

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

RECEIVED

DEC - 9 2013

2012-CP-43-0669
Appellate Case No. 2013-000264

S.C. Supreme Court

CALDERONE BRACEY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the post-conviction court rule on Petitioner's claim that Counsel was ineffective for failing to explain the "required 85% service time on his voluntary manslaughter conviction?" If so, did the post-conviction relief court properly find that counsel was not ineffective?

STATEMENT OF THE CASE

Petitioner was indicted during the May 2011 term of the Sumter County Grand Jury under a twenty five-count indictment (2011-GS-43-0881) for one count of Murder, one count of Burglary in the First Degree, eight counts of Kidnapping, seven counts of Assault with Intent to Kill, two counts of Armed Robbery, and six counts of Attempted Armed Robbery. Timothy W. Murphy, Esquire (hereafter "Counsel") represented Petitioner on all twenty-five charges. On September 19, 2011, Petitioner appeared before the Honorable Howard P. King, where he pled guilty to the lesser included offense of Voluntary Manslaughter pursuant to plea negotiations with the State. Based on these negotiations, Judge King sentenced Applicant thirty years imprisonment. The remaining twenty-four charges were *nolle prossed* pursuant to plea negotiations. Petitioner did not appeal his guilty plea or sentence.

Thereafter, Petitioner filed an application for post-conviction relief on April 9, 2012, alleging that he was being held in custody unlawfully due to ineffective assistance of counsel. Specifically, Petitioner alleged that:

1. Counsel was ineffective failing to file a timely notice of appeal;
2. Counsel was ineffective for failing to prepare and to conduct a proper trial investigation; and
3. Counsel was ineffective for advising Applicant to plead guilty to the lesser included offense of voluntary manslaughter.

Respondent made its Return on June 25, 2012 and requested that an evidentiary hearing be held. An evidentiary hearing was convened on December 10, 2012, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. Counsel was also present and

testified at the hearing, as did Petitioner's mother, Angela Stuckey. By Order dated January 24, 2013, Judge Cothran denied and dismissed the application with prejudice.

Petitioner filed a Petition for Writ of Certiorari on October 23, 2013. This Return 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 court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, 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 the application alleges ineffective assistance of counsel 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, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland; Id. The petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance 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.

Where there has been a guilty plea, the petitioner must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pled guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012); Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009).

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from Counsel and his mother, Angela Stuckey. Petitioner testified first on his own behalf. He testified that he met with Counsel three times prior to his guilty plea. (App. p. 66). Petitioner stated that he testified at his co-defendants' trial in exchange for a favorable plea deal from the State, which included allowing him to plead to the lesser included offense of voluntary manslaughter and the dismissal of his twenty-four other charges. (App. p. 70). Petitioner testified that his co-defendants were convicted at trial and both received a harsher sentence than his thirty year sentence. (App. p. 70-71). Petitioner testified that he only pled guilty based on the advice of his attorney, but that he now wishes he had "[taken] it to trial" and "would have beat [the charge]s." (App. p. 60) He testified that he told the plea court under oath that he was guilty, and he acknowledged during the evidentiary hearing that he is guilty. (App. p. 67). Petitioner testified that he was injured during the incident and was found at the scene the next morning suffering from a gunshot wound. (App. pp. 67-68). Petitioner testified that he did not want to proceed to trial on any of his charges. (App. p. 71).

Petitioner testified that he was originally indicted for twenty-five different charges, including murder. (App. p. 67). He testified that he is aware that murder carries a mandatory minimum sentence of thirty years imprisonment and carries up to life without parole. (App. p. 67). Petitioner testified that he was aware that the plea negotiations were for thirty years imprisonment and dismissal of all other charges, but stated that Counsel told him he would only be required to serve a total of twenty-four years within the South Carolina Department of Corrections. (App. pp. 69-70). Petitioner testified that he told the plea court he understood the

negotiations with the State were for a determinate sentence of thirty years imprisonment and the dismissal of all related charges. (App. p. 70).

Petitioner testified that he told the plea court while under oath that he was satisfied with Counsel's representation, but that he now feels Counsel failed to conduct a proper investigation. (App. p. 68). Specifically, Petitioner testified that he wanted Counsel to: investigate which bullet fatally injured the victim, conduct and review a ballistic report, and investigate gun powder on various items. (App. p. 68). Petitioner did not present any such reports, evidence, or expert testimony to the post-conviction relief court. (App. p. 68). Petitioner testified that he wanted to appeal his guilty plea; however, he acknowledged that he never requested Counsel file an appeal on his behalf. (App. p. 71).

Following Petitioner's testimony, Counsel testified that he has been practicing law for approximately twenty-five years and roughly seventy-five percent of his practice is comprised of criminal defense work. (App. p. 78). He testified that he was appointed to represent Petitioner in the summer of 2010 and that he met with Petitioner "frequently" prior to his guilty plea. (App. p. 78). Counsel testified that he reviewed the indictments and elements of the crimes for each of the twenty-five charges with Petitioner. (App. pp. 78-79).

