

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 22 2015

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014-001069

Kevin K. Fowler,..... Petitioner,

v.

State of South Carolina,..... Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW4

ARGUMENT

 The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel should have enforced the terms of the plea agreement because Petitioner did not plead guilty pursuant to that plea agreement.4

 The issue of whether Petitioner met his burden of proving his guilty plea was involuntary because plea counsel misadvised him about pleading guilty to second-degree criminal sexual conduct with a minor is not preserved for appellate review.10

CONCLUSION.....12

QUESTIONS PRESENTED

1. 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?
2. 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 OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the November 2011 term of General Sessions for lewd act upon a minor (2011-GS-23-8818) and second-degree criminal sexual conduct (CSC) with a minor (2011-GS-23-8819). (App.pp.150-55). Matthew Kappel, Esquire represented Petitioner.

On February 6, 2012, Petitioner pled guilty to second-degree CSC with a minor.¹ The Honorable Letitia H. Verdin sentenced Petitioner to eight years imprisonment. (App.p.21; p.149).

A notice of appeal was filed at the South Carolina Court of Appeals. Petitioner was represented by Tara D. Shurling, Esquire. The Court of Appeals granted Petitioner's request to withdraw his appeal by order filed June 29, 2012.

Petitioner filed an application for post-conviction relief (PCR) on July 19, 2012 (2012-CP-23-4612) and an amended application on December 27, 2013. (App.pp.23-29; pp.37-40). A hearing was held at the Greenville County Courthouse on December 18, 2013. (App.pp.41-109). Petitioner was present and represented by Tara D. Shurling, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable G. Edward Welmaker denied relief in an order filed March 25, 2014. (App.pp.113-24). Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC and Respondent filed a return. (App.pp.125-30; pp.131-34). Judge Welmaker filed an order denying the motion on April 15, 2014. (App.p.125). Judge Welmaker filed a supplemental order denying the motion on April

¹ The State not prossed the charge of lewd act upon a minor. (App.p.9; p.156).

29, 2014. (App.pp.146-48).

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. The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel should have enforced the terms of the plea agreement because Petitioner did not plead guilty pursuant to that plea agreement.**

Petitioner argues the PCR judge erred 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.” (Pet. Cert., p.4). This argument is without merit because Petitioner did not plead guilty pursuant to the plea agreement in question.

A.

At the plea hearing, Petitioner was advised of the maximum sentence he could receive. (App.p.4). Petitioner acknowledged he had discussed the charge with plea counsel and was satisfied with his representation. (App.pp.4-5). Petitioner stated neither force nor promises were made to induce his guilty plea. (App.p.5). Petitioner waived the right to a jury trial and stated he was guilty. (App.p.5-6). The assistant solicitor then

recited a summary of facts to the plea judge – that Petitioner digitally penetrated the minor victim living in his house and performed oral sex upon her over the course of several years – and handed up a letter from the victim. (App.pp.6-9). The assistant solicitor requested “an active jail sentence in this case” and noted Petitioner did not have a prior record. (App.p.9).

Plea counsel made a mitigation argument, which included three individuals who spoke on Petitioner’s behalf. (App.p.10-14). Petitioner addressed the plea judge, stating he had been “irresponsible” and made “bad decisions” and that he had “hurt the victim deeply.” (App.p.16). Plea counsel then presented an additional mitigation argument. (App.pp.16-19).

The plea judge stated “this goes beyond irresponsible. This is not irresponsible. This is, this is hurting someone in a vulnerable position who can not do anything – who can not do anything about it.” (App.pp.19-20). The plea judge went on to explain her rationale in determining Petitioner’s sentence:

I will be honest with you [Petitioner] though this is not going to be my sentence. I’ll be honest with you that if I heard just your conduct and not the words that your attorney had said and people that came with you today had said, if I had just heard those things and I had not heard the heartbreaking plea in a letter from the victim thinking about your family, then I would have given you 20 years. I think that your conduct warrants the maximum sentence in this case. This was ongoing repeated long-term abuse that was in a vulnerable position. But I think that your mom’s right. I do not think that you are a bad person. I think you have done some terrible, horrible, awful things and you did them over a period of time and had a choice to quit, to stop at any time and you didn’t.

Though it pains me to give you this and give you a reduced sentence, I am going to give you a reduced sentence based on some of the things that I’ve heard. But most importantly, based upon the words of the victim. I am going to take that into consideration. I don’t know if it will help her in any

way for her to know that she helped you get a lighter sentence. I don't know if that will help her. But if it will, I want to do what I can to help her, even if it pains me to do that.

I can not put you on probation. I will not put you on probation. This is not a probationary case. The sentence of the court is eight years. Good luck to you.

(App.pp.20-21).

B.

At the PCR hearing, Petitioner stated plea counsel said he had spoken to the State and they had made an offer for him to plead guilty to lewd act upon a child and they would dismiss the CSC charge. (App.p.86; p.93). Petitioner stated plea counsel said the State would not recommend a prison sentence. (App.pp.86-87). Petitioner stated he never saw the actual plea offer letter from the State. (App.p.89). Petitioner stated if he had known the State agreed in writing not to make a sentence recommendation if he pled guilty to lewd act upon a child, he would have accepted that offer. (App.pp.89-90). Petitioner confirmed he rejected the State's plea offer on the day of the plea hearing and instead decided to plead guilty to the second-degree CSC with a minor charge. (App.pp.94-95).

