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STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2026-000676

Reginald R. Scurry,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PETITIONER’S STATEMENT OF THE ISSUE PRESENTED	ii
RESPONDENT’S COUNTERSTATEMENT OF THE ISSUE PRESENTED.....	ii
STANDARD OF REVIEW	1
ARGUMENT	2
The PCR court properly found that Counsel’s failure to proactively advise Petitioner of the provisions of Rule 410(4), SCRE, was not deficient performance and that Petitioner failed to prove prejudice because there was no evidence that further plea discussions would have resulted in a different plea bargain which both sides would have been willing to accept.	2
CONCLUSION.....	7

PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

Did the circuit court err in holding that Petitioner's trial counsel was not ineffective for failing to advise that statements made in direct plea discussions with the prosecutors were inadmissible?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

The PCR court properly found that Counsel's failure to proactively advise Petitioner of the provisions of Rule 410(4), SCRE, was not deficient performance and that Petitioner failed to prove prejudice because there was no evidence that further plea discussions would have resulted in a different plea bargain which both sides would have been willing to accept.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On the one hand, pure questions of law are reviewed *de novo* without deference to the lower court. *Id.* at 180–81, 810 S.E.2d at 839–40. On the other hand, the lower court’s findings of fact receive great deference during appellate review and will be upheld if “any evidence of probative value” exists in the record to support those findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

ARGUMENT

The PCR court properly found that Counsel's failure to proactively advise Petitioner of the provisions of Rule 410(4), SCRE, was not deficient performance and that Petitioner failed to prove prejudice because there was no evidence that further plea discussions would have resulted in a different plea bargain which both sides would have been willing to accept.

Petitioner was charged with failure to stop for a blue light (2018-GS-36-00115) and trafficking in crack cocaine, 28g or more, 3rd offense (2018-GS-36-00116). Assistant Public Defender Charles V. Verner, Esquire ("Counsel"), represented Petitioner.

On April 3, 2018, Petitioner proceeded to a jury trial before the Honorable Frank R. Addy, Jr., circuit court judge. On April 5, 2018, the jury found Petitioner guilty of both offenses as indicted. Judge Addy sentenced Petitioner to three years' imprisonment for failure to stop for a blue light and a concurrent sentence of twenty-five years' imprisonment for trafficking cocaine.

At the PCR hearing, Petitioner and Counsel both testified that the solicitors visited Counsel's office prior to trial in order to offer Petitioner a plea deal in person. (App.pp.43–48; p.73, lines 11–25). Counsel testified the solicitors offered to let Petitioner plead guilty to a first offense for a range of seven to 25 years' imprisonment. (App.p.42, lines 10–14). Petitioner testified the offer was for "seven to 30, might give me a little more than seven." (App.p.74, lines 11–12). Counsel and Petitioner both testified that Petitioner rejected the offer. (App.p.43, lines 18–21; p.48, lines 8–10; p.75, lines 19–21).

Petitioner now argues that he is entitled to post-conviction relief ("PCR") because Counsel failed to advise him that any statements he made during plea negotiations with the solicitor could not be used against him pursuant to Rule 410(4), SCRE. That Rule provides:

[E]vidence of the following is not . . . admissible against the defendant who made the plea or was a participant in the plea discussions:

...

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Rule 410(4), SCRE.

In a PCR action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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 [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as he did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable

competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003); *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Second, the applicant must prove that counsel's deficient performance prejudiced him 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. “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

Petitioner now argues that Counsel was ineffective for not explaining to him that anything he said during plea discussions with the solicitors would be inadmissible at trial pursuant to Rule 410, SCRE. Petitioner claims that he was under the mistaken impression that anything he said during plea negotiations would be admissible in evidence against him if his case went to trial. He claims that, had he been properly advised that his statements in plea discussions with the solicitors could not be used against him at trial, he “would have talked with them and tried to negotiate a plea.” (App.p.79, lines 6–14). Petitioner attempts to liken this case to *Missouri v. Frye*, 566 U.S. 134 (2012), in which the United States Supreme Court held defense counsel was deficient for failing to communicate a favorable plea offer to his client before the offer expired.

