

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
EDGAR W. DICKSON, Circuit Court Judge

Case No. 2011-CP-32-1293

Oscar Gramling, #341691,
Petitioner,

vs.

State of South Carolina,
Respondent,

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT.....3

 I. The PCR judge erred in finding that although Petitioner’s plea counsel’s representation may have fallen below the reasonable professional standard that Petitioner failed to meet his burden that he was prejudiced as a result.....3

 II. The PCR judge erred in finding that Petitioner’s plea counsel was not ineffective for failing to adequately investigate Petitioner’s case.....6

 III. The PCR judge erred in finding that Petitioner’s plea counsel was ineffective by misrepresenting the terms and conditions of the plea offer by misinforming Petitioner regarding the potential maximum term of incarceration under this plea and misrepresenting what could be expected in terms of sentencing.....7

 IV. The PCR judge erred in finding that Petitioner’s plea counsel was ineffective for failing to prepare for trial, failing to prepare an adequate defense and demonstrating such directly to the Petitioner.....9

CONCLUSION.....11

QUESTIONS PRESENTED

1. Did the PCR judge err in finding that although Petitioner's plea counsel's representation may have fallen below the reasonable professional standard that Petitioner failed to meet his burden that he was prejudiced as a result?
2. Did the PCR judge err in finding that Petitioner's plea counsel was not ineffective for failing to adequately investigate Petitioner's case?
3. Did the PCR judge err in finding that Petitioner's plea counsel was ineffective by misrepresenting the terms and conditions of the plea offer by misinforming Petitioner regarding the potential maximum term of incarceration under this plea and misrepresenting what could be expected in terms of sentencing?
4. Did the PCR judge err in finding that Petitioner's plea counsel was ineffective for failing to prepare for trial, failing to prepare an adequate defense and demonstrating such directly to the Petitioner?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. The Petitioner was indicted for Second- Degree Criminal Sexual Conduct (CSC) with a Minor (2009-GS-32-2003) and Contributing to the Delinquency of a Minor (2009-GS-32-2005). Victor Li, Esq. represented the Petitioner on the charges. The State brought the case to trial on July 12, 2010. After the direct examination of the alleged victim, Defense Counsel approached the State regarding a possible plea. On July 13, 2010, Petitioner pled guilty and was sentenced to eight (8) years for CSC Second Degree and Three (3) years for Contributing to Delinquency of a Minor, with both sentences to be served concurrently, by the Honorable William P. Keesley. The Petitioner did not appeal his conviction or sentence.

The Petitioner subsequently filed an application for post-conviction relief on March 31, 2011. The State made its return on December 16, 2011. An evidentiary hearing was held at the Lexington County Courthouse on November 12, 2012 before the Honorable Edward W. Dickson. Arie D. Bax, Esq. represented the Petitioner. Karen C. Ratigan of the South Carolina Attorney General's Office represented the State. At the hearing, the Petitioner testified on his own behalf, followed by the testimony of his trial counsel, Victor Li, Esq. Upon motion by PCR counsel, the court held the hearing open in order to obtain the possible deposition testimony of Alexandra Benevento, Esq. who assisted Mr. Li during Petitioner's trial.

It was subsequently determined by the parties that Ms. Benevento did not have any additional testimony to offer. On July 9, 2013, Judge Dickson issued an Order of Dismissal denying Petitioner's application for post-conviction relief. Petitioner filed a Notice of Appeal on August 1, 2013. This Petition 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (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, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. 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 v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

ARGUMENT

- I. **The PCR judge erred in finding that although Petitioner's plea counsel's representation may have fallen below the reasonable**

professional standard that Petitioner failed to meet his burden that he was prejudiced as a result.

Petitioner alleged in his application and subsequent hearing that his plea counsel's representation fell below the reasonable professional standard and that he was prejudiced as a result.

“When alleging ineffective assistance of counsel after a guilty plea, an applicant in a PCR action must show: 1) counsel's representation fell below an objective standard of reasonableness; and 2) but for counsel's unprofessional errors, there is a reasonable probability the applicant would not have pled guilty but would have insisted upon going to trial.” Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988).

Petitioner had initially decided to take his case to trial. However, due to the substandard representation of his counsel and his apparent distress, Petitioner ultimately entered a guilty plea after the start of his trial.

Both Petitioner and plea counsel testified that plea counsel listened to the direct testimony by the alleged victim, began sweating profusely, and became visibly nervous in front of his client. App. pp. 293-294, ll. 14-24; App. p. 333, ll.11-13; App. p. 334, ll. 19-25. Even though Victim initially testified that there had not been a relationship between herself and the Defendant before she changed her story under intense direct examination by the State, plea counsel did not even attempt to test her credibility by conducting a cross-examination. App. p. 332, ll. 4-11. Plea counsel admitted during his testimony that based on his past experience as a prosecutor, he was well aware that a witness's best testimony occurs during the direct examination and that the majority of times, it is only during cross examination that testimony is able to be challenged. App. p. 360, ll. 12-24. However, instead of taking advantage of Defendant's right to cross-exam his accuser as guaranteed by the Sixth Amendment, plea counsel

instead went sweating and shaking to approach the prosecutor to ask for a deal for his client. App. p. 335, ll. 9-13. Counsel testified that he did not consult with his client prior to approaching the assistant solicitor about a plea. App. p. 336, ll. 12-20.

