STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Charleston County
Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2014-000153

REGINALD RICE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the lower court correctly held counsel was not ineffective for failing to move to recuse the plea judge based on comments made during sentencing when the Petitioner failed to show a bias or prejudice warranting recusal?

II. Whether the lower court correctly held the Petitioner's guilty plea was entered freely and voluntarily when the Petitioner was correctly advised by counsel and the court of the potential sentences he was facing by pleading guilty?

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 Charleston County. The Petitioner was indicted at the June 2010 term of the Charleston County Grand Jury for two counts of armed robbery (2010-GS-10-4553, -4569), two counts of burglary- first degree (2010-GS-10-4554, -4565), three counts of kidnapping (2010-GS-10-4555, -4571, -4573), and two counts of possession of a weapon during the commission of a violent crime (2010-GS-10-4570, -4556). Lauren Williams, Esquire, represented the Petitioner. On January 19, 2011, the Petitioner pled guilty as indicted. On March 22, 2011, the Honorable R. Markley Dennis sentenced the Petitioner to confinement for five (5) years for possession of a weapon and thirty (30) years on each of the other charges. The sentences were to run concurrently. The Petitioner did not appeal his convictions or sentences.

The Petitioner subsequently filed an application for post-conviction relief on December 21, 2011. The Respondent filed its Return and an evidentiary hearing was held in the matter on September 19, 2013 at the Charleston County Courthouse. The Petitioner was present at the hearing and represented by Tommy Thomas, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent. Also, present and testifying at the evidentiary hearing was Zenna Foster, Reginald Foster, and defense counsel Lauren Williams, Esquire. By Order filed December 31, 2013, the Honorable Roger Young denied and dismissed the Petitioner's application for post-conviction relief. This appeal follows.

ARGUMENT

I. There is probative evidence to support the lower court's finding that counsel was not ineffective for failing to move to recuse the plea judge based on comments made during sentencing when the Petitioner has shown no bias or prejudice warranting recusal by the judge.

The Petitioner claims counsel was ineffective for failing to move to recuse the plea judge based on comments made by the judge during sentencing. The Respondent submits the Court's comments were not improper and did not in any way reflect a bias or prejudice by the court warranting recusal. The Petition should be denied and this appeal dismissed.

In a post-conviction relief action, 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 the application alleges ineffective assistance of counsel 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, 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. The Applicant 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 Applicant 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 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, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The Respondent submits the Petitioner failed to show any basis for a motion by counsel to recuse the plea judge. The Petitioner has failed to carry his burden of proving counsel's performance was deficient and affected the outcome of his guilty plea proceeding. "Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal." State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003).

The Respondent submits the Petitioner has failed to show any evidence of judicial bias or prejudice based on the plea judge's comments during sentencing. The plea judge's comments do not reflect any judicial bias or prejudice, but rather they reflect the difficulty of presiding over a matter which has affected a community of those associated with a local college. While the Court's comments may seem to indicate the plea judge knew or interacted with people who were Citadel graduates, there has been no showing by the Petitioner that the plea judge's sentencing

decisions were swayed to the detriment of the Petitioner or his co-defendant based on these interactions and relationships.

The Petitioner has also failed to show that the plea judge's alleged bias resulted in a sentencing decision based on something other than what the judge learned from his participation in the case. The Court was informed about the Petitioner's and his co-defendant's connections with the Citadel by both the solicitor and one of the victims (App. 51:21-5, 64:10-65:23).

It is also clear from the record that any comments made to the Court by the victims or others did not result in any prejudice to the Petitioner, but rather erred to the Petitioner's benefit. Based on these comments and the presentation of mitigation evidence by counsel, the Court decided to go along with the State's recommendation of a 30 year cap as opposed to sentencing the Petitioner to a life sentence for burglary- first degree or consecutive sentences. The plea judge told the Petitioner and his co-defendants the following during sentencing:

> "I'm not bound by the recommendation, because I'm going to tell each one of you, I did not intend to be bound by it. I wasn't going to do it. I wasn't going to let you get out at some point in time, probably before you become a geriatric case...But after what's been said her today and your lawyers' representations, your family members. Somebody said when you consider mercy, it's twice blessed. And I am going to do that. I could put you in jail for the rest of your life. I seriously, seriously thought about it...I will accept the recommendation. I might tell you this. That is mercy, as far as I'm concerned." (App. 179:12-181:25).

This Court should also find persuasive counsel's testimony that she did not find the Court's comments during sentencing to be objectionable or a basis for recusal. Counsel testified "the context of that comment was basically young people facing a whole lot of time in a whole lot of trouble. I didn't see that in relation to the Citadel or any kind of conflict at all. The way that comment, or at least I took it or how it looks to me is that here is another hard case in front of me that I would like to have." (App. 277:12-24). The Respondent submits probative evidence exists to support the lower court's finding that counsel was not ineffective for failing to move to

recuse the plea judge based on comments he made during sentencing. The Petitioner has failed to carry is burden of proving counsel was ineffective and that counsel's performance affected the outcome of his guilty plea proceeding or his decision to plead guilty. This Court should affirm the lower court finding.

II. There is probative evidence to support the lower court's finding that the Petitioner's guilty plea was entered freely and voluntarily when the Petitioner was correctly advised by counsel and the court of the potential sentences he was facing and the Petitioner's misapprehension that he would receive a sentence between 17-20 years for burglary- first degree was purely the result of wishful thinking by the Petitioner.

