

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Richland County

S.C. Supreme Court

L. Casey Manning, Circuit Court Judge

LEHENRY S. RILEY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
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ATTORNEY FOR RESPONDENT

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ARGUMENTS

 1.

 There was evidence to support the PCR court’s ruling that the state violated the provisions of the Interstate Agreement on Detainers warranting dismissal, and that the continuance motion was improperly granted by the trial judge since the state failed to show “good cause” for the continuance motion where the IAD had been strongly invoked.11

 2.

 There was the “any evidence” necessary to affirm the PCR court’s ruling that counsel was ineffective for advising respondent to plead guilty since he waived the appellate issue of dismissal of his charges under the Interstate Agreement on Detainers by pleading guilty.14

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QUESTIONS PRESENTED

- I. Did the post-conviction relief court err in granting respondent relief under the Interstate Agreement on Detainers?
 - A. Did the post-conviction relief court err in determining that Article IV of the Interstate Agreement on Detainers applied in the present case?
 - B. Did the post-conviction relief court err in determining that the state's continuance motion was improperly granted?

- II. Did the post-conviction relief court err in its determination that counsel was ineffective for advising respondent to plead guilty, where there is no evidence of probative value to support a determination that counsel's performance fell below an objective standard of reasonableness?

COUNTER-QUESTIONS PRESENTED

1.

Was there any evidence to support the PCR court's ruling that the state violated the provisions of the Interstate Agreement on Detainers warranting dismissal, and that the continuance motion was improperly granted by the trial judge since the state failed to show "good cause" for the continuance motion where the IAD had been strongly invoked?

2.

Was there any evidence to support the PCR court's ruling that counsel was ineffective for advising respondent to plead guilty since he waived the issue of dismissal of his charges as a winning appellate issue under the Interstate Agreement on Detainers by pleading guilty?

STATEMENT OF FACTS

Respondent was indicted at the May 15, 2002 term of the Richland County Grand Jury for armed robbery and kidnapping. App. 123–130. Following his release on bond, respondent traveled to Florida, where he subsequently was arrested for and convicted of additional charges. After serving approximately a year-and-a-half on his Florida sentence, respondent sent a request to the Fifth Circuit Solicitor’s Office for the disposal of his pending South Carolina charges pursuant to the Interstate Agreement on Detainers. (IAD). See S.C. Code §17-11-10 et seq. App. 64-65; App. 95. Respondent’s request was served upon Fifth Circuit Solicitor’s Office on June 18, 2008. App. 13; App. 95. As will be seen infra, 180 days from June 18, 2008 was December 15, 2008. Respondent was subsequently transported to and arrived in South Carolina on August 5, 2008. App. 3, ll. 17-18. December 4, 2008 was 120 days from August 5, 2008 under the IAD.

Respondent’s case was scheduled for trial the week of December 8, 2008. On December 1, 2008 the state filed a Notice of Motion and Motion for Extension, requesting a continuance until the week of December 15, 2008, or after. App. 95. On December 3, 2008, a hearing on the state’s motion for continuance was held before the Honorable J. Michelle Childs. App. 1-22.

The state, represented by Assistant Solicitor Dolly Justice Garfield, moved for a continuance. She informed the court that she was assigned the case in September, 2008. She requested for respondent’s case to be “first up the week of December 15th. As well we are requesting an extension. . . We are asking for a continuance *because his 180 days actually expires December 15th.*” App. 3, l. 19 – 4, l. 8. (emphasis added).

She alleged another case was scheduled for the week of December 8, 2008. “That is expected to go the entire week, and I don’t believe we could get into the courtroom.” App. 4, ll. 3-

24. She also asserted the continuance was due to the “unavailability” of the alleged victim, who “[i]s leaving tomorrow for an out-of-state trip she has planned for some time and she will not be returning until December 10th. So we would just ask if we could please be first up and we would ask for an extension. And just to cover all bases, your honor, if we could have that extension until January because you never know what might happen the week of the 15th. *The judge could end up not coming, or whatever*, just to cover ourselves.” App. 3, l. 8 – 4, l. 24. (emphasis added).