There can be no doubt that one of the most important jobs of trial counsel is to conduct a cross-examination of a witness. Cross-examination is not merely an obligatory process. It is the ultimate weapon that a Defendant can have in his arsenal to present a defense. Indeed, a Defendant is not even required to be his own witness in a trial, a right guaranteed by the Constitution. That same Constitution, as well as case law, also guarantees the Defendant the right to confront his accuser. "The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford v. Washington. If counsel was not prepared to challenge the one obvious individual that would be testifying against the Defendant, he had a duty to inform his client, as well as the court, that he was not prepared to proceed. Instead he made it apparent to all, including the court, the prosecutor, and his client, that he was not prepared to handle the situation.

Petitioner testified that he had complete faith in his plea counsel, Mr. Li, and that when he saw his reaction he did not know what to do. App. p. 294, ll. 10-16. He further testified that when Mr. Li informed him that he needed to take the plea offer that Mr. Li had secured from the prosecutor, that he totally believed that there was no other choice and that he would be able to receive probation after all was said and done. App. p. 295, ll. 10-23.

Petitioner was prejudiced by the mere fact that he DID NOT have competent counsel. He was prejudiced because he relied on the advice of his lawyer who admitted that he had no idea how to handle the situation with the alleged victim. He was prejudiced due to the fact that his lawyer utterly failed at the job that he was tasked to do, defend his client. He was prejudiced due

to the fact “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’ ” Rolen, 392 S.C. at 459. In this case, but for his attorney’s unprofessional errors, the Defendant would not have pled guilty, but would have continued with trial.

II. The PCR judge erred in finding that Petitioner’s plea counsel was not ineffective for failing to adequately investigate Petitioner’s case.

Petitioner contends that plea counsel failed to adequately investigate the facts of his case. Petitioner testified that he had numerous conversations with his counsel regarding his version of events and possible defenses and witnesses. Specifically, Petitioner and his counsel discussed detailed information regarding the alleged victim, her mental health history, and her credibility issues. App. pp. 323-325, ll. 25-15. More importantly, the alleged victim herself, contacted plea counsel several times and spoke to him in detail about the pending case. App. pp. 322-323, ll. 20-21. Yet, plea counsel never obtained a statement from the alleged victim. App. p. 323, ll. 22-24. Although, plea counsel had discussed engaging a private investigator in order to obtain a statement, he ultimately failed to do so.

“A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (quoting Wiggins, 539 U.S. at 524-25, 123 S.Ct. 2527).

As stated above, it was obvious to every one present that plea counsel was not prepared to confront the alleged victim in cross-examination. If plea counsel had adequately investigated the alleged victim in this case, he would not have had an issue in confronting her on her past

accounts of sexual abuse that had been discounted. He would have been able to explore and go in depth into her history of mental illness. More importantly, he would have been able to impeach her testimony by her prior inconsistent statements. However, since he failed to do so, he was not prepared to challenge the alleged victim once she testified in favor of the prosecution.

More importantly, "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). Counsel's strategy will be reviewed under " an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Plea counsel offered no reason why he neglected to obtain statements from the alleged victim, which he could use to impeach her. As any attorney is aware, it is not unexpected for a witness to change their testimony and impeachment of a witness, particularly an alleged victim, is a powerful tool. This is especially true when the only evidence against the Defendant is the testimony of the alleged victim, as it was in this case.

III. The PCR judge erred in finding that Petitioner's plea counsel was ineffective by misrepresenting the terms and conditions of the plea offer by misinforming Petitioner regarding the potential maximum term of incarceration under this plea and misrepresenting what could be expected in terms of sentencing.

Petitioner alleges his plea counsel did not properly explain the minimum and maximum time he was facing. Petitioner further alleges that due to his plea counsel misrepresenting what to expect as a result of his plea, that his plea was in fact involuntary. "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty plea

is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). Petitioner testified that plea counsel did not discuss how much time he could get from the judge once he decided to plea in the middle of trial, just that he would be able to walk out of court that very day. App. p. 265, ll. 10-15. Petitioner further testified that he had complete trust in his plea counsel and his decisions. App. p. 265, ll. 16-23. Petitioner testified that the only thing that his decision to plea was based on was his plea counsel assuring him he would not be incarcerated. App. p. 298, ll. 10-15.

