STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2013-000930

Christopher McLeod, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the post-conviction judge properly find trial counsel was not ineffective in allowing Petitioner to proceed to trial on all four charges where Petitioner did not want to accept a plea, where trial counsel articulated a valid strategy for proceeding on all charges, and where Petitioner was not prejudiced by his decision to proceed to trial?

STATEMENT OF THE CASE

In January 2007, the Florence County Grand Jury indicted Petitioner for first degree criminal sexual conduct with a minor, lewd act on a minor, assault and battery of a high and aggravated nature, and unlawful conduct towards a child. (App. pp. 583-85). Karen E. Parrott, Esquire, ("trial counsel") represented Petitioner. (App. p. 1). Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury on March 8, 2010. (App. p. 1). The jury found Petitioner guilty of assault and battery of a high and aggravated nature and unlawful conduct towards a child. (App. p. 492, lines 9-14). The jury found Petitioner innocent of first degree criminal sexual conduct with a minor and lewd act on a minor. (App. p. 492, lines 5-9). Judge Russo sentenced Petitioner to consecutive terms of ten (10) years for assault and battery of a high and aggravated nature and seven (7) years for unlawful conduct towards a child. (App. p. 503, line 23-p. 504, line 7).

Trial counsel filed a notice of appeal, and Robert M. Pachak, Esquire, of the South Carolina Office of Appellate Defense, perfected Petitioner's appeal with the filing of an Anders[1] brief. (App. p. 516). Petitioner voluntarily withdrew his appeal, and the South Carolina Court of Appeals dismissed the appeal by order dated January 27, 2011. (App. p. 506).

Petitioner filed an application for post-conviction relief on January 11, 2011. (App. pp. 507-14). Bryan W. Braddock, Esquire, represented Petitioner. (App. p. 521). The Honorable William H. Seals, Jr. ("the post-conviction judge") convened an evidentiary hearing into the application at the Florence County Courthouse on February

[1] Anders v. California, 386 U.S. 738 (1967)

26, 2013. (App. p. 521). Assistant Attorney General T. Andrew Johnson, Esquire, represented Respondent. (App. p. 521) The post-conviction judge denied relief in an order dated March 19, 2013, and filed March 21, 2013. (App. pp. 577-582).

ARGUMENT

I. Probative evidence supports the post-conviction judge's finding trial counsel was not ineffective for allowing Petitioner to proceed to trial on all four charges.

Petitioner asserts the post-conviction judge erred by finding trial counsel was not ineffective for failing allowing Petitioner to plea to the assault and unlawful conduct charges. However, probative evidence supports the post-conviction judge's findings. Therefore, Respondent submits the post-conviction judge properly denied Petitioner's application.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trail counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit judge's denial of post-conviction relief when there is probative evidence to support the findings of the circuit judge. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

Applicant testified he freely admitted his guilt to the assault and unlawful conduct charges, but always denied his guilt on the criminal sexual conduct and lewd act charges. (App. p. 528, lines 406). He also said he was always willing to plead to the assault and unlawful conduct charges. (App. p. 528, lines 13-17). He attempted to claim he was never told he could plea to just two of the charges. (App. p. 529, lines 12-19). However, he did admit he knew he would lose credibility with the jury if he pled to two of the four charges before trial. (App. p. 529, line 24-p.530, line 4).

The prosecuting solicitor testified he would have allowed Petitioner to plead to the assault and unlawful conduct charges and go to trial on the criminal sexual conduct and lewd act charges if trial counsel had requested it. (App. p. 540, lines 5-12). However, he further testified he had never, in his thirty (30) years of experience, seen a defendant plead to some charges and go to trial on other charges. (App. p. 540, lines 17-

25). He also testified he would have only allowed Petitioner to enter a plea without negotiations or recommendations, and would have asked the trial judge to determine the sentence. (App. p. 543, lines 6-7; p. 551, lines 15-17).