Defense counsel James D. Cooper, III, of the Richland County Public Defender’s Office objected to the continuance motion citing the Interstate Agreement on Detainers Act, asserting the state controlled the docket and had not maintaining there was not “good cause” for a continuance in this case. He also argued the state had six months to move for a continuance, and respondent had “been in reliance on this statute for six months. Just because they have other cases they want to try, that is not good cause for a continuance.” Counsel also argued that not only did the 180-day requirement of Article III of Interstate Detainer Act apply, but the 120 day [December 4, 2008 deadline] requirement of Article IV also applied. App. 5, l. 5 – 8, l. 23. Judge Childs granted the state’s motion for continuance, finding that good cause existed, and granted an extension of one week over respondent’s objection. App. 21, l. 6 – 22, l. 6.

On December 12, 2008, respondent, alongside counsel, appeared before the Honorable Clifton Newman, where he pled guilty as indicted to kidnapping and to the lesser-included offense of strong arm robbery. Counsel noted that respondent was a tank driver in the United States Army and he had been discharged honorably after three years. Respondent had a substance abuse problem at the time of bizarre robbery attempt. Counsel asked for a five or six year sentence given the unusual facts of this case. App. 37, l. 12 - 38, l. 3.

The state recommended a “cap” of ten years, and Judge Newman sentenced respondent to ten years imprisonment for common law robbery and seven years imprisonment for kidnapping, with the sentences to be served concurrently. Additionally, an unrelated burglary in the second degree charge was dismissed pursuant to plea negotiations with the State. The judge ruled this case did not involve the sex offender registry, and that no weapon was recovered. This supported respondent’s assertion that he was not armed during the pathetic robbery attempt. App. 29, l. 4 – 43, l. 10.

Thereafter, respondent filed an application for post-conviction relief on October 19, 2009. App. 45-51. He asserted violations of the Interstate Detainer Act, and ineffective assistance of counsel regarding how it was misapplied to him. App. 47-48. Petitioner filed its Return on March 19, 2010, requesting an evidentiary hearing be held. App. 52-55.

An evidentiary hearing was convened March 2, 2011, before the Honorable L. Casey Manning. App. 57-90. Respondent was represented by Jeremy Thompson, Esquire. Petitioner was represented by Assistant General Brian Petrano. App. 57.

Thompson argued that respondent was asserting his attorney was ineffective because if he had proceeded to trial he could have argued that his case should have been dismissed pursuant to the interstate detainer agreement, and his case would have been reversed on appeal. App. 62, ll. 3 – 22. Respondent testified that he told his defense attorney during their first meeting in this state “we were nearing the end of the hundred and twenty days of me being in this state and other than that we talk mostly about the case because at the time I had -- I indicated I wanted to go to trial.” App. 68, ll. 14 – 25.

Respondent testified he spent “months looking into it before I actually filed a request for final disposition.” Respondent filed the motion on June 11, 2008. Respondent told the PCR judge

that he never would have pled guilty had he known he could have been successful on appeal raising “this issue.” App. 68, l. 14 – 75, l. 7.

Defense counsel Cooper testified at the PCR hearing that he understood that a violation of the Interstate Detainer Agreement meant that respondent’s charges would be dismissed. Counsel noted that the solicitor was not happy with him for opposing the continuance motion, and continuing to press the interstate detainer dismissal matter. App. 77, l. 12 – 81, l. 17.

PCR counsel Thompson argued that in the state’s motion for a continuance and at the hearing on the motion for a continuance the state acknowledged that Article IV, as well as Article III, of the Interstate Detainer Agreement were applicable. Supp. App. 1. Thompson noted that under Article IV that the 120 days to call the case to trial started to run on the day respondent got into South Carolina which was August 5, 2008. “The day that that would have expired by my account was *December 3, 2008* the day of the continuance hearing. So the argument is that the continuance was improperly granted because the -- because the docket congestion and the victim being on vacation are just not sufficient reasons to grant a continuance under the IAD.” Counsel again noted that Article IV was referenced in the state’s continuance motion and also argued at the continuance hearing. App. 86, l. 4 – 87, l. 21. (emphasis added). The salient points are that by granting the continuance the 120 provision was violated, and by trial counsel advising respondent to plead guilty on December 12, 2008 the 180 day mandate that expired on December 15, 2008 was waived as an appellate issue if it did not succeed as a dismissal grounds at a later hearing.