Plea counsel also has a responsibility to give his client a reasonable account of what to expect in sentencing. While, no attorney can be held responsible for guaranteeing what a sentencing judge will do, he still bears a responsibility. In this case, while plea counsel could not have given Petitioner an exact time of how much Petitioner would be sentenced to, he had a duty to give him the correct information regarding what to reasonable expect. In this particular case, a suspended sentence of probation could not be something that an effective attorney can tell his client to reasonable expect. It is totally unreasonable for any practicing attorney to give Petitioner the advice that he would even had the possibility of receiving a probationary sentence based on the facts and circumstances of this case, particularly in this jurisdiction and/or with this particular presiding judge. Plea counsel owed his client a duty to at least have some knowledge of the sentencing history of the trial judge when advising clients about a potential sentence for any type of open-ended plea. The mere fact that plea counsel admitted that he thought it was a possibility that Petitioner may have received a probationary sentence demonstrates ineffective assistance of counsel in this case. App. p. 338, ll. 19-25. Plea counsel admitted that he didn't

make any effort at the time that he was advising his client to plea, or prior to the plea, to inquire about the particular sentence this judge would impose. App. p. 344, ll. 7-21. More importantly, plea counsel acknowledged in his own testimony that he was well aware and relied on the fact that Petitioner would follow his recommendations. App. p. 346, ll. 6-23.

Additionally, Plea counsel also had the opportunity to delay sentencing in order to prepare a more detailed mitigation presentation. However, plea counsel failed to advise his client properly that any hope, however small, that the sentencing judge would even consider imposing a sentence of probation, would depend greatly on a through mitigation presentation. App. p. 345, ll. 12-20.

IV. The PCR judge erred in finding that Petitioner's plea counsel was ineffective for failing to prepare for trial, failing to prepare an adequate defense and demonstrating such directly to the Petitioner.

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Petitioner testified that he had complete confidence in his plea counsel and if Mr. Li had told him that he was prepared to continue to proceed in trial, there would never had been any consideration of entering a plea. However, since, Mr. Li was visibly nervous and shaken after hearing the testimony of the alleged victim, he felt he no longer had a choice. App. pp. 301-302, ll. 11-7.

This testimony from both Petitioner and his plea counsel concerning plea counsel's visible reaction of dismay and nervousness bordering on panic clearly demonstrates that plea counsel had failed to adequately prepare a defense to present at trial for Petitioner. Based on the testimony of Plea counsel and Petitioner, the only two avenues defense that was discussed was 1) relying on the pretrial assertion by victim that should would testify that no sexual intercourse occurred between her and Petitioner and 2) in the event that the victim did not testify in Petitioner's favor, his counsel would discredit the victim by attacking her credibility with numerous facts about her past and mental health conditions that plea counsel and Petitioner testified that plea counsel had possession of.

However, as previously mentioned above, plea counsel's testimony confirmed Petitioner's allegation that plea counsel did nothing to ensure that the alleged victim would actually testify as she had promised plea counsel, including having a private investigator testify to her prior inconsistent statements. In his testimony, Plea counsel did not articulate any other theory than to blindly rely on the alleged victim's unguaranteed promised to defend his client at trial through her testimony. This in itself demonstrates an ineffective assistance of counsel as it was the alleged victim, herself, that reported the alleged crime to law enforcement. Therefore, any statement she gave to the contrary would clearly demonstrate her lack of credibility. Plea counsel testified that all that he came prepared to defend his client with was the discovery provided to him by the solicitor and he was not even sure if that discovery was complete. Regardless of how the alleged victim testified, plea counsel would have had to do more preparation than he did to be an effective attorney at trial.

As to the back up plan of discrediting the victim if she was testify in a way contrary to Petitioner's interest, there was no evidence offered by plea counsel that he was truly prepared to

conduct such a cross examination. His shaky conduct along with his recommendation to Petitioner to plea without conducting a cross examination, leads to only one logical conclusion, that plea counsel was not prepared to cross exam the victim and attack her credibility.

Conclusion

Petitioner bases his request for certiorari on the arguments outlined above. Any number of these errors by plea counsel demonstrated representation that fell below professional norms as was found by the PCR judge. Petitioner contends that any number of these errors were prejudicial in that it led to the Petitioner's uninformed and misadvised decision to plea guilty. Petitioner further contends that when all of these errors are taken in conjunction that they only correct conclusion is that plea counsel's ineffective assistance of counsel result in an involuntary guilty plea that would not have resulted but for his error.

Based on the arguments stated above, Petitioner submits that the PCR court erred in not granting the relief requested pursuant the Post-Conviction Relief Act. This Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the Petitioner asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,



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Oscar Gramling, #341691,
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vs.

State of South Carolina,
Respondent,

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Certiorari and Appendix in the above referenced case has been deposited in the United States Mail, postage prepaid, addressed to J. Walt Whitmire, SC Attorney General's Office, P.O. Box 11549, Columbia, SC 29211, this 7th day of May 2014.



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May 27, 2014

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

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JUN 02 2014

S.C. Supreme Court

RE: Oscar Gramling v. State of South Carolina
2011-CP-32-1293

Dear Mr. Shearouse:

Enclosed for filing is:

- 1) an original and (6) copies the parties' Consent Motion to Amend.
- 2) an original and (6) copies of Petitioner's Petition for Certiorari and two copies of the revised Appendix for this matter filed on behalf of Oscar Gramling in the above captioned case along with the required Proof of Service.
- 3) I have also enclosed the requested originals of the Proof of Service for the initial Certiorari and Appendix served earlier this month. Thank you.

Please let me know if you have any questions.

Sincerely yours,

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