STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2013-001737

Oscar Grambling, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Whether Certiorari is necessary to determine if the PCR Judge erred in finding Petitioner failed to meet his burden to prove counsel was ineffective for purported failing to investigate the victim's credibility?

2. Whether Certiorari is necessary to determine if the PCR Judge erred in finding Petitioner failed to meet his burden to prove counsel was ineffective for purportedly misadvising him on the terms of his plea?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the August 2009 term of General Sessions for criminal sexual conduct with a minor, second-degree (2009-GS-32-2003) and contributing to the delinquency of a minor (2009-GS-32-2005). Victor Li, Esq, represented Petitioner.

After the State called the case to trial, Petitioner chose to plead to guilty. On July 13, 2010, the Honorable William P. Keesley sentenced Petitioner to concurrent terms of eight years imprisonment for the CSC charge and three years imprisonment for the contributing to the delinquency of a minor charge. Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on March 31, 2011. A hearing was convened at the Lexington County Courthouse on November 14, 2012. (App.pp.x). Petitioner was present and represented by Ari Bax, Esq. Karen C. Ratigan, Esq., of the South Carolina Attorney General's Office represented Respondent. Judge Dickson denied relief in an order dated July 2, 2013.

STATEMENT OF TRIAL FACTS

After the State called its case to trial, the Trial Judge heard numerous motions in limine. App.pp.1-123. A Jackson v. Denno[1] hearing was convened to determine the admissibility of Petitioner's post-Miranda statement. App.pp.85-96. The Trial Judge decided to let the State introduce Petitioner's statement. App.p.96. The statement detailed Petitioner's remorsefulness for his culpable conduct. The Trial Judge also decided to let counsel introduce the victim's prior false allegation of rape during his cross-examination of the witness. App.p.109.

The victim testified during the State's case-in-chief. App.pp.148-203. She detailed the extent and circumstances of her relationship with Petitioner. Petitioner interned as a track coach for the Irmo Middle School team when the victim was a participant on the team. She was fourteen at the time. App.pp.148-50. After a friendship began on "Myspace," Petitioner began grooming the victim. She testified that they communicated several times a week over the social media forum. Soon after, Petitioner gave his phone number to her, which led to numerous phone calls a week. App.pp.150-55. The first sexual encounter resulted when the victim invited the Petitioner to sneak into her bedroom at her parent's home. She testified that Petition performed oral and vaginal intercourse on her. App.p.150. The victim noted that she was fourteen at the time and that Petitioner's had recently celebrated his twenty-eighth birthday.

Petitioner escalated the grooming. The victim testified that Petitioner purchased her a cellular phone after her mother confiscated her phone. Again, after the victim's mother confiscated the phone purchased by Petitioner, he provided her second phone.

[1] Jackson v. Denno, 378 U.S. 368 (1964).

App.p.58. Petitioner's showering of gifts led the victim to believe that she was in a committed relationship with Petitioner. Petitioner's criminal conduct was revealed when the victim's mother discovered pictures of the Petitioner on the victim's "MP3" player. Consequently, the discovery led the victim to run away from her parent's home. App.p.161. Petitioner aided her in the escape. She testified that Petitioner instructed her to hide in his bathroom when the police came to Petitioner's home in search of the child. App.p.169. The matter ultimately led to Petitioner's arrest. App.p.164.

The victim testified that she had over ten sexual encounters with Petitioner during the course the relationship. App.p.203. She identified undergarments that Petitioner had gifted to her.App.p.197. She further identified a diamond ring that Petitioner had also gifted. The victim testified that Petitioner had promised her marriage. App.p.176-77.

Petitioner informed the Trial Judge of his decision to enter guilty pleas prior to counsel having the opportunity to cross-examine the victim. App.p.208. The Trial Judge accepted Petitioner's plea and sentenced him accordingly. App.pp.209-34. Counsel presented the findings from a favorable report of Petitioner's psychological evaluation during the mitigation phase of the sentencing hearing. App.p.227.

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

I.

