STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2013 – 002543

JAYMES M. WOOD, #315669,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. The day before Petitioner pled guilty, the presiding judge sentenced a defendant to probation following the defendant's guilty plea to assaulting a child in the defendant's care as a daycare worker. A media firestorm following calling the judge's sentence too lenient. During Petitioner's guilty plea to criminal sexual conduct with a minor in the second degree, the plea judge revealed his daughter had been sexually assaulted as a child. Did plea counsel's failure to move to recuse the plea judge in light of these circumstances violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law?

II. Did plea counsel's failure to move to withdraw Petitioner's guilty plea when the plea judge revealed his daughter had been sexually assaulted during Petitioner's guilty plea to criminal sexual conduct with a minor in the second degree violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law?

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

I. Did the PCR court err in refusing to find defense counsel ineffective when counsel did not move to recuse the plea judge, in light of supposed media scrutiny over the judge's sentencing practices and after the judge remarked that his daughter had been violated?

II. Did the PCR court err in refusing to find defense counsel ineffective when counsel did not withdraw the Petitioner's guilty plea after the judge revealed that his daughter had been violated?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the January 2008 term of the Richland County Grand Jury for Criminal Sexual Conduct with a Minor, Second Degree (2007-GS-40-7907). Petitioner was represented by Luke A. Shealey, Esquire. On December 9, 2008, Applicant appeared before the Honorable Kenneth G. Goode where he pled guilty as indicted, without recommendation or negotiations from the State. Judge Goode sentenced Petitioner to fifteen (15) years imprisonment. Applicant moved for a reconsideration of sentence, and the matter was heard by the Honorable Allison Renee Lee on December 9, 2009. Judge Lee denied Applicant's request to reconsider his sentence.

A notice of appeal was filed, which was perfected by LaNelle C. Durant, Esquire, of the South Carolina Commission on Indigent Defense. On appeal, Petitioner argued that Judge Goode should have recused himself following disclosure that his daughter had been "violated." The court of appeals affirmed Petitioner's conviction, finding the issue unpreserved for appellate review. State v. Wood, Op. No. 2012-UP-129 (S.C. Ct. App. filed February 29, 2012). The remittitur was sent on March 16, 2012.

Petitioner filed an application for post-conviction relief (PCR) on October 22, 2012. An evidentiary hearing convened on October 1, 2013, before the Honorable James R. Barber, III. Paul B. Rogers represented Petitioner, and the State was represented by Mary S. Williams, Esquire. Judge Barber denied Petitioner relief, by order filed on November 5, 2013. Petitioner filed a notice of appeal and a Petition for Writ of Certiorari. This Return 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 Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

II. Certiorari is not warranted where there is probative evidence to support the PCR court's ruling that counsel was not ineffective in not moving to recuse the plea judge, in light of supposed media scrutiny over the judge's sentencing practices and after the judge remarked that a family member had been violated.

Petitioner asserts the PCR Court erred in not ruling that counsel was ineffective in failing to move for the recusal of the plea judge. Petitioner claims a "media firestorm" was triggered by a sentence handed down by the plea judge the day before he pled which adversely affected his guilty plea and sentencing. Petitioner also argues that plea counsel should have made a motion to recuse the judge when the judge revealed that a family member had been "violated." This allegation is without merit as there is clearly evidence to support the PCR court's finding that counsel was not ineffective.

The PCR Court found counsel was not deficient in not moving to have the plea judge recused. The PCR Court held that "[t]o fail to move for recusal of a judge in one case due to scrutiny in a separate, unrelated case, without more, would not be outside the realm of competence." The court also found that the remark the plea judge made about his family member did not show personal bias or prejudice against Petitioner.

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner 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, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 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 (1985). Respondent submits Petitioner did not satisfy either requirement of the Strickland test.

The PCR court correctly found that counsel's performance was not deficient in failing to move to recuse the judge based on alleged bias or impartiality. "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party." Mallett v. Mallett, 323 S.C. 141, 145, 473 S.E.2d 804, 807 (1996). However, "[i]t is not enough for a party to simply allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice." Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 139, 447 S.E.2d 218 (1994). Such an alleged bias "must stem from an extrajudicial source and result in a decision

based on information other than what the judge learned from his participation in the case. Id. Moreover, when a party moving for disqualification alleges bias, any remarks "must be interpreted in the light of the context in which it is uttered in determining whether the remarks show an extrajudicial personal bias or prejudice on the part of the judge sufficient to require that he be disqualified." Shaw v. State, 276 S.C. 190, 193, 277 S.E.2d 140, 141 (1981).

As an initial matter, Respondent notes that plea counsel's testimony was the product of hindsight and second guessing. Petitioner cites plea counsel's testimony in support of his argument for prejudice. Plea counsel testified at the PCR hearing that he should have moved to recuse the plea judge and that he should have moved to withdraw the plea. Plea counsel even went so far as to say that he considered part of his representation ineffective. (App. p. 110, lines 19-22).