Trial counsel testified Petitioner eventually admitted his guilt to all four charges. (App. p. 558, lines 8-16). She recalled attempting to enter a plea in front of another judge when Petitioner "balked" and decided he wanted to go to trial. (App. p. 559, lines 1-4). She recalled asking the prosecuting solicitor numerous times for plea offers, but henever offered a plea that did not include either the criminal sexual conduct or lewd act charge. (App. p. 574, lines 3-8, p. 562, lines 19-22). She further testified she believed it made more sense for Petitioner to proceed to trial on all four charges and admit his guilt to two them, thereby gaining credibility with the jury. (App. p. 563, lines 13-17). She also believed the prosecuting solicitor would have postponed the inevitable trial on more serious sexual crimes while Petitioner served his sentence on the lesser assault crimes. (App. p. 569, lines 6-8). Trial counsel testified she advised Petitioner to enter a plea, but he decided to go to trial. (App. p. 565, lines 17-21). She also maintained the position that sentencing is within the judge's discretion, and she could not guarantee any sentence if Petitioner had entered a plea to the two lesser charges. (App. p. 569, line 23-p. 570, line 2). She testified it was speculation to assume Petitioner would have received a lesser sentence if he had entered such a plea. (App. p. 564, lines 13-16).

The record supports the post-conviction judge's determination trial counsel was not deficient in her representation of Petitioner. The State has the discretion to offer a defendant the opportunity to enter a plea as opposed to calling a case for trial. State v. Blakely, 402 S.C. 650, 658, 742 S.E.2d 29, 33 (Ct. App. 2013) (quoting State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012)). Trial counsel has no affirmative duty to

request certain plea offers from the State. Van Wart v. United States, CRIM. RWT-07-0492, 2013 WL 3788535, at *3 (D. Md. July 18, 2013) (quoting United States v. Pender, 514 Fed. Appx. 359 (4th Cir. 2013) (unpublished)).[2] Furthermore, a defendant cannot force the State to accept the terms of his proposed plea offer. See, e.g. State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (Ct. App. 2007) ("The State is not bound to accept a defendant's terms simply because a defendant reveals otherwise undiscoverable facts in the hope of securing a favorable plea agreement." (citing State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996))). Here, trial counsel testified she requested several plea offers from the prosecuting solicitor and never received an offer satisfactory to Petitioner. She advised Petitioner to plead guilty, but he insisted upon a trial. In light of this testimony, no evidence supports Petitioner's contention he would have entered a plea to the two lesser charges and proceeded to trial on the others.[3] Accordingly, trial counsel cannot be deficient for not pursuing a plea bargain Petitioner may or may not have accepted.

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[2] Pender is distinguishable from Petitioner's case. There, the inmate alleged his attorney never initiated plea negotiations, while the State alleged it made a plea offer and the inmate declined it. Pender, 514 F. App'x at 360. In contrast, trial counsel here testified she engaged in plea negotiates but never received an offer suitable to Petitioner. Furthermore, the inmate in Pender was facing a mandatory life sentence. Id. at 361. Here, the trial judge retained discretion to sentence Petitioner if convicted. Interestingly, Respondent also notes Pender was remanded for an evidentiary hearing based on the discrepancy between the inmate's and the State's affidavits. Id. Therefore, the Pender court did not affirmatively state counsel's performance was ineffective under the circumstances. Rather, it merely stated the inmate's allegations raised a question of fact as to that issue. Id.

[3] Petitioner testified at the evidentiary hearing he would have entered such a plea. However, he also testified he always denied his guilt to the remaining charges. This testimony is in stark contrast to trial counsel's testimony, where she specifically recalled Petitioner admitting to committing a lewd act on the victim. The post-conviction judge found Petitioner's testimony to be not credible on both accounts. (App. p. 580-81). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a PCR judge's credibility findings).