Certiorari is not warranted where the PCR Judge correctly found Petitioner's allegation that counsel was ineffective in his preparation for and representation during the victim's trial testimony was fatally reliant upon speculation.

The PCR Judge's finding was sound where Petitioner failed to produce any evidence of what counsel purportedly neglected to investigate to support the allegation. Furthermore, any *post hoc* blame concerning counsel's reaction to the victim's testimony of Petitioner's marriage proposal should be properly placed at the feet of Petitioner for leaving his attorney hanging out to dry. Regardless, the Record shows that counsel's reaction did not change the damaging import of the victim's testimony to Petitioner's cause.

Relevant Testimony and Facts from the PCR Hearing

At the PCR hearing, Petitioner argued that counsel was ineffective for failing to adequately investigate a defense case to attack the victim's credibility. App.p.285. Petitioner testified that me het with counsel numerous times prior to trial. App.p.303. Petitioner testified that he hinged his hopes on the victim not taking the stand to testify at trial, or alternatively, the victim deciding to not implicate him in her testimony. App.p.305. He testified that he disclosed his relationship with the victim to counsel. App.p.303. Petitioner testified that counsel did not employ an investigator for his case or review all of the State's evidence with him. App.p.276-81. He testified that counsel promised him that he would be acquitted but would not look talk to the victim after Petitioner told counsel that the victim planned on not testifying against him.App.pp.285-

87. Petitioner testified he decided to plead guilty because counsel's inadequate performance in his preparing against the victim's trial testimony ensured a jury conviction. App.p.295. He also testified that counsel's shaken demeanor to the victim's testimony left him with little confidence in counsel's ability to adequately challenge the damaging testimony. App.p.293.

At the PCR hearing, Counsel testified to his course of conduct during the representation. App.pp.307-97. Counsel met with Petitioner numerous times and noted an extensive independent review of the State's evidence that contained boxes of phone records and pictures. App.p.315. He relayed his impressions to Petitioner and advised him that the case "didn't look good" based upon the State's evidence. App.p.316. In particular, counsel advised Petitioner that the only viable trial strategy would be to attack the victim's credibility and hope she adopts a hostile posture towards the State's case. App.p.316. He testified to his investigation on the victim's credibility and outlined his preparations to utilize the beneficial materials that obtained during his cross-examination of the victim at trial. App.pp.324-27. From the outset of representation, Petitioner ensured counsel that the victim would not take the stand against him, or at least not provide inculpatory testimony concerning their relationship. App.p.317. Counsel noted that Petitioner was always open with him their conversations concerning the facts of the relationship. App.p.352. Counsel testified that the victim made several phone calls to his office to inquire about Petitioner's bond status but that she never disclosed the facts of the substantive offense to his staff. App.p.323.

Counsel opined that the victim's trial testimony "sank [Petitioner]." App.p.331.

He noted his adverse physical reaction to learning for the first time that Petitioner proposed marriage to the victim during her trial testimony. App.p.333. He testified that Petitioner whispered "I'm sorry" to him when the victim testified on the matter. Counsel testified that the victim's trial testimony "sealed his guilt." App.p.333. Counsel testified that the Trial Judge granted his request for a brief recess after the State's direct examination of the victim to discuss the best course of action going forward. App.pp.333-34. Counsel testified that he advised Petitioner of the likelihood of a harsher prison sentence if Petitioner wanted to continue the trial, which would result in putting the victim through cross-examination. App.p.342. After consultation, Petitioner made the decision to enter guilty pleas. Counsel testified that he completed extensive preparations and was prepared to thoroughly cross-examine the victim if Petitioner desired to proceed with the remainder of his trial. App.pp.350-51.

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner failed to produce evidence to support his contention that counsel's representation concerning the State's presentation of victim to prove prejudice. App.pp.7-8.

Effective Assistance of Counsel

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). In order to prove

prejudice, an applicant must show "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. "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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

"This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); see also McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("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.").