On occasion, PCR counsel will obtain some acknowledgement from trial counsel that trial counsel was incompetent. Such self-proclaimed admissions have been regarded with skepticism. Counsel's self-serving statements need not be accepted as true. Dows v. Wood, 211 F.3d 480, 496 (9th Cir. 2000). The Ninth Circuit Court of Appeals dealt with later confessions of trial counsel's own incompetence in Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995). The court stated that the latter day emergence of their belief in their incompetence runs afoul of the rule of contemporary assessment, noting that they certainly did not believe it at the time. Id. And their statement that they would do more if they had more information is also the Monday-morning quarterbacking forbidden by the contemporary assessment rule, concluding that if Ben Franklin had more information, he may have invented the television. Id at 40. See also Rhoades v. Henry, 611 F.3d 1133, 1138 n.1 (". . .it is all too easy" for counsel or a court "to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight," citing

Bell v. Cone, 535 U.S. 685, 702, 123S.Ct. 1843, 1854, 152 L.Ed.2d 914 (2002); Eberts v. Gaetz, 610 F.3d 415 (7th Cir. 2010) (an attorney's reflection about what should have been done after the fact is irrelevant to the question of ineffective assistance), which is why there is a presumption of reasonable, professional assistance); Miller v. Champion, 161 F.3d 1249, 1286 (10th Cir. 1998) (that counsel would have done something different in "hindsight" is unhelpful because that is the wrong test). The Supreme Court has held that an objective standard of reasonableness applies:

> After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

Harrington v. Richter, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011).

Here, plea counsel's testimony is clearly the result of hindsight and should be considered in that light. Respondent submits Petitioner's reliance on plea counsel's testimony is misguided since counsel clearly seconded guessed his strategy while giving testimony with the benefit of nearly five (5) years to reflect upon those decisions. Plea counsel testified that he made the decision to proceed before the plea judge with the facts he knew at that time. (App. p. 111, lines 22-25 – App. p. 112, lines 1-7). Respondent submits that plea counsel acted reasonable and was not deficient in any way at the guilty plea proceeding.

A. Recusal based on remarks made by plea judge regarding family member's abuse.

The PCR court correctly found no evidence of prejudice on the part of judge, based on his remarks during the plea hearing. The remarks that Petitioner takes issue with are as follows:

> THE COURT: I'll make this simple. I'll terminate his probation on the current charges. All due respect, he said it wasn't a violent situation. You know, I consider it just absolutely one of the most violent situations. I have a twenty-six year old daughter who was violated at Girl Scout camp when she was eight. She

hasn't recovered from that yet.

(App. p. 17, lines 5-11). Interpreted within the light of the context of the plea hearing, Judge Goode's remarks about his family member being violated did not suggest a personal bias against the Petitioner. Rather, in the context of the plea, Judge Goode was responding to a statement made by Petitioner that the crime was not violent and was attempting to convey to Petitioner that even without ostensible violence, all crimes of sexual misconduct inherently have lasting effects upon the victims. Furthermore, the sentence imposed by the judge was not motivated by any bias or prejudice. In sentencing, the judge considered several factors, such as the Petitioner's repeated pursuit and targeting of this particular child, statements from the victim's mother, and the Petitioner's own criminal record, which revealed a prior indictment for criminal sexual misconduct, and his inability to complete probationary supervision.

B. Recusal based on a sentence handed down by plea judge the day prior.

Additionally, the PCR court properly found Petitioner's allegation that counsel was ineffective in not moving to have the plea judge recused due to external pressure from the media to be without merit. In its Order of Dismissal, the PCR court stated that "[j]udges, in the execution of their duties, are inherently subject to public scrutiny. To fail to move for recusal of a judge in one case due to scrutiny in a separate, unrelated case, without more, would not be outside the realm of competence." Petitioner, thus, offers nothing more than a mere allegation of prejudice on the part of the judge without any evidence that the judge held an extrajudicial bias which formed the basis of his decision. The record is devoid of any evidence that the plea judge was even aware of the media attention. Petitioner argues the plea judge sentenced him in excess of what he would have but for the media scrutiny. This argument is flawed on many bases. First, Petitioner argues the plea judge abandoned his neutral and detached judicial role and failed to act

impartially and fairly. See Canon 3 of the Code of Judicial Conduct, Rule 501 SCACR. That is a bold accusation that is completely unfounded. At the PCR hearing, Petitioner presented this conclusory argument to the court who properly dismissed it as unsupported by the testimony. Second, Petitioner cannot show prejudice. The sentence is legal and within the range described by the plea judge during the colloquy with Petitioner. (App. 3, lines 13-25). Petitioner stated that he understood he could be sentenced to a maximum of twenty (20) years imprisonment. Id.