The assistant attorney general argued that if the state was bound by Article IV because it was relied upon by the solicitor he still maintained that the judge’s reason for granting the continuance request based on the main witness going out of the state was “a legitimate reason.” The assistant attorney general also stated respondent should be governed by the 180 day provision, and

not the 120 day provision. “He pled before the end of the 180 expired there is no debate...” The PCR judge noted that respondent pled guilty “three days shy [December 12, 2008] of the 180 [the 180 days after he asserted his rights under the agreement which was June 18, 2008].” App. 88, l. 8 - 89, l. 16.

At the conclusion of the hearing, the court took the matter under advisement and requested proposed orders from each party. By written Order dated March 1, 2013, and filed March 4, 2013, Judge Manning granted relief and dismissed respondent’s charges with prejudice. App. 93 - 107.

Article III and IV of the Agreement

Judge Manning noted in his order granting relief that the state’s reason for the continuance at the December 3, 2008 hearing was that 180 day time requirement **of Article III** of the interstate agreement **would expire on December 15, 2008**. In response, defense counsel noted that not only did the 180 day requirement of Article III apply, but the 120 requirement of Article IV also applied. Defense counsel argued under Article IV, the 120 day time limit also applied. Defense counsel argued the state’s grounds for a continuance at the December 3, 2008 hearing did not constitute “good cause” for a continuance. App. 95-96.

The PCR judge explained in his order that if a defendant requests disposition pursuant to Article III, then the receiving state has 180 days in which to try the defendant after his request for final disposition of the charges has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him. Citing, *Fex v. Michigan*, 507 U.S. 43, 52 (1993). App. 98.

The order also noted “that under Article IV” the State has 120 days after the defendant has returned to the State’s jurisdiction to dispose of the defendant’s charges.” The “120 day limitation imposed under Article IV (c) is mandatory.” *State v. Holbrook*, 274 S.C. 4, 6, 260 S.E.2d 181, 182

(1979). The judge wrote: “[T]here is no question that the applicant met the requirements of Article III.” The order also stated “[T]his Court finds that the State invoked the requirements of Article IV by requesting and obtaining custody of the applicant following his Article III request. While the mere transfer of the applicant to South Carolina would not invoke Article IV’s time limits, the fact that the State specifically stated that Article IV applied in its continuance motion is significant evidence that the State requested custody of the applicant pursuant to Article IV.” See Applicant’s Exhibit 1 at 2. Additionally, when confronted with defense counsel’s argument that Article IV applied, the assistant solicitor never once replied that Article IV was not applicable; instead, she stated that she was acting under the assumption that Article III applied. When all of these factors are considered in conjunction with the lesser standard required of the state to trigger Article IV, this court concludes that the state triggered the 120-day time limit of Article IV by requesting the applicant’s transfer to South Carolina.” App. 100.

“This Court finds that Article IV was applicable in this case. Since the applicant was returned to the custody of the State on August 5, 2008, his 120 day time limit for disposing of his charges would have expired on December 3, 2008, the date of the continuance hearing. Therefore, the Court will turn to the question of whether or not Judge Childs properly granted the State’s motion for a continuance.” App. 101.

Continuance

“This Court finds that Judge Childs improperly granted the State’s motion for a continuance. The two grounds asserted by the State for the continuance were that the docket was overcrowded and that the victim was going to be out of town for a vacation. Neither ground is sufficient to sustain a continuance under the IAD, especially when the deadline under the IAD is approaching

because the state is subject to the requirements of Article IV. The State's "grounds" for the continuance were problems created by the State." App. 102.

"Given the length of time that this case had been scheduled for trial, and the State's knowledge of the IAD's time requirements, the State should not have been allowed to continue the case beyond the 120 day time limits of Article IV. Accordingly, inasmuch as the IAD requires a heightened standard for obtaining a continuance to schedule a trial, this Court finds that Judge Childs improperly granted State's motion for a continuance. Consequently, since the applicant's plea on December 12, 2008, was made 9 days after the expiration of the time limits under article IV of the IAD, article IV of the IAD was violated in this case." App. 102.