Counsel testified that he received discovery in this case and reviewed all the materials with Petitioner. (App. 78-79). Counsel testified that the evidence showed that Petitioner and his brother were the likely shooters who fatally injured the victim during an armed robbery; Counsel elaborated that there were two other co-defendants who did not enter the incident location but whom law enforcement believed to be masterminds behind the robbery. (App. pp. 75-76). He testified that the State's evidence against Petitioner was "very, very strong" and would have

likely resulted in convictions. (App. p. 80). Counsel testified that he explained the concept of “hand of one, hand of all” to Petitioner. (App. p. 79). Counsel testified that the State wanted Petitioner to testify against these two co-defendants and offered Petitioner an extremely favorable plea deal in exchange for his testimony. (App. pp. 75-76). Counsel characterized the State’s plea offer as so favorable that it “stunned” him. (App. p. 81). Counsel testified that he reviewed the State’s plea offer with Petitioner and advised Applicant that he felt the plea offer was in Applicant’s best interest. (App. p. 76). Counsel testified that he explained to Petitioner that the plea offer was for a thirty year sentence to the lesser included offense of voluntary manslaughter, which would allow Petitioner to serve roughly eighty-five percent of his sentence before he would be eligible for community supervision, as opposed to murder, which requires day-to-day service of a full thirty years. (App. p. 76). Counsel testified that Petitioner indicated to him that he understood these conversations with him. Counsel testified that he never told Petitioner or any member of his family that he would only be required to serve twenty-four years of his sentence, or any specific sentence length. (App. pp. 76-77).

Counsel testified that Petitioner never denied his involvement in the crimes and he wanted Counsel to secure him a favorable plea deal. (App. pp. 79-80). Counsel testified that after a thorough review of the discovery, his primary focus was moving to suppress incriminating statements that Petitioner made to law enforcement after the incident. (App. p. 80-81). Counsel elaborated that he believed these statements may not have been voluntary, and that if Petitioner proceeded to trial, he would have moved to suppress these statements. (App. p. 80-81).

Counsel testified that he advised Petitioner of his right to appeal prior to his guilty plea. (App. p. 83). Counsel also testified that the plea court advised Petitioner of his right to appeal during his plea colloquy. (App. p. 83). Counsel testified that Petitioner never contacted him following his plea regarding an appeal. However, Counsel testified that Petitioner did contact him regarding an error on his sentencing sheet, in which the CDR code for murder was listed incorrectly in place of the CRD code for voluntary manslaughter. Counsel testified that Petitioner wanted this to be corrected, as it was affecting his projected release date from the South Carolina Department of Corrections. Counsel testified that he contacted the necessary parties and had this corrected for Petitioner. (App. p. 77). Counsel testified that he does not believe that Petitioner had a meritorious issue on which to appeal his negotiated guilty plea. (App. pp. 83-84). Counsel stated that it is his general practice to file an appeal whenever a client requests an appeal, as he feels it is his ethical obligation. (App. p. 84).

Following Counsel's testimony, Petitioner's mother, Angela Stuckey, testified on her son's behalf. (App. pp. 85-88). Ms. Stuckey testified that she was not present for any meetings between Counsel and Petitioner, but she did meet once with Counsel by herself. (App. pp. 86-87). She testified that she thought her son had a plea deal that would require him to spend twenty-four years in prison, but acknowledged that she heard Judge King state numerous times during the plea that the negotiation was for a thirty year sentence. (App. pp. 86-88).

ARGUMENT

The post-conviction relief court did not specifically rule on the claim of ineffective assistance of counsel for failure to explain the “required 85% service time on his voluntary manslaughter conviction”; therefore, the issue is not preserved for appellate review. Nonetheless, Counsel was not ineffective.

Petitioner contends that Counsel was ineffective for “failing to fully explain sentencing consequences to him because Petitioner mistakenly believed that the required 85% service time on his voluntary manslaughter conviction would be deduced on the front end of his original sentence issued during the sentencing phase of his plea proceeding when such a calculation, or any calculation, could only occur after he commenced serving his prison sentence.” (PWC p. 2). However, the post-conviction relief court’s Order of Dismissal does not address this allegation. (App. pp. 91-100). Therefore, the issue is not preserved for appellate review.

It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Specifically, within the context of post-conviction relief matters, an issue is not preserved for appellate review unless “specific findings of facts and conclusions of law” have been determined in regards to the specific claim for relief. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007); Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013).

Even if this Court finds the issue preserved, there is nothing to suggest that Counsel was ineffective in regards to this allegation. Counsel testified that he explained to Petitioner that the plea offer was for a thirty year sentence to the lesser included offense of voluntary manslaughter, which would allow Petitioner to serve roughly eighty-five percent of his sentence before he would be eligible for community supervision, as opposed to murder, which requires day-to-day

service of a full thirty years. (App. p. 76). Counsel testified that Petitioner indicated to him that he understood these conversations with him. Counsel testified that he never told Petitioner or any member of his family that he would only be required to serve twenty-four years of his sentence, or any specific sentence length. (App. pp. 76-77). Additionally, Petitioner testified that he was aware that the plea negotiations were for thirty years imprisonment and dismissal of all other charges. There is ample evidence in the record to support the post-conviction relief court's findings that Counsel was not deficient in his discussions and advice given to Petitioner regarding the State's plea offer.

Furthermore, Petitioner has failed to establish any resulting prejudice, as he testified that he did not want to proceed to trial on any of his charges. (App. p. 71). See Hill v. Lockhart, 474 U.S. 52 (1985); Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012); Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (for the general proposition that where there has been a guilty plea, the petitioner must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pled guilty and instead would have insisted on going to trial).

Petitioner has not previously raised this issue and the post-conviction relief court did not rule on this specific allegation; therefore, it is not preserved for appeal. Nonetheless, Counsel cannot be found ineffective because Counsel testified, and Petitioner acknowledged, that the State's plea offer was for a negotiated sentence of thirty years imprisonment and Petitioner freely admitted his guilt and that he did not wish to proceed to trial.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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December 9, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge
Appellate Case No. 2012-207627

CALDERONE BRACEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.


PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 7th day of December, 2013.


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ALAN WILSON
ATTORNEY GENERAL

December 9, 2013

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DEC - 9 2013

S.C. Supreme Court

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

Re: Calderone Bracey v. State of South Carolina
Appellate Case No. 2013-000264

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: Wander H. Carter, Esquire
Trisha Allen, Victim Services