

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

S.C. Supreme Court

KEVIN K. FOWLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001069

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Did the PCR court err in finding counsel provided effective assistance where counsel failed to enforce the terms of a plea agreement; which included the State agreeing not to make a recommendation as to sentencing during the plea hearing?

II.

Did the PCR court err in finding that Petitioner's plea was knowing and voluntary where plea counsel misadvised Petitioner that pleading guilty to second-degree criminal sexual conduct with a minor would allow Petitioner to avoid mandatory lifetime GPS monitoring while not negatively impacting his chance of receiving probation?

STATEMENT

Indictment and Plea Hearing

On November 22, 2011, Petitioner, Kevin Fowler, was indicted for lewd act upon a minor and second-degree criminal sexual conduct (CSC) with a minor. App. 145-156.

On February 6, 2012, Petitioner pled guilty to second-degree CSC with a minor before the Honorable Letitia H. Verdin. App. 1 - 22. Petitioner was represented by Matt Kappel, and the State was represented by Kris Hodge. Judge Verdin sentenced Petitioner to eight years imprisonment. App. 20, ll. 11 – App. 21, ll. 16.

On June 29, 2012, the Court of Appeals granted Petitioner's request to withdraw appeal.

PCR and Evidentiary Hearing

Petitioner filed an application for post-conviction relief (PCR) on July 19, 2012. App. 23-28. The State filed a return dated November 30, 2012. App. 30-35. On December 27, 2013, Petitioner filed an amended PCR application. App. 37-38. On December 18, 2013, an evidentiary hearing was held before the Honorable G. Edward Welmaker. App. 41-112. Petitioner was represented by Tara Shurling and the State was represented by Karen Ratigan. *Id.* Judge Welmaker denied Petitioner relief by an order filed on March 25, 2014. App. 113-124.

Petitioner filed a Rule 59(e) Motion on April 8, 2014. App. 125-129. The State filed a Return to Petitioner's motion on April 16, 2014. App. 130-134. On April 17, 2014, Petitioner filed a Reply to State's Return. App. 135-144.

On April 15, 2014, Judge Welmaker filed an order denying Petitioner's motion. App. 145. On April 29, 2014, Judge Welmaker filed a supplemental order also denying Petitioner's motion. App. 146-148.

This petition follows.

ARGUMENT

The PCR court erred in finding counsel provided effective assistance where counsel failed to enforce the terms of a written plea agreement; which included the State agreeing not to make a recommendation as to sentencing during the plea hearing.

Relevant Facts

Plea Hearing

Petitioner and the State reached an agreement for Petitioner to plead guilty to one count of second-degree CSC with a minor. App. 4, ll. 2-15. The agreement was a modified version of a written and signed offer from the solicitor's office dated October 3, 2011.¹ App. 111-112. In the written offer, the State agreed, in exchange for Petitioner pleading guilty to second-degree CSC with a minor, to dismiss the lewd act upon a child charge. *Id.* The Solicitor also agreed to make no recommendation as to sentencing. *Id.* Counsel believed that the final plea agreement still included the State not making a recommendation as to sentence. App. 48, ll. 12 – App. 51, ll. 21.

At the plea hearing, the Solicitor summarized the circumstances of Petitioner's indictment and submitted to the trial judge a letter from the victim requesting Petitioner not be incarcerated. App. 6, ll. 5 – App. 5, ll. 9. Petitioner then presented a series of character witnesses as well as a psychological assessment letter from Dr. Paul Gunter concluding that Petitioner's unlikely to reoffend.² App.10, ll. 11 – App. 19, ll. 13.

¹ This letter was entered into the record of the PCR hearing as Plaintiff's Exhibit No. 1 and is on file with this Court. Supp. App. 3 – Supp. App. 4.

² This letter was entered into the record of the PCR hearing as Plaintiff's Exhibit No. 2 and is on file with this Court. Supp. App. 2.