Ineffective assistance of counsel

The PCR court also ruled that defense counsel's failure to advise respondent that the IAD motion could be successful as an appellate issue, even if the motion was unsuccessful at trial constituted deficient performance. The PCR court also reasoned that since it was clear that respondent wanted the IAD issue litigated, that had defense counsel properly advised respondent there was a strong likelihood the IAD issue would have been successful on appeal, "there can be no question" that respondent would have exercised his right to trial to preserve the issue. Citing Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (stating that a PCR applicant challenging the validity of a guilty plea must demonstrate "something that would have affected counsel's advice to [the applicant] to accept the plea bargain offered or that would have caused [the applicant] to decline to accept it."). "Consequently, this Court finds that the applicant has met his burden of proof with regard to this issue, and his convictions and sentences should be vacated." App. 103 – 104.

IAD Act violation

The Court noted that S.C. Code 17-27-20 (a)(1) provides that an Applicant can bring a PCR action challenging his conviction and sentence as being in violation of the Constitution of the United States or the Constitution or laws of this state. “This Court has found that Judge Child’s improperly extended the time in which the State was allowed to try the applicant. The applicant’s pleas of guilty occurred nine days after the expiration of time under Article 4 of the IAD, which rendered his convictions invalid. Therefore, this Court finds the applicant’s convictions and sentences should be vacated pursuant to §17-27- 20(a)(1), and that the charges against the applicant should be dismissed with prejudice. See S.C. Code §17-11-10; Article V(c).” App. 104-105.

Sex Offender registry

The PCR court also found that the plea judge correctly found there was no sexual element to the kidnapping offense in this case, and therefore since the judge made an explicit ruling on that issue respondent was not required to register as a sex offender. App. 105-106.

The state filed a Motion to Alter or Amend a Judgment Pursuant to Rule 59(e), SCRPC, asking the court to enter an Order denying respondent relief, or in the alternative, incorporate its attached proposed Order of Dismissal into the record to preserve all arguments for appellate review. App. 108-119. By written Order filed March 20, 2013, the PCR court denied petitioner’s motion to reconsider but made its proposed Order part of the record.

The state filed a Petition for Writ of Certiorari dated December 3, 2013. This is the Return to that petition.

ARGUMENT

1.

There was evidence to support the PCR court's ruling that the state violated the provisions of the Interstate Agreement on Detainers warranting dismissal, and that the continuance motion was improperly granted by the trial judge since the state failed to show "good cause" for the continuance motion where the IAD had been strongly invoked.

Respondent caused the Florida Department of Corrections to send a letter dated June 18, 2008 to the Fifth Circuit Solicitor's Office notifying the solicitor of respondent's request to dispose of his charges under the IAD. Respondent was transported to South Carolina by the Columbia Police Department and he arrived in South Carolina on August 5, 2008. It was undisputed under Article III, where the defendant requests disposition of his pending charges the state has 180 days in which to try the defendant after his request for final disposition has actually been delivered to the court and the prosecuting officer of the jurisdiction that lodged the detainer against him. See Fex v. Michigan, 507 U.S. 43, 52 (1993). One hundred and eighty days from June 15, 2008 would have been December 15, 2008.

The state asserted at the December 3, 2008 motion for a continuance that respondent's 180 days expired on December 15, 2008. The state asked for an extension into January, 2009 noting "the judge could not end up not coming, or whatever, but just to cover ourselves." App. 4, ll. 3-24.

Defense counsel Cooper noted that the 120 day IAD provision from respondent's August 5, 2008 arrival expired the following day, December 4, 2008. App. 5, l. 5 - 6, l. 6. Defense counsel asserted that the state's grounds for a continuance did not constitute good cause.

Defense counsel Cooper told Judge Childs of the two requirements under the Act. One is that the state had 180 days from the time Respondent caused his request to be delivered, and the

second was that the state hds 120 days from the time Respondent was actually received in the state to be tried. Respondent was received in the state on August 5, 2008. Defense counsel Cooper noted that 120 days from August 5, 2008 was the next day, December 4, 2008. Defense counsel argued the state had not shown good cause for a continuance on December 3, 2008.