Plea counsel testified he had numerous meetings with the State in discussing "the best way to go forward." (App.p.51). Plea counsel testified the State made a plea offer on October 3, 2011 for Petitioner to plead guilty to lewd act upon a minor (and that the second-degree CSC with a minor charge would be dismissed). Plea counsel testified this offer also noted there was no sentence recommendation and the State would remain silent on sentencing. (App.pp.47-49). Plea counsel testified "it seemed quite logical that they

were looking for simply one conviction. Ultimately the question was, what conviction would it be?” (App.p.53). Plea counsel testified he reviewed the offer with Petitioner. (App.p.48). Plea counsel testified he believed Petitioner rejected the plea offer because a lewd act conviction carried lifetime ankle monitoring. (App.pp.69-70). Plea counsel testified at some point, the State agreed to a new recommendation that would allow Petitioner to plead guilty to second-degree of CSC with a minor (and that the lewd act upon a minor charge would be dismissed). (App.p.70). Plea counsel testified that, “because of the judge’s reaction to the case,” he did not believe “it made that much of a difference whether the solicitor was silent or not.” (App.pp.55-56; p.71).

In denying Petitioner’s application for post-conviction relief, the PCR judge found “[p]lea counsel was not deficient in his representation” and that, “[r]egardless, [Petitioner] cannot prove he was prejudiced.” The PCR judge found “[t]he assistant solicitor had no obligation to refrain from seeking an active jail sentence because . . . [Petitioner] did not enter his guilty plea to second-degree CSC with a minor pursuant to the October 3, 2011 plea offer.” The PCR judge also found that, due to the plea judge’s comments made during sentencing, it was clear “the assistant solicitor’s request for active time had, at most, a minimal effect on the ultimate sentence imposed.” (App.pp.120-21).

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); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective. First, Petitioner failed to demonstrate plea counsel's representation was deficient. The State's plea offer of October 3, 2011 was for (1) Petitioner to plead guilty to lewd act upon a child and (2) the State to dismiss the charge of second-degree CSC with a minor. The offer also noted there would be "[n]o recommendation as to sentence." (App.pp.111-12). Plea counsel reviewed the plea offer with Petitioner. Plea counsel clearly fulfilled his responsibilities in this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance). Petitioner, however, chose to reject this plea offer and instead plead guilty to the charge of second-degree CSC with a minor. This Court has noted "a plea bargain rests on contractual principles." State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1997). Petitioner's decision to switch the charge to which he would plead guilty invalidated the plea offer. See Weisz Graphics Div. of Fred B. Johnson Co., v. Peck Indus., Inc., 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991) (finding "no contract is formed if the acceptance

varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer. . . .”); Am. Jur. Contracts § 65; Restatement 2d Contracts § 39; see also Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (noting common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement). As Petitioner did not plead guilty pursuant to the State’s plea offer, plea counsel did not err in failing to object to the assistant solicitor’s request for “an active jail sentence.”

Petitioner also failed to demonstrate he was prejudiced because plea counsel did not object to the assistant solicitor’s request for an active jail sentence. The plea judge was extremely candid in her comments about Petitioner’s sentence. It is clear the plea judge chiefly considered plea counsel’s mitigation presentation and the letter from the victim in determining what sentence to levy upon Petitioner. (App.pp.20-21). The plea judge did not reference the assistant solicitor’s request for an active jail sentence. There is no indication, in fact, that the plea judge considered this request in levying Petitioner’s eight-year sentence. As such, Petitioner did not meet his burden of proving that the lack of an objection to the assistant solicitor’s request for an active jail sentence was prejudicial. See Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625 (“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”) (quotation omitted).

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. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea 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.”).

II. The issue of whether Petitioner met his burden of proving his guilty plea was involuntary because plea counsel misadvised him about pleading guilty to second-degree criminal sexual conduct with a minor is not preserved for appellate review.

Petitioner argues the PCR judge 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.” (Pet. Cert., p.10). This argument is not preserved for appellate review.

The order of dismissal notes Petitioner proceeded at the PCR hearing solely upon the allegations listed in the Amended PCR application. (App.p.115). The Amended PCR application did not include either an allegation of an involuntarily entered guilty plea or that plea counsel “misadvised” Petitioner that a guilty plea to second-degree CSC with a minor would “avoid mandatory lifetime GPS monitoring while not negatively impacting

his chance of receiving probation.” (App.pp.114-15). Further, the order of dismissal does not address the issue Petitioner has raised now on appeal. As such, this issue is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (holding an issue is procedurally barred if it is not both raised to and ruled upon by the PCR judge) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)).

In addition, while there was testimony at the PCR hearing about both lifetime GPS monitoring and the possibility of a probationary sentence, the issue as framed by Petitioner in this appeal was not raised in either his Rule 59(e) motion or his reply to the State’s return to this motion. (App.pp.125-28; pp.135-36). This issue was also not addressed in either the original or supplemental orders denying Petitioner’s Rule 59(e) motion. (App.pp.145-48). As such, this issue is not preserved for appellate review. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue).

Accordingly, as this issue was not raised to or ruled upon by the PCR judge in this case, it is not preserved for appellate review by this Court.

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,

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

May 22, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-001069

Kevin K. Fowler,..... Petitioner,

v.


State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same into inter-agency mail and addressed to:

John H. Strom, 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 22nd day of May, 2015.


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

May 22, 2015

RECEIVED

MAY 22 2015

S.C. Supreme Court

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

Re: **Kevin K. Fowler v. State**
Appellate Case No. 2014-001069

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Senior Assistant Deputy Attorney General

cc: John H. Strom, Esquire
Trisha Allen, Victim Services