Petitioner also presented a letter from his employer stating that he would be able to continue working with the company if he was given probation. App. 12, ll. 18-25. Counsel stated that Petitioner continued to have his wife's support; had followed all SCDSS placement plan requirements; and had cooperated with law enforcement in the investigation. App. 10, ll. 18 – App. 12, ll. 1. Petitioner did not have a prior criminal record. App. 9, ll. 7-8. In contradiction of the agreement, the solicitor recommended an “active jail sentence” twice. App. 8, ll. 18-24; App. 9, ll. 6-9. The plea judge then sentenced Petitioner to eight years. App. 21, ll. 13-16.

PCR and Evidentiary Hearing

At the evidentiary hearing, Petitioner and counsel testified about the plea negotiations with the State. Counsel testified that they were prepared to accept the plea as outlined in the October 3, 2011 offer. *Id.* However, Petitioner and counsel discovered that pleading guilty to the lewd act would require Petitioner to maintain lifetime GPS monitoring at his expense. App. 78, ll. 2-20. Counsel averred that the State agreed to switch the charges and allow Petitioner to plead to second-degree CSC with a minor. *Id.* Counsel testified at the evidentiary hearing that while the CSC charge ran the risk of a greater jail sentence, he advised Petitioner that lifetime ankle brace at monitoring would be an extremely onerous collateral consequence of pleading guilty to committing a lewd act. App. 88, ll. 13-18.

Counsel candidly admitted he failed to insure that the State did not make a recommendation as to Petitioner's sentence. App. 52, ll. 11-18. Counsel confessed that he had simply forgotten about that particular aspect of the plea offer during the hearing. App. 53, ll. 1-5. Petitioner stated that he believed that, because the State was not going to make a recommendation as to sentencing, the specific charge he pled to would not impact the possibility of receiving probation. App. 51, ll. 7 – App. 52, ll. 18. Petitioner said he was never shown the October 3, 2011 written plea offer. App. 79, ll. 20-25. Petitioner testified that if he knew the

State would have asked for jail time, he would not have pled to second-degree criminal sexual conduct and he would have accepted the terms of the October 3, 2011 offer, even with the condition of lifetime ankle bracelet monitoring, or gone to trial. App.89, ll. 23 – App. 90, ll. 2. On cross-examination, Petitioner explained he entered into the plea deal with the belief that both offenses carried the same range of sentences and that both were eligible for probation. App. 87, ll. 24 – App. 89, ll. 8.

Order of Dismissal

In denying Petitioner relief, the PCR court concluded that plea counsel was not ineffective for failing to object to the State’s recommendation of a jail sentence as the State had no obligation to refrain from making a recommendation and any impact the recommendation might have had was minimal. App. 120.

With respect to the decision to plead to second-degree CSC with a minor instead of lewd act, the Court noted that counsel and Petitioner: “discussed that [CSC] had a greater maximum sentence (with a larger percentage of the sentence that must be served) but that a lewd act conviction involved lifetime GPS monitoring and a second-degree CSC with a minor conviction did not.” App. 117. Accordingly, the PCR court determined that counsel did not render ineffective assistance of counsel. App. 122.

The court also held that Petitioner had failed to demonstrate prejudice or show with competent evidence that the outcome of the case would have been different absent counsel’s alleged failings. *Id.*

Discussion

The PCR court erred in finding that counsel provided effective assistance where counsel failed to enforce the terms of a plea agreement with the State that it would make no recommendation as to sentencing. App.113-124; *See Hill v. Lockhart*, 474 U.S. 52 (1985)

(applying the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to guilty plea challenges).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland*, 466 U.S. at 686. “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 668).

