STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2013-002409

Christopher Bernard Anderson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

1. Did trial counsel err in failing to object to the solicitor's "substantial sentence" recommendation made during the plea proceeding because no sentencing recommendations were connected to the plea agreement and Petitioner was prejudiced as a result since he received a substantial sentence indeed in the case?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the February 2010 term of General Sessions for manufacturing cocaine base (2010-GS-23-0713), possession with intent to distribute (PWID) cocaine base (2010-GS-23-0714), and trafficking cocaine (2010-GS-23-0715). (App.pp.715-73). Joshua Schultz, Esquire represented Petitioner.

On June 16, 2011, Petitioner pled guilty. The Honorable Letitia H. Verdin sentenced Petitioner to concurrent terms of 18 years for manufacturing cocaine base, second offense, 18 years for PWID cocaine base, second offense, and 18 years for trafficking cocaine (10-28 grams), second offense. (App.p.16). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on June 14, 2012 (2012-CP-23-3899). (App.pp.18-24). A hearing was held at the Greenville County Courthouse on August 27, 2013. (App.pp.30-58). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed October 10, 2013. (App.pp.60-67).

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective.

Petitioner argues plea counsel should have objected when the assistant solicitor asked for a "substantial sentence" at the guilty plea hearing. This allegation is without merit.

A.

At the guilty plea hearing, the clerk of court announced Petitioner was pleading guilty to second offenses. (App.p.3). The plea judge advised Petitioner of the sentence ranges for his charges. (App.p.4). Petitioner stated he had discussed his charges with plea counsel, was satisfied with his representation, and had not been made any promises in exchange for his guilty pleas. (App.pp.5-6). Petitioner waived his right to a jury trial. (App.pp.7-8). Petitioner did not dispute the assistant solicitor's recitation of either the facts of his case or his prior criminal record. (App.pp.9-11).

The only mention of sentencing at the guilty plea hearing – prior to plea counsel's mitigation argument – occurred after the assistant solicitor recited Petitioner's prior criminal history:

> **[Assistant solicitor]:** And law enforcement does have input at the appropriate time.
>
> **The Court:** All right.
>
> **[Assistant solicitor]:** Your Honor, they are asking for substantial jail time. They understand I'm reducing it off the 25. But they did still want me to ask for substantial jail time.
>
> **The Court:** All right.

(App.p.11) (emphasis added).

After plea counsel spoke in mitigation (and asked for a sentence on the low end of the 5-30 year sentence range), the plea judge stated:

> I take into consideration the fact that he's been involved in this before, been sentenced to a significant amount of time and went right back to it. Not right back to it, but went back to it. It is a tragic situation. It's a tragic situation for his family now. It's a tragic situation for his mother that died to have seen her son live that kind of life. It's a tragic situation all the way around.
>
> I'll run each of them concurrent but the sentence of the court is 18 years. Good luck to you, sir.

(App.pp.12-16) (emphasis added).

B.

At the PCR hearing, Petitioner argued he hired plea counsel to attempt to get a sentence of house arrest and probation. (App.p.33). Petitioner stated plea counsel said he was eligible for probation on these charges. (App.p.39). Petitioner stated he based his decision to plead guilty upon the lack of a recommendation and plea counsel "being able to talk to get me the low end of the sentence." (App.p.45). Petitioner stated he would have gone to trial if he had known the assistant solicitor would ask for a "high sentence." (App.p.40; p.42).

Petitioner's fiancée, Beverly Adams, stated plea counsel advised Petitioner was facing a 60-year sentence. (App.p.48). Adams stated plea counsel did not promise a particular sentence but said he was pushing for either five years of probation or a five-year active sentence. (App.p.49).

Plea counsel testified he discussed with Petitioner the risks and advantages of a plea versus a trial. (App.p.53). Plea counsel testified he negotiated the third offense charges down to second offenses but there was no specific offer for a sentence. (App.pp.53-54). Plea counsel testified he likely explained to Petitioner the consequences of a plea without a recommendation. (App.p.54; p.56). Plea counsel testified he did not think he would have said he would ask for probation because (1) the charges carried a mandatory prison sentence and (2) he was hoping for a 5-10 year sentence. (App.p.54). Plea counsel testified he told Adams he would push for the minimum sentence but did not recall saying anything about probation. (App.p.55). Plea counsel testified he was "just surprised" at the solicitor's comment. (App.p.55).