Furthermore, trial counsel articulated a valid trial strategy for not attempting plea Petitioner to the assault and unlawful conduct charges. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Trial counsel testified she believed it was prudent to let Petitioner admit on the stand his guilt to the assault and unlawful conduct charges. Such an admission would lend credibility to Petitioner's testimony. His credible admission to guilt on those crimes would bolster his denial of guilt on the more serious crimes of criminal sexual conduct and lewd act. Such a decision is clearly reasonable trial strategy. See United States v. Leifried, 732 F.2d 388, 390 (4th Cir. 1984) ("Counsel's decision to admit guilt on individual drug trafficking offenses where the evidence of guilt was overwhelming and attempt to persuade the jury of Leifried's innocence of the continuing criminal enterprise charge was acceptable trial strategy."). The prosecuting solicitor also conceded that, in his thirty (30) years of experience, it was common for defendants to strategically admit partial guilt in hopes the jury will reach a compromised verdict. Furthermore, Petitioner's testimony indicates he understood this was the strategy trial counsel would employ at trial. Accordingly, the post-conviction judge properly found trial counsel had articulated a valid strategic reason for not pursuing an earlier plea to the assault and unlawful conduct charges.

Regardless, Petitioner has failed to demonstrate the outcome of his case would have been different had trial counsel pursued a plea to assault and unlawful conduct charges. The validity of trial counsel's strategy to forgo such a plea is evident because the jury found Petitioner innocent of the criminal sexual conduct and lewd act charges. Although Petitioner complains about the length of his current sentence, he was facing a

mandatory minimum sentence of twenty-five (25) years. See S.C. Code Ann. § 16-3-655 (D)(1) (person convicted of first degree criminal sexual conduct with a minor "must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended nor probation granted, or must be imprisoned for life."). Petitioner cannot simply assume the jury would have found him not-guilty of the more serious sex crimes if he had not taken the stand and candidly admitted his guilt to the two other charges. To the contrary, an earlier plea to the two less serious charges would have allowed the State to use those charges to impeach Petitioner's credibility. See Rule 609(a), SCRCP. Under the circumstances of this case, the record demonstrates Petitioner actually derived a benefit from trial cousnel's strategic decision to candidly admit guilt.

Petitioner does not stop his speculation at what the jury would have done if they heard different testimony. He also speculates as to what the trial judge would have done if presented a plea without negotiations or recommendations. Although defendants may be rewarded for admissions of guilt in a plea, a trial judge is strictly forbidden from punishing a defendant for exercising his right to a jury trial. State v. Hazel, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995). Petitioner's argument borders upon accusing the trial judge of punishing him for going to trial. However, no evidence in the record supports such an accusation.

Because no evidence indicates the trial judge punished Petitioner for electing a trial, Petitioner is left to speculate that his sentences would have been concurrent had he entered a plea. However, the decision to issue concurrent or consecutive sentences "is a matter left to the sound discretion of the trial judge." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997) (citing 21 Am. Jur. 2d Criminal Law § 552 (1981); Finley v. State, 219 S.C. 278, 64 S.E.2d 881 (1951)). The record does not indicate the

trial judge acted with "partiality, prejudice, oppression, or corrupt motive" in issuing the consecutive sentences. Id. at 531-32, 481 S.E.2d at 444 (citing Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977); State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976)). Instead, the record reflects the trial judge felt the nature of the injuries to the victim warranted a severe sentence. (App. p. 502, lines 7-17). Based on the facts and circumstances of this case, Petitioner has not shown any concrete evidence the trial judge would have sentenced him to concurrent sentence if he pled to the assault and unlawful conduct charges. See, e.g., Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure conjecture"). Accordingly, the post-conviction judge properly found Petitioner had failed to demonstrate such a plea would have made a difference in the length of his sentence.

Because the record contains significant probative evidence trial counsel acted reasonably and within professional norms when implementing Petitioner's trial strategy, and that no prejudice resulted from trial counsel's actions, the post-conviction judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
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July 9 , 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

The Honorable William H. Seals, Jr., Circuit Court Judge

CHRISTOPHER MCLEOD, JR.,

Petitioner,

v.

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:

Appellate Defender Wanda H. Carter
Division of Appellate Defense
Post Office Box 11589
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This 9th day of July, 2014

Norma Bigbee
NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

July 9, 2014

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

RE: **Christopher McLeod, Jr., #339758 v. State of South Carolina**
Appellate Case No: 2013-000930

Dear Mr. Shearouse:

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

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)