First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ ” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the

charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *See Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty.” *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing *Hill v. Lockhart*, 474 U.S. at 56–58). On review, a PCR judge's findings will be upheld if there is evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, even if the agreement has not been finalized by the court a defendant’s detrimental reliance on a prosecutorial promise in a plea bargain may make a plea agreement binding. *Custodio v. State*, 373 S.C. 4, 10-11, 644 S.E.2d 36, 39 (2007). In addition, if a prosecutor reneges on a plea bargain agreement, counsel may be ineffective for continuing with the guilty plea. *Santobello v. New York*, 404 U.S. 257 (1971); *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988).

In the present case, counsel admitted, “the recommendation and [the solicitor] asking for a jail sentence was my oversight. That’s the only way I can explain it. You know I see the plea offer. It states that she would remain silent on the sentence. And I should have held her to it, and I did not.” App. 52, ll. 13-18. Further, counsel testified that he did not recall the solicitor conditioning her

plea offer on Petitioner pleading guilty to the lewd act upon a minor as opposed to the second-degree criminal sexual conduct with a minor charge. *Id.* at ll. 19-25.

Counsel continued, "--if you want to know what I think, I'll tell you what I think. We came into court and she announced that she was going to be asking for a jail sentence. I think she probably forgot what she wrote in the offer and in the heat of the moment I had forgotten." App. 54, ll. 25 – App. 53, ll. 5. Counsel concluded, based on his discussions with the Solicitor; that the State was likely only looking for a single conviction as opposed to a conviction on both indictments. App. 53, ll. 21-25.

Due to counsel's failure to hold the State to its offer, the State asked for a jail sentence, this was also against the wishes of the victim. App. 8, ll. 18-24; App. 9, ll. 6-9. Counsel could have enforced the plea agreement as either binding because it was already offered and accepted or under the detrimental reliance exception. *Custodio*, 373 S.C. at 10, 644 S.E.2d at 38; *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d. 290, 292 (2001) (plea bargains are governed by contract principles). There was no testimony at the evidentiary hearing supporting the PCR court's finding that counsel's performance satisfied prevailing professional norms. *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999) (conclusions not supported by probative evidence will not be upheld on appeal).

Accordingly, the appropriate remedy is the specific performance of the plea agreement. *See Sprouse v. State*, 355 S.C. 335, 585 S.E.2d 278 (2003) (specific performance of plea agreement is most efficient option because it eliminated need for new trial or plea hearings and granted parties nothing more and nothing less than the benefit for which they had bargained). Therefore, this Court should reverse the PCR court's denial of relief to Petitioner and order that on remand, the solicitor's office cannot assert anything other than the promised plea agreement with no recommendation on sentencing related to Petitioner's case.

II.

The PCR court erred in finding that Petitioner's plea was knowing and voluntary where plea counsel misadvised Petitioner that pleading guilty to second-degree criminal sexual conduct with a minor would allow Petitioner to avoid mandatory lifetime GPS monitoring while not negatively impacting his chance of receiving probation.

Discussion

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); *see also Hill*, 474 U.S. at 56 (“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.*’ ” (quoting *North Carolina v. Alford*, 400 U.S. 25, 31(1970)) (*emphasis added*). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” *Hill*, 474 U.S. 52 at 59; *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011). Undisputed testimony by the applicant that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty. *Smith*, 369 S.C. at 138, 631 S.E.2d at 261.

In the present case, counsel's erroneous advice for Petitioner to plead guilty to second-degree CSC with a minor, instead of lewd act, was objectively unreasonable given the disparity in consequences when pleading guilty to the respective charges and that Petitioner's primary concern was securing probation and avoiding lifetime GPS monitoring. *Ray v. State*, 303 S.C. 374, 375, 401 S.E.2d 151, 152 (1991) (counsel ineffective for erroneous advice regarding potential sentences).