In denying the application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving plea counsel should have objected when the State said law enforcement wanted 'to ask for substantial jail time.'" The PCR judge noted there was no sentence recommendation and that plea counsel did not believe the comment violated the spirit of any agreement. The PCR judge concluded "there was no error or prejudice from the lack of an objection to the solicitor's statement." (App.p.65).

C.

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). When there has

been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving both that (1) plea counsel was ineffective for not objecting to the assistant solicitor's comment during the guilty plea hearing and (2) he suffered prejudice as a result.

Deficiency

Plea counsel was not deficient for not objecting because the assistant solicitor's comment was not a sentence recommendation. Rather, the assistant solicitor merely relayed a request from law enforcement that "they are asking for substantial jail time." (App.p.11) (emphasis added). The assistant solicitor did not phrase this as a recommendation from herself or from the State. As such, this case is clearly distinguishable from cases such as Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014) and Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000), where counsel were found to be ineffective for not objecting when the prosecutor actually recommended imposition of the maximum sentence. In both cases, it was concluded the prosecutor recommended the maximum sentence in violation of a plea agreement. These holdings are distinguishable from Petitioner's case because (1) the assistant solicitor in this case did not make a sentence recommendation and (2) there was no plea agreement.

While plea counsel may have been surprised by the assistant solicitor's comment, there was no need for an objection, as the comment did not amount to a sentence recommendation from the State. Rather, this was merely information the assistant solicitor relayed to the plea judge for her consideration in sentencing. Such information was properly before the plea judge. See In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) ("A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant.").

It is clear the assistant solicitor's comment during sentencing did not amount to a sentence recommendation from the State. As such, it was not incumbent upon plea counsel to have objected. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms.

Prejudice

Regardless, Petitioner cannot prove the assistant solicitor's comment prejudiced him in any way. Plea counsel's lack of objection cannot be viewed as prejudicial in a case involving such overwhelming evidence of guilt. During a protective sweep of a residence, Petitioner "was at a kitchen table with a pile of while [sic] powder, scales, baking soda, Pyrex dishes. And one of the Pyrex dishes did have finished product on it." Police recovered $1209 from Petitioner's person, as well as 9.69 grams of crack cocaine and 27.32 grams of powder cocaine from the aforementioned kitchen. (App.pp.10-11). There was no probability of different outcome in this case because of the State's strong evidence against Petitioner. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346

(1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record). While Petitioner stated he would have gone to trial on these facts if he had known the assistant solicitor would make this comment, based on the facts of this case and Petitioner's prior criminal record, this testimony is simply not believable. The PCR judge, in fact, specifically found Petitioner's testimony was not credible. (App.p.64). See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses). There is no reasonable probability Petitioner would have insisted upon a jury trial if he had known the assistant solicitor would relay a request from law enforcement for "substantial jail time" during his plea hearing. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370.

Further, Petitioner failed to demonstrate the assistant solicitor's comment impacted the plea judge's decision-making process in determining his sentence. While the assistant solicitor may have relayed law enforcement's request that Petitioner receive a "substantial" sentence, it is the plea judge who determines sentencing. See In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542 ("A trial judge has broad discretion in sentencing within statutory limits."). In levying Petitioner's sentence, the plea judge did not reference the law enforcement request. Rather, the plea judge was most concerned with Petitioner's recidivism after having received a substantial sentence for his last

conviction:

> I take into consideration the fact that he's been involved in this before, been sentenced to a significant amount of time and went right back to it. Not right back to it, but went back to it.

(App.p.16). Petitioner's sole argument that he was prejudiced rests merely with the length of his sentence. The record is devoid of any evidence, however, that the assistant solicitor's comment had any impact upon the sentence Petitioner ultimately received.

Accordingly, Petitioner failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

E.

As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel, 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."). As explained supra, there is probative evidence to support the PCR judge's denial of the PCR application in this case. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

December 3, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2013-002409

Christopher Bernard Anderson, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 3rd day of December, 2014.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

December 3, 2014

RECEIVED
DEC 3 2014
S.C. Supreme Court

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

Re: **Christopher Bernard Anderson v. State of South Carolina**
Appellate Case No. 2013-002409
Lower Court Case No. 2012-CP-23-3899

Dear Mr. Shearouse:

Attached are the original and thirteen (13) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General
SC Bar #68331

KCR/jacc

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services