STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2013-000512

Linwood Carson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Did Petitioner even make a prima facie showing that he was allegedly prejudiced by counsel's performance to warrant a review of the PCR judge's ruling?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the November 2005 term of General Sessions for possession of crack cocaine, less than 1 gram (2005-GS-32-4184), six (6) counts of burglary, second-degree violent (2006-GS-32-0249; -0250; -0251; -0252; -0253; -0254), and possession of burglary tools (2006-GS-32-0255). (App.pp.149-72). Gene Stockhom, Esq., represented Petitioner.

After the State called the case on January 30, 2006, Petitioner entered a guilty plea. The Solicitor recited plea negotiations. First, the State offered to plead Petitioner straight-up on the burglary charges. Second, the State offered to plead Petitioner to negotiated fifteen (15) year term of imprisonment. (App.p.4). Petitioner accepted neither offer. Third, the State again offered to Petitioner to a negotiated fifteen (15) year term of imprisonment only on the burglary charges. The narcotics possession and the possession of burglary tools charges were no longer part of the negotiated offer. (App.p.5). After Petitioner's third rejection, the State served Petitioner with its notice to seek life without the possibility of parole "LWOP" and called the case to trial. Only then did Petitioner decide to plead guilty. Thus Petitioner entered his plea as indicted. The Honorable Larry R. Patterson sentenced Petitioner to three (3) years imprisonment for narcotics possession, fifteen (15) years of imprisonment on each of the (6) counts burglary, second-degree violent, and five (5) years imprisonment for possession of burglary tools. The burglary convictions were to be served concurrently with the two remaining convictions to be served consecutively. (App.pp.1-33). Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on December 26, 2006. (App.pp.35-9). A hearing was convened at the Lexington County Courthouse on September 3, 2009. (App.pp.48-98). Petitioner was present and represented by Elizabeth Zeck, Esq. West Lee, Esq., of the South Carolina Attorney General's Office represented Respondent. Gene Stockholm, Esq., "counsel" and Petitioner testified at the hearing.

At the PCR hearing, Petitioner alleged counsel was ineffective for erroneously advising him on parole eligibility. (App.p.77). He testified he would not have rejected the third plea offer but for counsel's advice that the burglary, second-degree violent required eighty-five (85) percent active service before he would be parole eligible. (App.p.79). He surmised counsel's advice here had to be wrong because he would be eligible for parole in 2010. However, Petitioner explained to the PCR Judge that he did not voice concern to the Plea Judge when the solicitor and counsel disputed parole eligibility. (App.p.95).

Counsel testified at the PCR hearing that he was the second attorney to represent Petitioner. Petitioner had his prior counsel, Lisa McPherson, Esq., relieved. (App.p.59). When counsel inherited the case, Petitioner had rejected the second plea offer from the prosecuting solicitor.[1] The offer that followed during his representation was not as favorable to Petitioner where the State was no longer inclined to plead all charges to a negotiated fifteen (15) year term of imprisonment. Counsel conveyed the offer and noted three separate reasons why Petitioner rejected it. (App.pp.59-62). Counsel conceded he provided erroneous advice on parole eligibility. (App.p.63). However, he adamantly protested Petitioner's assertion that he would have accepted the third guilty plea offer but

[1] Counsel's testimony did not include any reference to the Solicitor Myer's original plea offer.

the minor mishap. First, Petitioner lamented his decision to not accept the last offer conveyed to prior counsel. He desired the State revive it and was chiefly concerned about increased exposure to a longer period of incarceration. Second, Petitioner was convinced local law enforcement had conspired against him. Last, Petitioner believed he could prevail at trial had certain eyewitnesses flipped their testimonies. (App.p.63-64). Furthermore, counsel protested Petitioner's allegation that he suffered prejudice from counsel's advice on parole eligibly. (App.pp.65-66). Petitioner's prior conviction for a violent offense negated the possibility of parole. (App.p.66). Last, counsel testified that under S.C. Code Section 17-25-50 the third offer at issue was no different than Petitioner pleading guilty. (App.p.71).

The Honorable R. Knox McMahon denied relief in an order dated March 2, 2010. (App.pp.118-26). as indicted. This Petition follows.

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

Certiorari is certainly not warranted where Petitioner's argument is facially without merit because Petitioner asserted he would have accepted a prior plea offer but for counsel's erroneous advice that he had to serve significantly more time of an active sentence for burglary, second-degree violent than the law required before becoming parole eligible where Petitioner's prior violent convictions unequivocally negated any possibility of parole.