Second-degree criminal sexual conduct with a minor is a Class C felony, carrying a maximum sentence of twenty years. S.C. Code Ann. § 16-3-655(C)(3) (2012); § 16-1-20(A)(3)

(1995). It also qualifies as a violent offense, a most serious offense, and is a parole ineligible offense. S.C. Code Ann. § 16-1-60 (2012); § 17-25-45(A) (2010); § 24-13-100 (1995). Offenses classified as violent crimes are ineligible for pretrial intervention, mental health court, or shock incarceration. S.C. Code Ann. § 16-1-130 (2011), § 24-13-1330 (2010). An adjudication of guilty for a most serious offense makes the convicted ineligible for parole, for any early release credit, or for participation in early release programs. S.C. Code Ann. § 17-25-45(A) (2010).

The only way to avoid classification as a most serious offense with respect to second-degree CSC with a minor is for the sentencing court to make specific findings that the offense is based on the ages of the parties and that the conduct was consensual. S.C. Code Ann. § 17-25-45(C)(1) (2010). Finally, while GPS monitoring is not mandatory, the Court must again make specific finding that the offense is based on the ages of the parties and that the conduct was consensual to avoid imposing it. S.C. Code Ann. § 23-3-540(B) (2012). At the plea hearing, counsel did not present any evidence to support a specific finding exempting Petitioner from GPS monitoring. App. 20, ll. 11 – App. 21, ll. 16.

By comparison, committing or attempting a lewd act upon a minor was a Class D felony carrying a penalty of not more than fifteen years imprisonment *and/or a fine at the discretion of the trial judge.*³ S.C. Code Ann. § 16-15-140 (repealed 2012). Lifetime GPS monitoring was mandatory following an adjudication of guilt. S.C. Code Ann. § 23-3-540 (2005). However, lewd act was not classified as a most serious or violent offense; thus allowing greater opportunities for parole and other forms of early release.

Under the circumstances of Petitioner's case, it was unlikely, as counsel failed to present the court with any mitigating evidence suggesting that the conduct was consensual, that

Petitioner would be able to avoid GPS monitoring, violent offense classification, or most serious offense classification once he pled guilty. *Hinson v. State*, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (counsel ineffective for giving specious advice on parole eligibility which motivated defendant's plea). Uncontroverted evidence presented at the PCR hearing demonstrates that Petitioner entered his plea in expectation of avoiding lifetime GPS monitoring and the possibility of probation. App. 88, ll. 13 – App. 90, ll. 2. However, counsel's erroneous advice regarding the consequences of pleading guilty to the CSC charge grossly misstated the law and downplayed the great disparity in seriousness between the two charges. App. 88, ll. 13-18.

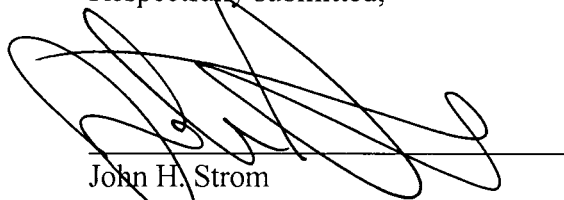
Accordingly, Petitioner was prejudiced by plea counsel's deficient performance because there is "a reasonable probability [Petitioner] would have accepted the earlier [more favorable] plea offer had [he] been afforded effective assistance of counsel." *Hill*, 474 U.S. 52 at 59

³ Committing or attempting to commit a lewd act upon a child under the age of sixteen was repealed in 2012, and replaced by third-degree CSC with a minor. S.C. Code Ann. § 16-3-655(C) (2012).

CONCLUSION

For the reasons herein stated, Petitioner Kevin Fowler's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is stylized and somewhat cursive.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

KEVIN K. FOWLER,

PETITIONER,

V.

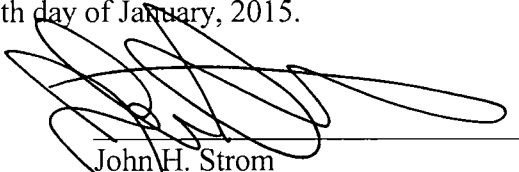
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001069

CERTIFICATE OF SERVICE

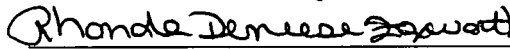
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of January, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.