STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Ismael R. Cruz, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did trial counsel err in failing to object to and move for the withdrawal of Petitioner's pleas after the solicitor recommended significant prison time at the plea sentencing because this was a violation of the plea agreement which included a promise that no sentencing recommendation would be made by the solicitor in the case?

STATEMENT OF THE CASE

Petitioner waived presentment to the Greenville County Grand Jury on charges of second-degree criminal sexual conduct (CSC) with a minor (2008-GS-23-9798), two (2) counts of first-degree CSC with a minor (2008-GS-23-9799, -9803), and incest (2008-GS-23-9800). (Supp.App.pp.1-8). Richard H. Warder, Esquire represented Petitioner.

On April 4, 2009, Petitioner pled guilty. The Honorable John C. Few sentenced Petitioner to concurrent terms of twenty (20) years for second-degree CSC with a minor and twenty-five (25) years for one count of first-degree CSC with a minor.[1] Judge Few then levied a five (5) year sentence for incest and a twenty-five (25) year sentence for the second count of first-degree CSC with a minor[2] and ordered these sentences would be consecutive. Petitioner, therefore, received a fifty-five (55) year sentence. Petitioner did not file an appeal. (App.p.35).

Petitioner filed an application for post-conviction relief (PCR) on October 1, 2009 (2009-CP-23-8380). (App.pp.37-46). A hearing was convened at the Greenville County Courthouse on November 16, 2010. (App.pp.53-72). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order dated January 14, 2011 and filed January 28, 2011. (App.pp.74-80).

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[1] 2008-GS-23-9799.
[2] 2008-GS-23-9803.

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective in not objecting or moving to withdraw his guilty pleas.

At the guilty plea hearing, the plea judge advised Petitioner of the minimum and maximum sentences for his charges and explained that, if the sentences were to be consecutive, he could receive a ninety (90) year sentence. (App.pp.8-9). Petitioner stated no promises or threats had been made in exchange for his pleas. (App.p.14). Petitioner stated he made the decision to plead guilty and was answering the judge's questions truthfully. (App.pp.15-16). Petitioner stated four (4) times that he was guilty. (App.p.13; p.15; p.24). Both the assistant solicitor and plea counsel noted there was no sentence recommendation but that the State would be dismissing several charges in consideration of the plea. (App.p.14; p.25).

The assistant solicitor recited the facts of the case. One of the victims, Petitioner's thirteen (13) year old daughter, indicated the sexual abuse began approximately three (3) years earlier. This victim eventually became pregnant (as confirmed by a paternity test) by Petitioner. Petitioner was charged with first-degree

CSC, second-degree CSC, and incest as to this victim. (App.pp.16-19; pp.22-23). The second victim, Petitioner's older daughter, indicated the sexual abuse began approximately two (2) years earlier. Petitioner was charged with first-degree CSC as to this victim. (App.pp.19-20; pp.23-24). Petitioner did not dispute the State's recitation of the facts. (App.p.26). The assistant solicitor noted the lieutenant in charge of the case could not appear but "did want me to relay to the Court that he wants significant time." (App.p.27). Plea counsel spoke in mitigation and then stated , "I would ask you to be as lenient as you can under the circumstances." (App.p.34). The assistant solicitor then stated that, while the defense wanted to plead guilty without a sentence recommendation, "the State naturally would be requesting very significant time on this case." (App.pp.34-35).

At the PCR hearing, Petitioner argued plea counsel told him he would receive a sentence between ten (10) and fifteen (15) years.[3] (App.p.68). Petitioner stated plea counsel never said he was pleading guilty without a sentence recommendation. (App.p.68). Petitioner recalled the assistant solicitor asked for "a severe sentence" at the plea hearing. (App.pp.68-69). Petitioner stated he would not have pled guilty if he had known the assistant solicitor would ask for a lengthy sentence. (App.p.69). Counsel for Petitioner argued plea counsel should have objected or moved to withdraw the guilty pleas when the assistant solicitor asked for "significant time." (App.pp.71-72).