The PCR court, however, properly found Petitioner failed to prove either deficiency or prejudice as to this allegation. Initially, the PCR court distinguished this case from *Frye* because “it appears undisputed that [Petitioner] *was* aware of the State’s offer to let him plead to a reduced charge with a mandatory minimum sentence of seven years, rather than the mandatory minimum of 25 years he was facing if he went to trial.” (App.p.111). The PCR court found Petitioner had effectively admitted “that Counsel did not breach his duty to communicate the plea offer.” (App.p.111).

Next, the PCR court addressed Petitioner's claim that his own fear of having his statements used against him at trial prevented him from meaningfully engaging in plea negotiations. The PCR court rejected the argument that "Counsel . . . had a duty to disabuse [Petitioner] of this fear by advising him about the protections of Rule 410, SCRE." (App.p.111). Noting that Petitioner had failed to cite any authority recognizing such a duty, the PCR court declined to "adopt a new rule requiring defense attorneys to affirmatively ascertain and correct their clients' unspoken misconceptions about the law." (App.p.111).

The PCR court's reasoning on this issue was correct. The evidence at the PCR hearing established, without dispute, that Petitioner was approached in person with the State's plea offer and had the opportunity to accept it or attempt to negotiate a more favorable one. Although Petitioner now claims he was afraid to participate in further discussions, there is no evidence that he ever communicated this fear to Counsel. Even if Petitioner's alleged fear of having his statements used against him at trial was genuine, there was no way for Counsel to know what was going through Petitioner's head. "Effectively," as the PCR court ruled, accepting Petitioner's argument "would hold Counsel performed deficiently by failing to read Applicant's mind, which would be absurd." (App.p.111) (citing *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant. . . ."), *overruled on other grounds* by *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999)).

However, even if Counsel had performed deficiently, the PCR court correctly found Petitioner failed to prove prejudice. As already explained, Petitioner admitted at the PCR hearing that he was aware of the State's plea offer and chose to reject it. What Petitioner appears to be arguing is that, although he was aware of and rejected the State's plea offer, he would have preferred to participate in *further* plea negotiations had he known that any statements he made

could not be used against him. But, as the PCR court pointed out, Petitioner has not explained *how* he would have participated in further negotiations, much less shown that his participation would have led to another, more favorable plea offer. The PCR court correctly found there was “simply no evidence that any further plea negotiations would have produced a plea agreement that both [Petitioner] and the State would have accepted.” (App.p.112). Accordingly, the PCR court found Petitioner had failed to meet his burden of proving that he was prejudiced by Counsel’s failure to advise him of Rule 410(4), SCRE.

Petitioner testified at the evidentiary hearing that he had accepted a negotiated plea for a 19-year sentence in a similar case in Cherokee County, *after* his conviction in the instant case. (App.p.77, line 20–p.78, line 16). Petitioner now claims this proves he would have accepted a similar negotiated plea on his Newberry County charges if he had engaged in further plea negotiations with the solicitor. However, the mere fact that Petitioner was willing to negotiate a 19-year plea bargain *after* being convicted and sentenced to 25 years in Newberry County is obviously not probative of whether he would have been willing to accept a negotiated 19-year offer *before* he was convicted and sentenced in Newberry County. The PCR court appropriately found that Petitioner’s Cherokee County plea deal did not suffice to meet his burden of proving prejudice, “especially in light of his admission that he knowingly rejected a plea with a mandatory minimum of only seven years.” (App.p.112).

The PCR court properly found that Petitioner failed to prove either deficiency or prejudice as to this allegation of ineffective assistance of counsel. Accordingly, the PCR court did not err in ruling that Petitioner was not entitled to relief. This Court should leave undisturbed the correct decision of the PCR court and should deny the petition for a writ of certiorari.

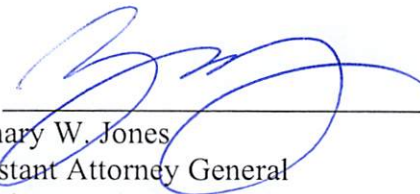
CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari.
Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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