

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JAN 23 2014

S.C. Supreme Court

Appeal from Charleston County
Honorable Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2013-000048

KEVIS LEVOR LEE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
#100269

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Was there probative evidence to support the lower court's ruling that counsel was not ineffective for advising the Petitioner he could serve his state sentence concurrent with his federal sentence when counsel had the Petitioner's federal sentence amended to have the state and federal sentence run concurrently and no prejudice resulted from counsel's performance?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Petitioner was indicted at the March 2010 term of the Charleston County Grand Jury for assault and battery with intent to kill (2010-GS-10-1319). The Petitioner was represented by Andrew Grimes, Esquire.

On December 10, 2010, the Petitioner pled guilty as indicted. Pursuant to a negotiated plea, the Petitioner was sentenced by the Honorable Roger M. Young, Sr. to confinement for a period of seventy (70) months to run concurrent with the federal sentence the Petitioner was serving. The Petitioner did not appeal his conviction or sentence.

The Petitioner filed an application for post-conviction relief on December 12, 2011. The Respondent filed a Return on February 10, 2012. An evidentiary hearing was held at the Charleston County Courthouse on July 25, 2012. The Petitioner was present and represented by William Nixon, Esquire. The Respondent was represented by Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General. By Order filed December 17, 2012, the Honorable Stephanie P. McDonald denied and dismissed the Petitioner's application with prejudice. The Petitioner filed a timely Notice of Appeal and a Petition for Writ of Certiorari. This Return follows.

ARGUMENT

Trial counsel was not ineffective for advising the Petitioner that his State sentence would be served concurrently with a prior federal sentence when counsel obtained an amended federal sentence which ran the state and federal sentences concurrent and no prejudice resulted from counsel's performance.

The Petitioner asserts that the post-conviction relief court erred by finding counsel was not ineffective for advising the Petitioner that he would be able to serve his State sentence in the federal prison system. The Petitioner argues counsel should have moved to withdraw the Petitioner's guilty plea after learning the negotiated sentence provision authorizing the Petitioner to serve his sentence in a federal prison was a sentencing impossibility. The Respondent submits probative evidence exists to support the post-conviction relief court's findings that the Petitioner failed to carry his burden of proving counsel was ineffective. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant 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 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, 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. First, the Applicant 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 Applicant 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 Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test:

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The Petitioner asserts counsel erred by obtaining an order from a federal judge running the Petitioner's federal sentence concurrent to his state sentence when he should have moved to withdraw the guilty plea entered in state court when he learned that the sentencing provision was an impossibility. The Respondent submits trial counsel's performance was not deficient because amending the federal sentence was necessary to effectuate the provision of the state plea agreement requiring the federal and state sentences to be run concurrently.

On December 10, 2010, the Petitioner pled guilty to assault and battery with intent to kill (ABWIK), in South Carolina Circuit Court. Prior to this guilty plea, the Petitioner pled guilty to possession of a weapon by a felon in violation of 18 U.S.C. 922(g)(1) (2005). For the federal offense, the Petitioner was sentenced to confinement for seventy (70) months. For the state offense, the Petitioner pled guilty to a negotiated sentence of seventy (70) months to run concurrent with his federal sentence. (App. 5:3-9). At the Petitioner guilty plea for the state

offense, plea counsel asked the court to allow the sentence to be served at the Federal Bureau of Prisons. (App. 6:20-21). The state court, accepted the Petitioner's negotiated plea and ran the seventy month sentence concurrent to the federal sentence the Petitioner was serving.

The record reflected the plea counsel advised the Petitioner he would receive a seventy month sentence and his sentence would be served in the federal penitentiary. (App. 29:7-11, 20-24). Counsel testified he later had the Petitioner's federal sentence amended to have the sentences run concurrent and to remand the Petitioner to the custody of the U.S. Marshals. However, the U.S. Marshals never took custody of the Petitioner to effectuate the terms of the Petitioner's federal sentence.

The Respondent submits counsel's performance was not deficient. While a state court judge cannot place conditions on a sentence served in federal court, plea counsel had the Petitioner's federal sentence amended to reflect the state and federal sentences are to be served concurrently as ordered by the state court. While a state trial judge may properly order the sentences which he or she imposes to run concurrently or consecutively, to each other, a state court is without authority to modify or place conditions on a sentence from a foreign jurisdiction. Clark v. State, 321 S.C. 377, 380, 468 S.C. 653, 655 (1996) (citing Bloomgren v. Belaski, 948 F.2d 688 (10th Cir. 1991)). The determination by federal authorities that a defendant's federal sentence runs consecutive to his or her state sentence is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently obtained state court conviction. Id.

