement.

On December 13, 2017, Petitioner filed a notice of appeal and an explanation of appealable issues from the guilty plea pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Court of Appeals reviewed the guilty plea explanation and determined the appeal could proceed forward to briefing. However, before the submission of briefs, Petitioner moved to withdrawal his appeal, submitting two affidavits stating that he had been advised on the risk of withdrawing his appeal and wished to drop his appeal. On January 9, 2019, the Court of Appeal issued an order dismissing the appeal. The remittitur was sent on January 25, 2019.

Petitioner filed a PCR application on February 6, 2019, and subsequently filed two amended applications through counsel. An evidentiary hearing on this was convened June 14, 2021, before the Honorable George M. McFaddin at the Richland County Courthouse. Petitioner appeared alongside counsel Tara Shurling. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Petitioner proceeded forward on the claims raised in his two amended applications. The Court heard testimony from Petitioner, plea counsel, Bakari Sellers, and prosecutor Nicole Simpson. The court denied relief in a written order on April 22, 2022. A petition for writ of certiorari was filed on May 15, 2023. This return follows.

STANDARD OF REVIEW

The appellate court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them, but will reverse if its decision is controlled by an error of law. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). A lower court's factual finding that a guilty plea was voluntarily and intelligently entered is binding upon the appellate court. Vickery v. State, 258 S.C. 33, 35, 186 S.E.2d 827, 827 (1972).

ARGUMENT

I. The PCR court correctly denied relief because Smalls failed to prove his guilty plea was not intelligently and voluntarily made, and counsel acted reasonably by seeking to have Petitioner resentenced rather than withdrawing the plea.

Evidence supports the PCR court's findings that Petitioner's plea was knowing and voluntary, despite counsel's mistaken belief that the State would not take a position on sentencing during the plea. Counsel acted reasonably by seeking to have Petitioner resentenced rather than withdraw his plea, as the plea agreement was beneficial to Petitioner. Petitioner has not shown prejudice because the solicitor's request that Petitioner be sentenced to 15–20 years' incarceration had no effect on the plea court's sentence, and counsel credibly testified Petitioner did not want to go to trial as the evidence against him was overwhelming. Certiorari should be denied.

a. Applicable law.

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The Sixth and Fourteenth Amendments to the United States Constitution guarantee defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. Id. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to

prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

The second, or "prejudice" prong of Strickland is rooted in the purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Strickland, 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant 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 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill v. Lockhart , 474 U.S. 52 (1985). The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not

whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

b. The State did not violate the terms of the plea agreement.

As an initial matter, the record demonstrates the State did not violate the plea agreement with Petitioner. At the outset of the plea hearing, the solicitor stated the terms of the agreement:

> With respect to recommendations, Your Honor, the State is dismissing three counts of human trafficking, as well as . . . two counts of contributing to the delinquency of a minor. This was all one incident. He is pleading guilty to this one charge from that incident, and we've agreed to run it concurrent to the probation revocation which will be heard at a later date. Other than that, there are no additional recommendations with respect to the agreements in this case.

(App.3–4). At the PCR hearing, the solicitor testified the State did not agree to remain silent with respect to sentencing.

The solicitor explained at the plea hearing and again at the PCR hearing that the only agreement in this case was to dismiss the trafficking and contributing to the delinquency of a minor charges, and to recommend concurrent sentences with Petitioner's probation revocation, which carried a 15-year suspended sentence. (App.110–11, 114). Petitioner's plea to CSCM was an "open plea," meaning both parties were free to request whichever sentence they believed was appropriate. (App. 111).

In Thompson v. State, 340 S.C. 112, 114, 531 S.E.2d 294, 295 (2000), the Supreme Court found counsel was ineffective for failing to object when solicitor requested maximum sentence despite an agreement not "to make a **sentencing request** or recommendation." Id. (emphasis added). It is clear from the opinion there was an explicit agreement that the State would not request any particular sentence in that case.

That did not happen in this case. The solicitor had previously offered to dismiss all companion charges if Petitioner would plead guilty to CSCM second degree and one count of

trafficking without recommendation. The most reasonable interpretation of this offer is that Petitioner would plead without the benefit of any recommendations of leniency by the State in exchange for the dismissal of the other charges. But even if the offer could have been construed as a promise not to request any particular sentence, Petitioner rejected the offer and countered with a request to plead to CSCM 3rd degree. The solicitor made a new offer to drop the trafficking charges if Petitioner would plead guilty to the CSCM, and this offer made no mention of any recommendation. (App.40). The State did not promise to remain silent, as reflected by the on-the-record statement of the offer before the plea and the solicitor's testimony at the PCR hearing. The trial court, after hearing from both attorneys and viewing the written plea offers, correctly held the State did not violate any plea agreement. (App.43–44).