Discussion

The PCR Judge did not err in finding Petitioner failed to meet his burden to prove counsel rendered ineffective performance because the allegation was fatally reliant on speculation and not competent evidence of what counsel should have additionally pursued here[2]. In light of Petitioner's admission of guilt to the Trial Judge, Petitioner has in total failed to produce any substantive evidence in the PCR *post hoc* forum to refute

[2] The State submits that Petitioner's "Argument 4" is an unnecessary duplication of the prejudice inquiry addressed in Petitioner's "Argument 2" that contends that counsel was ineffective for failing to investigate compared to Petitioner's "Argument 2" that contends Petitioner's guilty plea was rendered involuntary by counsel's purported failure to investigate. The semantically nuances constitute a distinction without a difference. See Petitioner's PWC pp.9-11.

the veracity of the victim's detailed and undisputed account of the sexual misconduct. Instead, Petitioner speculates that the victim would have chosen to produce an affidavit exculpating Petitioner prior to trial if counsel pursued the matter. Furthermore, in the absence of *post hoc* recantation testimony from the victim, the assertion is dubious at best. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) ("mere speculation and conjecture on the part of a defendant in PCR is insufficient."). At worst, Petitioner actually asserts that counsel was ineffective for failing to suborn perjury from the victim. See Chewning v. Ford Motor Co., 346 S.C. 28, 35-36, 550 S.E.2d 584, 588 (Ct. App. 2001) aff'd, 354 S.C. 72, 579 S.E.2d 605 (2003) ("Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court."). All, Petitioner has utterly failed to produce evidence of how an investigator would have produced beneficial evidence to aid his defense. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.").

Petitioner also hinges his allegation on counsel's physical reaction to hearing the victim's damaging testimony concerning the marriage proposal. Yet, Petitioner conveniently ignores that his thorough and apparent completely candid disclosures to counsel dictated scope of counsel's independent investigation into the case.

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable

> depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions

Strickland, 466 U.S. at 691 (emphasis added). Based on Petitioner's involvement, borne out through their numerous consultations, it was objectively reasonable for counsel to rely on Petitioner's representations. Thus, although counsel "may have done more to prepared for victim's testimony," Petitioner's own conduct undercut any possible deficiency finding in this forum[3]. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Importantly, counsel notes Petitioner apologized to him during the course of the trial for causing counsel to get blindsided by the victim's testimony on Petitioner's marriage proposal. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted.").

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that

[3] The State submits Petitioner's "Argument 1," is while standing alone is incomplete and deficient. See Petitioner's PWC pp.3-6. Most of the Petitioner's "Argument 1" concerns an academic treatise on the controlling Strickland standard of review. Instead the State posits that the relevant portion of Petitioner's "Argument 1" is but one sub-issue within the PCR allegation for "failure to investigate" addressed here by the State.

counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the prong of Strickland – that he was prejudiced by counsel's performance.

II.

Certiorari is not warranted where ample probative evidence supports the PCR Judge's correct finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to adequately advise him of the terms and the sentencing range of his plea.

The PCR Judge soundly denied and dismissed the allegation where probative evidence supports his findings that counsel's testimony was credible, Petitioner's testimony was not credible, and that the potential *post hoc* error alleged by Petitioner was cured by the Trial Judge's plea colloquy with Petitioner.

Relevant Testimony and Facts from the PCR Hearing

At the PCR hearing, Petitioner testified that counsel falsely assured him that he would get a probationary sentence if he entered an open guilty plea during the course of his trial. App.p.292. Petitioner testified that counsel's assurance was made in the presence was made in the presence of his mother; yet his mother did testify at the PCR hearing. App.pp.292-93. Petitioner testified that he believed counsel had already negotiated his sentence with the Trial Judge and the State despite the Trial Judge's contrary assertions at the colloquy. App.p.295.