Petitioner argues counsel essentially misadvised Petitioner that burglary, second-degree violent functioned as a non-parole offense under S.C. Code Ann. § 24-13-100.[2] Petitioner argues counsel's error resulted in prejudice because Applicant would have accepted the third plea offer had not been led to believe he would have been parole eligible much sooner than after serving eighty-five (85) percent of sentence in prison. The appeal rests solely on Petitioner's testimony and a rank hearsay reference from an unnamed Department of Corrections employee regarding Petitioner's actual parole eligibility. Despite ample evidence of probative value that supports the PCR judge's order, Respondent submits this appeal is facially without merit. Simply, Petitioner's prior convictions for violent offenses negated the possibility of parole. Therefore, further analysis is unnecessary.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance

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[2] Respondent does not dispute this. Despite the classification burglary second-degree violent, S.C. Code Ann. § 16-11-312(B), as a violent crime mentioned in S.C. Code Ann. § 16-1-60, burglary second degree-violent is still a Class D offense. See Hair v. State, 305 S.C. 77, 78, 406 S.E.2d 332, 333 (1991) ("The Omnibus Crime Bill makes the length of the sentence that must be served before a prisoner is eligible for parole dependent on whether the offense is classified as violent or non-violent."). No-parole offenses include only Class A-C offenses that necessitate a maximum sentencing exposure of at least twenty (20) years imprisonment. Furthermore, S.C. Code Ann. § 16-11-312(C)(2) provides the appropriate parole scheme.

under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399, 1402 (2012). "[P]arole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). "However, if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked." Id. "To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law." Frye, __ U.S. __, 132 S. Ct. at 1402-03.

The PCR judge correctly denied and dismissed Petitioner's Application where Petitioner's allegation for relief is a nullity.[3] "This Court has the authority to interpret the

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[3] The PCR judge correctly commented that Petitioner was "clearly not eligible for parole under [S.C. Code Ann. § 24-21-640]." (App.p.87, lines 17-8). The PCR judge further cited to the State's notice to seek LWOP and the attached certified convictions in support thereof. (App.p.97). However, the sustaining ground was not addressed in the order of dismissal. (App.p.114-15). See Rule 220(c) SCACR (appellate court may affirm for any reason appearing in the record); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338

parole statute. In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature." Hinton v. South Carolina Dep't of Prob., Parole, & Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004). Petitioner cannot make a prima facie showing that he was prejudiced by counsel's deficient advice. S.C. Code Ann. § 24-21-640 in part states that, "[t]he board **must not grant parole nor is parole authorized** to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60." S.C. Code Ann. § 24-21-640 (emphasis added). Petitioner had four prior convictions for burglary, second-degree violent (1999-GS-32-2375; -2376; -2377) and (1997-GS-32-3022). (App.p.29). The common nomenclature for S.C. Code Ann. § 16-11-312(B) is "burglary, second-degree violent" but for the legislature's inclusion of the offense within S.C. Code Ann. § 16-1-60.

At the PCR hearing, Petitioner myopically cited to a variance in Petitioner's release date from what the actual sentence as evidence of parole eligible. (App.p.87). The PCR judge correctly disagreed here by conceptually distinguishing an inmate's early "max-out" date from parole eligibility. (App.p.87, line 21—p.88, line 88). S.C. Code Ann. § 24-13-210(B) allows an inmate to hasten an early release date through the accumulation of "good-time" credits. The accumulation schemes are graduated upon severity of the underlying offenses. Even an inmate convicted of an offense that includes a "mandatory-minimum" term of imprisonment can accumulate "good-time" credits in certain circumstances. See Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371

S.C. 406, 417, 526 S.E.2d 716, 722 (2000).

(2010). Although this statutory body of law lies outside the scope of PCR, it is important to note in light of Petitioner's troubling posture at the lower court. See Al-Shabazz v. State, 338 S.C. 354, 368, 527 S.E.2d 742, 749 (2000). Furthermore, Petitioner had completed an active sentence for Burglary, second-degree violent prior to committing the underlying offenses in 2005. Thus, he should have been aware of these realities. Respondent finds the following comment from the Plea Judge particularly insightful:

> I am aware of the problems we have in the criminal court and in the prison system. The prisoners know more about how the system works than the citizens do and a lot of lawyers. I get PCRs all the time because they didn't get to plead in front of this judge or that judge.

(App.p.6, line 23—p.7, line 4). Regardless, the record clearly supports the PCR judge's order on its merits. "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) The guilty plea Petitioner entered was functionally indistinguishable from previous plea offer he allegedly declined because of counsel's advice on parole eligibility. See S.C. Code Ann. § 17-25-50. And even if the prior plea offer was more beneficial than the guilty plea Petitioner inevitably entered, the guilty plea judge made it manifestly clear that he did not take negotiated sentences or defer to the State recommendations as a matter of course. (App.p.6, lines 4-18; p.7, lines 2-9). Thus Petitioner is incapable of escape from the specter of speculation in alleging prejudice.

Last, all of the credible evidence in the record showed Petitioner pled guilty in order to avoid a mandatory LWOP sentence. (App.p.9; pp.17-21). See Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (S.C. Ct. App. 2007) (citing Blackledge v.

Allison, 431 U.S. 63, 97 S. Ct. 1621(1977) ("A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed."). Accordingly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: _____
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Feb. 3rd, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

LINWOOD CARSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Carmen V. Ganjehsani, Esq.
SC Commission of Indigent Defense
1330 Lady St. Suite 401
Columbia, SC 29201

This 3rd day of February, 2014

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

February 3, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: **Linwood Carson v. State of South Carolina**
Appellate Case No.: 2013-000512
Lower Court Case No: 2006-CP-32-4563

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari and Motion to Supplement the Record on Appeal** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Carmen V. Ganjehsani, Esq. (2 copies with all the attachments)