Plea counsel testified the assistant solicitor would not offer less than a forty (40)

[3] Petitioner, however, contradicted his own testimony when he later stated plea counsel did not make any promises about the sentence he would receive. (App.p.69).

year recommendation. (App.pp.62-63). Plea counsel testified he conveyed this offer to Petitioner, who rejected it. (App.p.63; p.65). Plea counsel testified the parties ultimately agreed Petitioner would plead guilty without a recommendation. (App.p.63). Plea counsel testified he explained to Petitioner that this meant the plea judge could sentence him to anything between the minimum and maximum sentences on each of his charges. (App.p.65).

In denying the application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving plea counsel should have objected to a violation of the plea agreement." The PCR judge found the "plea recommendation was not violated because the assistant solicitor did not make a sentence recommendation, [Petitioner] had been advised of the possible sentences he could receive, and plea counsel asked the plea judge to be lenient in sentencing." (App.pp.78-79).

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 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). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel should have objected or moved to withdraw the guilty plea hearing after the assistant solicitor requested "significant time." There is no question that Petitioner entered his guilty pleas that day without a specific sentence recommendation from the State. The sentencing sheets – which would have been signed by the assistant solicitor, Petitioner, and plea counsel – indicated the guilty pleas were without negotiations or recommendations.[4] (App.p.63). Plea counsel testified to the lack of a sentence recommendation at the PCR hearing and it was discussed during the guilty plea hearing. (App.p.14; p.25; p.63). While Petitioner stated he did not know he was pleading guilty without a sentence recommendation, the PCR judge found he was not a credible witness. (App.p.77). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Plea counsel did not err in how he handled this case. He and the assistant solicitor came to an agreement that there would not be a specific sentence recommended by the State at the guilty plea hearing. At the plea hearing, there was no recommendation as to the number of years the State recommended Petitioner receive in exchange for his plea. Rather, the assistant solicitor merely relayed to the plea judge some information from the lieutenant who handled this

[4] The sentencing sheets were not included in either the Appendix or Supplemental Appendix.

case but was unable to appear. The assistant solicitor simply stated the lieutenant hoped the judge would impose a significant sentence and then later echoed this sentiment prior to sentencing. These statements did not amount to a sentence recommendation by the State. Further, there is no evidence in the record Petitioner detrimentally relied upon the agreement there would be no sentence recommendation in deciding to enter guilty pleas to these charges. See Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (2001) (finding that in order to prevail on a claim that the State breached an oral plea agreement, the applicant must show the existence of the agreement and detrimental reliance by the applicant on the agreement). In fact, Petitioner testified at the PCR hearing that he did not know he was pleading guilty without a sentence recommendation. 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."). Based upon the lack of both error and detrimental reliance, plea counsel was not ineffective in failing to withdraw the guilty pleas in this case.

Regardless, Petitioner failed to prove he was prejudiced by plea counsel's failure to object or move to withdraw the guilty plea hearing after the assistant solicitor requested "significant time." There was overwhelming evidence of Petitioner's guilt. Petitioner was originally charged with committing sexual battery against his three daughters.[5] Facts related to the repeated forcible rape of the two eldest daughters were recited at the plea hearing. Further, a paternity test conclusively proved Petitioner

[5] The charge of lewd act upon a child – related to the nine (9) year old daughter/victim – was one of the charges dismissed in consideration of the guilty pleas. (App.p.25).

fathered a child with his thirteen (13) year old daughter. While Petitioner stated he would have gone to trial if he had known there was no sentence recommendation, such a statement is simply not credible based on the weight of the evidence against Petitioner and the potential sentences he was facing.[6] In light of the overwhelming evidence against him, Petitioner failed to prove plea counsel's failure to object or withdraw the plea affected the outcome of his case. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record). There is no credible evidence that Petitioner would have taken these charges to a jury trial if he had known the assistant solicitor would relay a request for "significant time." See Hill v. Lockhart, 474 U.S. at 58-59, 106 at 370.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he

[6] Additional charges of second-degree CSC with a minor and incest related to the eldest daughter/victim were dismissed in consideration of the guilty pleas. (App.pp.24-25).

was prejudiced by trial counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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: Karen Ratigan
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November 18, 2011

STATE OF SOUTH CAROLINA
In The Supreme Court

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Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy 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
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I further certify that all parties required by Rule to be served have been served.

This 18th day of November, 2011.

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