The Petitioner claims his guilty plea was entered involuntarily because he pled guilty based on counsel's advice that he would receive a sentence between 17 and 20 years. The Respondent submits the lower court correctly held the Petitioner's guilty plea was entered freely and voluntarily. The record reflects the Petitioner was correctly advised by the Court and counsel about the potential sentence he was facing. The record also reflects the Petitioner's belief that he thought he would receive a sentence between 17 and 20 years if he pled guilty was solely based on wishful thinking. This Court should affirm the lower court's ruling.

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing.

Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Respondent submits counsel provided credible testimony that the Petitioner's guilty plea was entered freely and voluntarily and that she did not promise the Petitioner a certain sentence in exchange for his plea. Counsel testified the Petitioner always knew he was facing a 15-30 year sentence on burglary- first degree and that she never promised the Petitioner he would receive a specific sentence. Counsel also provided credible testimony that she felt the Petitioner always knew what potential sentences he was facing. (App. 271:2-272:1). Counsel also provided the lower court with a copy of a providency form signed by the Petitioner which also reflects her proper advice to the Petitioner regarding the potential sentences he was facing. (App. 187-195).

This Court should not rely on the Petitioner's unconvincing post-conviction relief hearing testimony about counsel's advice regarding sentencing and its effect on his decision to plead guilty. "Ordinarily, defendant's testimony, several years after a guilty plea, that his plea was induced by erroneous advice of counsel, is not persuasive in post-conviction motion alleging ineffective assistance of counsel." Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). A defendant's explanation that he answered the trial judge in the affirmative on counsel's alleged advice that the questions were meaningless does not support the granting of PCR. Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998). A statement that questions are "routine" is not an invitation to answer then untruthfully, nor does it constitute reason to believe the questions and statement of the Judge during the guilty plea mean nothing. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

The Respondent submits the Petitioner's testimony at the evidentiary hearing was both self-serving and contradictory. When questioned by post-conviction relief counsel at the hearing, the Petitioner testified his attorney told him that when he went to plead guilty he would receive a 17-20 year sentence. (App. 228:1-12). However, when questioned by the post-conviction relief court during the hearing, the Petitioner testified "well, what I meant was that I wasn't promised that I would get a certain time, just that I wouldn't get 30" and "I wasn't promised actual time. She said we were looking at anywhere from 7-20, but she didn't promise and said I was going to get 20, but she did say, over and over, I wouldn't get 30." (App. 249:1-11). The Petitioner's conflicting and self-serving testimony regarding counsel's advice about sentencing supports the lower court's finding that his testimony at the evidentiary hearing regarding counsel's advice was not credible. (App. 303).

This Court should, however, consider conclusive the statements made by the Petitioner during the guilty plea regarding the voluntariness of his plea. A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

During his guilty plea hearing, the Petitioner told the Court that his lawyer had explained the potential sentences he was facing and the recommendation of a 30 years cap by the State. (App. 23:4-17, 23:22-24:7, 24:22-25:2, 25:7-11). Petitioner also told the Court that he fully understood all the Court's questions and had responded truthfully to the Court's questions.

The record of the Petitioner's plea hearing reflects his guilty plea was entered freely and voluntarily and that the plea court also correctly advised the Petitioner of the potential sentences he was facing. "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

At the guilty plea hearing, the Court questioned the Petitioner about whether or not counsel had explained to him the potential sentences he was facing. The Petitioner answered in the affirmative each time. The Court confirmed counsel's advice regarding the potential sentences the Petitioner was facing and advised the Petitioner as follows:

> As to burglary- first degree "I could sentence you up to life imprisonment with a minimum sentence of 15 years, and there will be a recommendation of a cap of 30 years." (App. 23:2-17), as to armed robbery "I could sentence you up to 30 years in jail for those" and "there is a minimum sentence of 10 years on each" (App. 23:22-24:3), as to kidnapping "I could sentence you up to 30 years on those", and as to possession of a firearm during the commission of a violent crime "I could sentence you to 5 years for that" (App. 25:3-11).

If there were any potential error in counsel's advice regarding sentencing as the Petitioner alleges, such error was cured by the colloquy between the court and the Petitioner during his guilty plea hearing.

Lastly, the Respondent submits the Petitioner's testimony that he would receive a sentence between 17-20 years was clearly the result of wishful thinking. "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

During the evidentiary hearing counsel also commented on the Petitioner's wishful thinking regarding sentencing. Counsel testified as follows:

> "Reggie obviously-- and I was hopeful as well. I would have loved for him not to get the recommended cap, but he was always facing 15-30. That's what it was. Would I have liked to see the judge give a progression of sentences? I would have loved that, but hope and what he was told are not the same thing. He was always facing 15-30, and you know that's what he was told. The 17-18, I honestly don't know where that is coming from unless that was a hope that Reggie had. You know, I don't remember specifically telling him anything less than 30, I'll be thrilled. You can't go below 15." (App. 271:2-13).

The Respondent submits and the record reflects there is probative evidence to support the lower court's ruling that the Petitioner's guilty plea was freely and voluntarily entered. It is obvious from the record that the Petitioner was well aware of the charges he was facing and the consequences of pleading guilty. The Petitioner failed to carry his burden of proving that counsel's advice regarding sentencing was improper and that based on her representations he would have proceeding to trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

[Signature on the following page.]

Respectfully submitted,

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January 2, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
The Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2014-000153

REGINALD RICE, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Ashleigh R. Wilson, 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:

Tommy A. Thomas, Esquire
7588 Woodrow St
Irmo, SC 29063

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

This 2nd day of January, 2015

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RECEIVED
JAN 02 2015
S.C. Supreme Court

January 2, 2015

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

RE: Reginald Rice v. State of South Carolina
Appellate Case No. 2014-000153
Lower Court Case No. 2011-CP-10-9423

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Tommy Thomas, Esquire
Trisha Allen, Victim Services