The Respondent submits the state court did not have the authority to order the federal sentence be served concurrently to the state sentence. However, counsel took the proper steps to effectuate this provision of the negotiated plea offer for the state offense. Counsel was able to

have the Petitioner's federal sentence amended to reflect the federal sentence is to be served concurrent to the Petitioner's state sentence. Generally, a federal court is powerless to impose a concurrent sentence until the defendant has been sentenced by another court. Id. However, since the Petitioner's federal sentence was amended after the imposition of the state sentence, the federal court had the authority to run the Petitioner's federal sentence concurrent to the Petitioner's state sentence. The Petitioner's amended federal sentence states:

"The defendant is hereby committed to the custody of the United States Bureau of Prison to be imprisoned for seventy (70) months to run concurrently with the seventy (70) month sentence imposed by the Honorable Roger M. Young on December 14, 2012 in the case of State of South Carolina v. Kevis Lee, Warrant Number 1103745, all other conditions remain the same" and "[t]he defendant is remanded to the custody of the United States Marshal." (Supp. App. 2-3).

Because counsel was able to put into place the terms of the Petitioner's negotiated plea by having the Petitioner's federal sentence amended, the Respondent submits the sentencing provision was not an impossibility and counsel was not ineffective for advising the Petitioner that he would serve his sentence in federal custody.

Unlike in the cases relied on by the Petitioner, this is not the case where the State fails to uphold a term of the defendant's plea agreement. A plea agreement was entered, counsel had the federal sentence amended to effectuate the terms of the state plea agreement, and the federal sentence is not being complied with. The Respondent submits the service of the Petitioner's state sentence while in federal prison is a provision of the Petitioner's negotiated guilty plea that has been put into place and counsel should not be held ineffective for the Federal Bureau of Prisons failure to comply with the terms of the Petitioner's federal sentence. The Respondent submits the Petitioner failed to carry his burden of proving counsel's performance was deficient.

The Respondent submits further even if counsel had been unable to effectuate the terms of the negotiated plea to have his federal sentence run concurrent to his State sentence, the

Petitioner failed to show how he was prejudiced. The Petitioner stated he pled guilty based on counsel's advice that he would be able to serve his sentence in federal prison.¹ However, both counsel and the Petitioner testified the Petitioner's ability to serve his state and federal sentences concurrently was not the only basis for the Petitioner's decision to plead guilty. The Petitioner testified he also pled guilty because he did not want to go to trial and wanted to get everything over with for his children. (App. 41:10-14). Also, had the Petitioner proceeded to trial, there was no guarantee that the sentencing court would agree to allow the Petitioner's state sentence to run concurrent to his state sentence.

Lastly, the Petitioner argues instead of having the federal sentence amended, counsel should have simply withdrawn the Petitioner's guilty plea for the state offense. The withdrawal of a guilty plea is generally within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982) (citing State v. Neal, 267 S.C. 53, 226 S.E.2d 236 (1975)). The Respondent submits it is mere speculation that the Court would have allowed the Petitioner to withdraw his plea on this basis and that after trial a judge would have allowed the Petitioner's state sentence to run concurrent to his federal sentence. The Respondent submits counsel was not ineffective for advising the Petitioner he could serve his state sentence in federal custody and the Petitioner failed to carry his burden of proving counsel's performance was deficient and resulted in prejudice. There is probative evidence to support the lower court's ruling and this court should affirm the post-conviction relief court's ruling.

¹ Ordinarily, defendant's testimony, several years after guilty plea, that his plea was induced by erroneous advice of counsel, is not persuasive in post-conviction motion alleging ineffective assistance of counsel. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989).

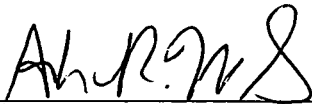
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY:  _____
Ashleigh R. Wilson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

January 23, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Stephanie P. McDonald, Circuit Court Judge

KEVIS LAVOR LEE

Petitioner,

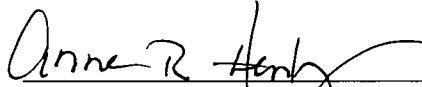
v.

STATE OF SOUTH CAROLINA,

Respondent.

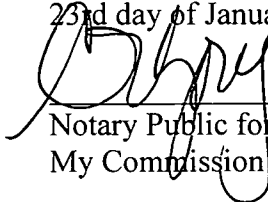
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari has been served upon opposing counsel, Wanda H. Carter, this 23rd day of January, 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
23rd day of January, 2014



(L.S.)
Notary Public for South Carolina.

My Commission Expires: 10/28/2014



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JAN 23 2014

S.C. Supreme Court

January 23, 2014

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

RE: **Kevis Lavor Lee v. State of South Carolina**
Appellate Case No. 2013-000048

Dear Mr. Shearouse:

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

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Wanda H. Carter, Esquire