It was at this point that the solicitor accused the defense of remaining “quiet,” and bringing up the applicable 120 day deadline to “surprise her.” Defense counsel Cooper responded that all he was doing was abiding by the statute, and that he was representing respondent’s interests. Counsel told the judge his job was not trying to protect the State’s interests in not having the case dismissed essentially because they were not ready for trial. Counsel said it was not the fault of the respondent that the state could not comply with the 120 Article IV IAD day provision. It was rather the fault of the state.

Defense counsel Cooper responded to the solicitor’s allegation that he kept quiet to gain an advantage by stating that it was his obligation to protect respondent under the statute and that the solicitor being upset that the time was going to run out on them under the IAD -- and they were not prepared to go to trial -- was not the fault of the respondent but the fault of the state. App. 17, l. 25 – 19, l. 3.

The PCR judge correctly found the state acquiesced – indeed cited -- the 120 day IAD time provision, and that good cause did not exist for a continuance. Supp. App. at 2. The solicitor apparently became angry at defense counsel for invoking the 120 provision but could not fight its application. The PCR court had ample evidence to find the 120 IAD day provision applied particularly given the state’s acknowledgment of its applicability, and indeed its reliance on it. App. 8, l. 17 – 19. l. 3.

It was respectfully the duty of the trial judge to enforce the IAD, and the solicitor's grounds for a continuance that the main witness for the state planned on going on vacation, and another case was going to be called for trial were simply insufficient to constitute "good cause." The state's failure to try respondent within the 120 day provision mandated dismissal since it failed to assert good cause for their continuance motion on December 3, 2008. The time limit expired the next day without respondent's case being called for trial by the state.

2.

There was the “any evidence” necessary to affirm the PCR court’s ruling that counsel was ineffective for advising respondent to plead guilty since he waived the appellate issue of dismissal of his charges under the Interstate Agreement on Detainers by pleading guilty.

The PCR court also correctly held that defense counsel was deficient by failing to advise respondent that even if counsel did not like the chances of the trial court dismissing his case under the IAD, that respondent could preserve this winning appellate issue by going to trial rather than pleading guilty. This record is clear that respondent had researched the IAD issue thoroughly, and he wanted his charges dismissed. He testified at PCR hearing that he would not have pled guilty had he known he likely would prevail on this issue, and obtain a dismissal on appeal if he went to trial. App. 71, ll. 16-21.

Instead, respondent pled guilty and he obviously waived the IAD issue by pleading guilty. A guilty plea is a waiver of all non-jurisdictional defects, here, the IAD issue on appeal. See State v. Passaro, 350 S.C. 499, 506, 567 S.E. 2d 862, 866 (2002). It is apparent that the IAD issue was the most important one for respondent since he carefully researched the issue and prepared defense counsel Cooper to argue it to the court. Respondent would not have pled guilty had he been properly advised. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009).

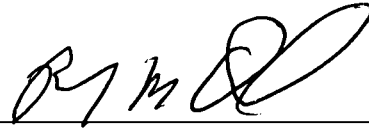
This Court has repeatedly held it will affirm if there is any evidence to support the PCR court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E. 2d 871, 873 (2012). Here, there was evidence to support the PCR judge’s ruling on the IAD particularly where the state cited, then acquiesced and agreed it was bound by the 120 IAD day provision. Further, by pleading respondent guilty on December 12, 2008, three days before the December 15, 2008 180 day provision **also**

expired, the PCR judge correctly found defense counsel ineffectively waived that appellate IAD issue. There was evidence to support both rulings by the PCR court, and *certiorari* consequently is not warranted.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

South Carolina Commission on Indigent Defense
Division on Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

This 28th day of April, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

LEHENRY S. RILEY,

RESPONDENT,

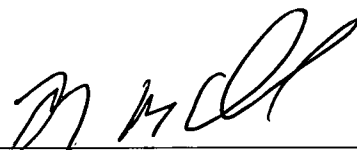
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

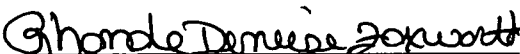
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of April, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 28th day
of April, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021