Furthermore, this claim cannot be raised at this stage in the proceedings. While Petitioner claims he was "denied the opportunity to have the appellate court" rule on the issue because it was not preserved for review, Petitioner waived his right to direct appeal when he voluntarily withdrew his appeal. This was his avenue to challenge the trial court's ruling. The ruling is the law of the case and cannot be challenged at this stage. See e.g., State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) ("Since Petitioner does not challenge the use of this conviction to impeach Bush's credibility, this ruling, right or wrong, becomes the law of the case."); Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) (stating an unchallenged ruling, right or wrong, becomes the law of the case); Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case); Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (observing where the appealing party does not challenge a ruling, it becomes the law of the case

and will not be considered by a reviewing court). Regardless, there was no basis to withdraw Petitioner's plea.

c. **Counsel sought to compel compliance with the purported deal by seeking reconsideration of Petitioner's sentence.**

Petitioner claims counsel should have moved to compel compliance with the purported deal to remain silent at sentencing. This is effectively what counsel did by filing a motion for reconsideration. At the hearing, counsel raised his allegation that the State had not complied with the plea agreement and requested that Petitioner be resentenced. (App.39). The trial court correctly rejected Petitioner's assertions that the plea agreement was violated. But more importantly, the court explained its sentence was not based on the solicitor's request, but rather was based on the facts of the case, Petitioner's prior record, and his status as a probationer. (App.43). Defense counsel agreed that the solicitor's request did not change Petitioner's sentence. (App.197). Accordingly, Petitioner could not have shown prejudice on direct appeal because the solicitor's request had no impact on his sentence.

d. **Counsel provided competent representation by filing a motion to reconsider sentence rather than seeking to withdraw the plea entirely.**

Defense counsel testified that he believed there was a term in the plea agreement that the State would not make any recommendation or request as to sentence based on the emails and contemporaneous conversations with the prosecution team. He was surprised when the solicitor made a request for a sentence of fifteen to twenty years at the end of the plea. However, he testified this was after the extremely involved mother of one of the victims had forcefully requested the court sentence Petitioner to the maximum sentence possible, which had a great impact on the court and sentencing (as evidenced by Judge Lee's comments during the motion to reconsider hearing). (App.152). When questioned as to why he did not immediately object, ask to stand-down, or otherwise bring this purported plea agreement to the court as soon as the State

made its sentencing request at the plea, counsel testified he made a strategic decision not to do so because this was an open plea (meaning the court was free to sentence Petitioner to whatever sentence it deemed appropriate) and he still believed that his Petitioner would receive a sentence in between the two ranges recommended by him and the State. (App.152). Counsel elaborated that he always believed his client would receive a sentence of eight to ten years of imprisonment based on the crime, which he conveyed repeatedly to Petitioner and his mother, but he strategically requested a low sentence to counteract what he anticipated to be a forceful request from the victim's mother for a maximum sentence in the hope and belief that the court would "split the baby" and give him a sentence around ten years of imprisonment.

Counsel also testified that there was no legitimate defense to the second-degree criminal sexual conduct with a minor charge based on the overwhelming evidence of his guilt—including Petitioner's own admission to having sexual relations with the fifteen-year-old girl. Based on this, he did not want to object or otherwise move to withdrawal or stop the plea because he understood that this would stop plea negotiations and Petitioner would be facing a trial on all of the charges "with no offer" and an all-but-certain conviction and harsher sentence of potentially seventy years. (App.155). It is this very real concern that caused him to proceed forward with the "really, really good offer" to resolve all pending charges, which he adamantly testified was still favorable even with the State requesting a sentence in the higher range. (App.156). Counsel testified that Petitioner **did not want to proceed to trial** on these charges. (App.197–98). He also testified repeatedly that Petitioner always admitted he was guilty of the second-degree criminal sexual conduct with a minor charge and had no defense to this charge.

e. Smalls failed to prove that his attorney was ineffective such that his plea was not intelligently and voluntarily made, and that he would have proceeded to trial but for counsel's performance.

Even if counsel was deficient, Petitioner did not show prejudice. Defense counsel testified Petitioner had no defense to the CSCM charge and did not want to go to trial. (App.197–98). While Petitioner incredibly claimed he would not have pled guilty but for counsel's failure to enforce the purported plea agreement, defense counsel credibly testified this was not what actually happened. Cf. Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 685 (1988) (finding prejudice due to defendant's "vehemence" about going to trial). Evidence of Petitioner's guilt, including his confession, was overwhelming. Evidence supports the PCR court's finding that Petitioner failed to show he would have proceeded to trial but for counsel's alleged errors. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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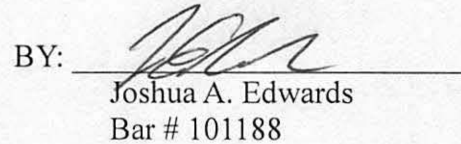
BY: 
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