

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2013-000263

JAMES W. BOONE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

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FEB 18 2014

S.C. Supreme Court

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ISSUE PRESENTED

Is there evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for advising Petitioner to plead guilty, where Counsel informed Petitioner prior to his guilty plea that the State's plea offer had expired and Petitioner acknowledged during his plea proceeding that he understood his plea was not pursuant to any negotiation or recommendation from the State?

STATEMENT OF THE CASE

Petitioner was indicted during the September 2007 term of the Sumter County Grand Jury for armed robbery and criminal conspiracy (2007-GS-43-0640). He was represented by Lauren Stevens, Esquire (hereinafter "Counsel") of the Sumter County Public Defender's Office. On September 15, 2009, Petitioner appeared before the Honorable George C. James, Jr., where he pled guilty as indicted to armed robbery; Petitioner's conspiracy charge was dismissed pursuant to the plea. Petitioner acknowledged during the plea that he understood there were no negotiations or recommendations from the State regarding sentencing. Judge James sentenced Petitioner to eighteen years imprisonment. Thereafter, Petitioner, through his counsel, filed a Motion for Reconsideration; a hearing on this motion was held on September 17, 2009. During this hearing, Judge James reduced Petitioner's sentence to fourteen years imprisonment.

A timely Notice of Appeal was filed and an appeal was perfected. Petitioner was represented by Elizabeth A. Franklin-Best, Esquire, on this direct appeal. Following briefing, the South Carolina Court of Appeals affirmed Petitioner's plea and sentence. State v. Boone, Op. No. 2011-UP-399 (Ct. App. filed Aug. 22, 2011). The Remittitur was sent on September 7, 2011.¹

Petitioner filed an application for post-conviction relief on October 18, 2011, alleging that he was being held in custody unlawfully based on the allegations:

1. Ineffective Assistance of Counsel.
 - a. "Breach of promise."
2. Involuntary Guilty Plea.
 - a. "Attempted to coerce trial court with set plea (without stating reason at original hearing)."

¹ In his Petition, Petitioner states that he "did not enjoy the benefit of a direct appeal." This statement is clearly erroneous. Additionally, the records from Petitioner's direct appeal were before the post-conviction relief court, but were not included in the Appendix filed by Petitioner.

3. Prosecutorial Misconduct.
 - a. "Coerced Applicant to accept plea then proceeded with picking jury for trial."

Respondent made its Return on December 19, 2011, requesting 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. Petitioner testified on his own behalf, as well as presented testimony from his mother, Alice Priest, and his sister, Arianne Baker. Counsel was also present and testified at the hearing. By Order signed January 24, 2013 and filed January 31, 2013, Judge Cothran denied and dismissed the application with prejudice.

Petitioner filed a Petition for Writ of Certiorari on September 30, 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) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his 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, Id.

The proper measure of performance is whether an 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; supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies 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, supra. 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. Where there has been a guilty plea, the applicant 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, 59 (1985); Hyman v. State, 397 S.C. 35, 49, 723 S.E.2d 375, 382 (2012).

In post-conviction relief actions, an applicant asserting a constitutional claim must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant; statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

ARGUMENT

There is evidence of probative value in the record to support the post-conviction relief court's finding that Counsel was not ineffective for advising Petitioner to plead guilty, where Counsel informed Petitioner prior to his guilty plea that the State's plea offer had expired and Petitioner acknowledged during his plea proceeding that he understood that his plea was not pursuant to any negotiation or recommendation from the State.

Petitioner asserts that the post-conviction relief court erred in determining that Counsel was not ineffective in advising Petitioner to plead guilty, specifically alleging she was ineffective for not clarifying with the State whether the plea offer had an expiration date and not advising Petitioner that the plea offer had an expiration date. However, there is evidence of probative value in the record to support the post-conviction relief court's findings.

In its Order of Dismissal, the post-conviction relief court specifically found that "Counsel's testimony [was] very credible while [Petitioner]'s testimony [was] not credible." (App. p. 102). At the evidentiary hearing, Counsel testified that after fully reviewing the discovery, the elements of each offense, and possible sentences with Petitioner, Petitioner asked Counsel to negotiate a plea deal on his behalf and stated he did not want to proceed to trial. (App. p. 84-87). Counsel testified that based on Petitioner's request, she entered into plea negotiations with the State and was ultimately able to secure a ten year negotiated sentence included the dismissal of the related charges. (App. p. 87) She testified that she presented this offer to Petitioner, who requested that she attempt to delay his plea for as long as possible so he could spend time with his family. (App. p. 87). Counsel did so, resulting in a withdrawal of the State's plea negotiation. (App. pp. 87-88). Counsel testified that she clearly and unequivocally communicated to Petitioner that no plea offer remained, and despite this, Petitioner decided to proceed forward with his guilty plea without a negotiation or recommendation. (App. p. 88-89).

The record of Petitioner's guilty plea supports Counsel's testimony, as Petitioner told the plea court under oath that he knew his plea was without any negotiations or recommendations from the State and that he understood could receive a sentence of up to thirty years imprisonment. (App. pp. 3-4; p. 8). The post-conviction relief court properly determined that Counsel was not deficient, which is supported by the record.

The post-conviction relief court also found that Petitioner failed to establish any prejudice resulting from Counsel's alleged ineffective assistance of counsel, as Petitioner stated numerous times during the evidentiary hearing that he was guilty of armed robbery and Counsel testified that Petitioner told him he did not want to proceed to trial on these charges. Additionally, the record from Petitioner's guilty plea reveals that he not only acknowledged that he was indeed guilty, but described to the plea court how planned and committed the robbery. (App. 11-12). The post-conviction relief court properly determined that Petitioner failed to establish any prejudice and this finding is supported by the record.

The record contains evidence of probative value to support the post-conviction relief court's findings that Counsel was not deficient. This Petition should be denied.


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,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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February 18, 2014

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JAMES W. BOONE,

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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, South Carolina 29211

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

This 18 day of February, 2014.


MEGAN E. HARRIGAN
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ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

February 18, 2014

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

Re: James W. Boone v. State of South Carolina
Appellate Case No. 2013-000263
Lower Court Case No. 2011-CP-43-1939

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: Wanda H. Cater, Esquire
Trisha Allen, Victim Services