Therefore, the PCR Court did not err and plea counsel was not ineffective in declining to move to recuse the judge, because the judge's decision was not tainted by or based upon any extrajudicial bias. Likewise, the PCR court's decision should not be disturbed because there is probative evidence that supports the PCR court's ruling that plea counsel was not ineffective.

II. Certiorari is not warranted where there is probative evidence to support the PCR court's ruling that counsel was not ineffective by not moving to withdraw Petitioner's guilty plea.

Petitioner asserts that his plea counsel was ineffective in failing to withdraw his guilty plea after the plea judge stated that a family member had been "violated." As prejudice, Petitioner asserts that the judge's personal experience in this regard resulted in a higher sentence. Petitioner argues that the PCR court erred in finding that his plea counsel was not ineffective when he failed to withdraw the plea even though the plea had already been accepted. This allegation is also without merit as there is clearly evidence to support the PCR court's findings.

The only requirements for a plea to be accepted are that the defendant "understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." Rollison v. State, 346 S.C. 506, 511, 522 S.E.2d 290, 292 (2001). Once a defendant has entered a guilty plea, he is not entitled to withdraw it as a matter of right. State v. Thomason, 355 S.C. 278, 285, 584 S.E.2d

143, 146 (2003); Riddle v. State, 278 S.C. 148, 292 S.E.2d 795 (1982). In this instance, a defendant's withdrawal of guilty plea is "left in the sound discretion of the circuit court." Thomason, 355 S.C. at 283. Moreover, "[a]n accused is not permitted to speculate on the supposed clemency of the judge and enter a plea of guilty with the right to retract it if he finds that his expectation was not realized." State v. Cantrell, 250 S.C. 376, 380, 158 S.E.2d 189, 191-192 (1967).

Petitioner cites Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), in support of his argument. In Rolen, the Court held that plea counsel was ineffective in failing to move to withdraw a guilty plea when the defendant only decided to enter a guilty plea after his attorney advised that the jury would likely find him guilty and when the defendant repeatedly stated that he was innocent during the plea proceedings. Though considering the discretion of the judge in allowing the withdrawal of the guilty plea, the Court reasoned that "[e]ven if the plea judge had denied [Rolen]'s motion to withdraw his plea, [Rolen] could have raised this issue on direct appeal." Id. At 414, 683 S.E.2d at 474. The Court also found ineffective assistance when plea counsel failed to move to withdraw a guilty plea after the State reneged on a plea bargain, and it was unlikely that defendant would have pleaded guilty but for such inadequate assistance. Jordan v State, 297 S.C. 52, 374 S.E.2d (1988).

As discussed above, the PCR Court did not err in finding that the plea judge held no bias or prejudice towards Petitioner in sentencing; likewise, the court did not err in ruling that plea counsel was not ineffective by not withdrawing Petitioner's guilty plea. In the present case, Petitioner, voluntarily and intelligently pleaded guilty to the charge. Petitioner was informed that he faced up to twenty (20) years imprisonment and that the solicitor asked for a minimum sentence of ten (10) years, given his prior offenses and failure to complete probationary

sentences. (App. p. 3, 9). Petitioner was also informed of the offense he was pleading to, advised of his rights to a jury trial, and agreed with the solicitor's statement of facts, including a statement in which he admitted the conduct. (App. p. 4 – 6).

Unlike the defendant in Rolen, the Petitioner was readily willing to admit guilt, and unlike in Jordan, the State never offered Petitioner a plea bargain. Instead, Petitioner asserts that the judge was unfair in sentencing, after he received a sentence more severe than he expected. Petitioner's argument that he received ineffective assistance from his plea counsel is based on this mere allegation of prejudice. The PCR Court cited State v. Harvey, 123 S.E. 201, 202 (1924), in its Order of Dismissal which is particularly applicable:

> [withdrawal of a plea] should not be made use of solely because of defendant's surprise at the severity of the sentence imposed, in the absence of some showing that the plea was induced by fraud, misrepresentation, or other unfair or undue means on the part of the prosecuting attorney or the presiding judge

State v. Harvey, 123 S.E. 201, 202 (1924). Plea counsel's failure to move for withdrawal of the plea based on the severity of the sentence did not constitute ineffective assistance of counsel. Therefore, the PCR court's decision should not be disturbed because there is ample probative evidence to support the PCR court's ruling that plea counsel was not ineffective.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

(signatures on following page)

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 14th, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable James R. Barber, III, Circuit Court Judge
Case No. 2012-CP-40-07145
Appellate Case No. 2013-002543

JAYMES M. WOOD, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, J. Clayton Mitchell, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 14th day of November, 2014.

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ALAN WILSON
ATTORNEY GENERAL

November 14, 2014

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

Re: Jaymes Wood v. The State of South Carolina
Appellate Case No. 2013-002543

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/sbm
Enclosures

cc: Susan B. Hackett, Esquire, Appellate Defense
Trisha Allen, Victim's Services