At the PCR hearing, counsel testified that he aggressively pursued the State in hopes of electing a favorable plea offer after his review of the State's convincing case against Petitioner. App.p.316. Counsel testified that through his efforts, he was able to get the State to offer to the lesser-included offense of assault and battery of high and

aggregated nature "ABHAN" that he believed to be reasonable. App.p.317. He advised Petitioner that offer held a sentencing range of zero to ten years imprisonment, which allowed Petitioner the opportunity to avoid incarnation. He further advised Petitioner that he devote his efforts to putting up a strong mitigation case concerning sentencing. App.p.318. Counsel submitted Petitioner for a psychological evaluation that yielded positive finding that Petitioner did not harbor sexual predator tendencies. App.p.327. Ultimately, Petitioner rejected the offer and hinged his hopes that victim would not take the stand against him at trial. App.p.320. Again the State made a subsequent ABHAN offer that was similarly rejected. Counsel testified that at the point Petitioner decided to plead guilty during his trial, his assessment of immediate consultation with Petitioner left him with impression that Petitioner was aware that he was entering an open plea that exposed him to incarnation. App.p.337. In other words, Petitioner did not leave the false impression that pled guilty with an unrealistic expectation that he would get a probationary sentence and walk out of the courtroom. Furthermore, counsel was unable to solely focus his efforts on a mitigation defense at the plea because he was preoccupied with contesting Petitioner's guilt at trial.

In denying and dismissing the allegation, the PCR Judge found counsel's testimony credible, Petitioner's testimony not credible, and that any possible error was cured by the Trial Judge's plea colloquy. Furthermore, the PCR Judge found, as noted above, Petitioner failed to produce favorable witnesses that would have aided his defense or otherwise mitigation case during sentencing phase of his plea. App.pp.10-11.

Effective Assistance of Counsel

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a 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). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting *State v. Ray,* 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

"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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

Discussion

First, the PCR Judge did not err in finding Petitioner failed to meet his burden of proving counsel did not explain the sentence ranges for the offenses. Counsel testified he told the Petitioner the minimum and maximum sentences he was facing on the charges. Counsel specifically testified he told the Petitioner of the sentencing ranges again when

they were discussing the plea offer because it was made without a sentence recommendation. Regardless, any error was cured by the judge's explanation of the sentence ranges during the guilty plea hearing. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011). Moreover, counsel testified that, after the victim's direct examination at trial, he spoke to the State about a plea offer and the State agreed to dismiss an enticement charge and not comment on sentencing. Counsel testified he explained this to the Petitioner. Counsel testified he never told the Petitioner he would not receive a jail sentence. Thus probative evidence supports the PCR Judge's credibility findings.

Regardless, any error was cured by the judge's explanation of the sentence ranges during the guilty plea hearing. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011). This Court finds the allegation is refuted by the transcript. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007). Plea counsel told the plea judge the agreement was to "plea guilty based on the State's silence as to sentencing" and the State added "we have agreed to dismiss a companion enticing a child – an enrolled child from school charge." The plea judge asked the Applicant whether "other than what's on the record . . . has anyone promised you anything or offered any hope of reward to get you to plead guilty" and the Applicant replied "[n]o, sir."

Second, the PCR Judge correctly found Petitioner failed to present any evidence to support the hollow assertion that counsel was ineffective for failing to present favorable mitigation evidence during the sentencing phase of the plea. In fact, the allegation is wholly contradicted by the record where counsel apprised the Trial Judge at

the plea hearing of Dr. McKee's favorable findings from Petitioner's psychological evaluation. See App.p.227.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the prong of Strickland – that he was prejudiced by counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. 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.").

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 issues discussed above.

Respectfully submitted,

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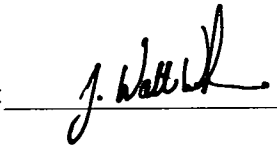
By: 

ATTORNEYS FOR RESPONDENT

Oct 20th, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2013-001737

OSCAR A. GRAMLING, III,

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:

Naki Richardson-Bax, Esquire
The Bax Law Firm, PA
69 Robert Smalls Pkwy, Suite 3C
Beaufort, SC 29902

This 20th day of October, 2014

Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

October 20, 2014

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

RE: **Oscar A. Gramling, III v. State of South Carolina**
Appellate Case No: 2013-001737

Dear Mr. Shearouse:

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

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Naki Richardson-Bax, Esquire