STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable James R. Barber, III, Post-Conviction Relief Judge

Appellate Case No. 2014-002397

Marshall Heath Collins, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the PCR judge err in finding trial counsel was ineffective in failing to request a continuance?

2. Did the PCR judge err in finding trial counsel did not properly handle the issue of the expired plea offer?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Respondent at the June 2010 term of General Sessions for trafficking methamphetamine (2010-GS-39-0937) and at the November 2010 term for possession of a weapon during commission of a violent crime (2010-GS-39-2142). (App.pp.418-19; pp.421-22). John W. DeJong, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty.[1] On December 1, 2010, the Honorable G. Edward Welmaker sentenced Respondent to concurrent terms of 25 years for trafficking methamphetamine (10-28 grams), third offense and 5 years for possession of a weapon during commission of a violent crime. (App.p.317; p.417; p.420).

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. (App.pp.320-39). The Court of Appeals affirmed Respondent's convictions and sentences. State v. Collins, Op. No. 2012-UP-356 (S.C. Ct. App. filed June 13, 2012). (App.p.353-54).

Respondent filed an application for post-conviction relief (PCR) on July 6, 2012 (2012-CP-39-0993). (App.pp.355-64). A hearing was held at the Pickens County Courthouse on August 25, 2014. (App.pp.371-407). Respondent was present and represented by John M. Mussetto, Esquire. Karen C. Ratigan, Esquire of the South

[1] The State also brought to trial indictments for possession with intent to distribute Alprazolam and Oxycodone (2010-GS-39-0938, -0939). After the jury indicated they could not reach a verdict on these two charges, the parties agreed to accept the verdicts on the other two charges only. (App.pp.308-09).

Carolina Attorney General's Office represented the State. In an order filed October 23, 2014, the Honorable James R. Barber, III granted relief and ordered a new trial. (App.pp.409-16).

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 erred in finding trial counsel was ineffective in failing to request a continuance.

Certiorari is warranted in this case because the PCR judge erred in finding counsel was ineffective in failing to request a continuance when the indictment for possession of a weapon during commission of a violent crime was served upon Respondent the morning of trial. There is no probative evidence to support the PCR judge's findings.

Prior to the commencement of trial, trial counsel noted the trafficking charge was the only charge listed on the trial docket and that the indictment for possession of a weapon during the commission of a violent crime had just been served upon Respondent. (App.p.7). The assistant solicitor stated he had informed trial counsel in an email[2] that the weapons charge was going to be tried and also sent him a copy of the indictment.

[2] The November 12, 2010 email was made a part of the record. (App.pp.9-11).

(App.pp.7-8). Trial counsel admitted he had been provided with the indictment the week before. (App.p.9). Trial counsel told the trial judge he had never discussed the weapons charge with Respondent and the court stood in recess. (App.pp.12-13). After the break, trial counsel reiterated his objection to a trial on the weapons charge but stated he could "try" to go forward. (App.pp.13-14). The trial judge found trial counsel had notice of the indictment prior to trial. (App.p.14). The jury was selected and the trial judge conducted a suppression hearing. The trial judge determined the evidence was "properly seized after a proper search" and denied trial counsel's motion to suppress. (App.pp.109-12).

The facts as presented at trial were extremely straightforward (and substantially the same as those presented at the suppression hearing). Officer Blair saw a vehicle lingering at a stop sign at approximately 1:30 a.m. and noticed the tag light was not working. (App.pp.128-30). Officer Blair stopped the vehicle and noticed the tag light was operational but had "a faint glow" and "it wasn't enough to make the tag where you could read it at a distance." (App.p.131). Officer Blair noted Respondent acted suspiciously in only opening his window a few inches and failing to make eye contact. (App.pp.131-32). Respondent fled the scene on foot (while putting on a backpack) as Officer Blair was checking his information. (App.pp.133-34). Respondent kept running though Officer Blair yelled at him to stop. (App.pp.134-35). Respondent ran into a tree and fell to the ground. (App.pp.135-36). Officer Blair and Officer Sapp placed handcuffs on Respondent while the backpack was still on his back. (App.pp.137-38; p.227). Officers found a loaded handgun in "the lower part of the backpack that he had on, which his hands were accessible to." (App.p.139; pp.229-30). Without removing the handcuffs,

officers took the backpack off Respondent's back. (App.p.142; p.230). Officers determined they would take Respondent into custody and performed an inventory search of the backpack – where they found methamphetamine and pills. (App.pp.142-46; pp.231-32).

At the PCR hearing, Respondent stated he did not know he was going to be tried on the weapons charge until he was served with it on the day of trial. (App.p.383). Respondent stated he "told [trial counsel] about it" after he learned of the charge. (App.p.384).

Trial counsel testified he was the second attorney in this case and filed discovery motions. (App.p.395). Trial counsel testified his first meeting with Respondent was October 14, 2010 and that "the case got old" while the first attorney was on the case. (App.pp.395-96). Trial counsel testified he and Respondent reviewed discovery materials, elements of the charges, and penalties. (App.p.397). Trial counsel testified the prosecutor had told him the weapons charge would be sent to the grand jury but confirmed it was not served upon Respondent until the morning of trial. (App.p.398). Trial counsel testified Respondent did not tell him on the morning of trial that he wanted a continuance. (App.pp.402-03). Trial counsel testified he had adequate time to prepare the case for trial and that "it was not a complicated case." (App.p.403). Trial counsel testified that, in retrospect, he was not sure he should have requested a continuance because of the late presentment of the weapons charge because "it certainly was not the major problem we were facing." (App.p.404)

In granting Respondent's application for post-conviction relief, the PCR judge

found Respondent "met his burden of proving trial counsel should have requested a continuance based on the fact that [Respondent] was served with an indictment for possession of a weapon during commission of a violent crime the morning of trial." The PCR judge found Respondent "demonstrated he suffered prejudice from the lack of a continuance." (App.pp.412-13). There is no probative evidence to support the PCR judge's findings.

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). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge erred in finding trial counsel was ineffective in failing to request a continuance at the start of trial. There is no probative evidence to support the finding either that trial counsel was deficient in this regard or that Respondent suffered any prejudice. Respondent failed to demonstrate trial counsel was deficient in failing to request a continuance. Trial counsel was in receipt of the discovery materials and, thus,

would have been aware a loaded handgun was found in Respondent's possession. Further, trial counsel was notified prior to trial that the assistant solicitor would be presenting the weapons charge to the grand jury. Trial counsel was clearly on notice of the existence of – and evidence relating to – the weapons charge prior to Respondent's trial. While trial counsel was not appointed to this case for very long, this does not automatically equate to inadequate preparation or representation on his part. "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). Based on the simplicity of the underlying facts of this case – and the fact that trial counsel was on notice that the weapons charge was tied to the drug charges and would be presented to the grand jury – it is doubtful the trial judge would have granted a continuance in this case. Further, trial counsel testified that, even in retrospect, he did not believe he needed to request a continuance. Respondent failed to demonstrate trial counsel's representation was deficient and the PCR judge's finding of such is not supported by any probative evidence. See Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066 (holding a PCR applicant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment").

Respondent also failed to demonstrate he was prejudiced by the lack of a continuance in this case. The facts of this case are very straightforward. Trial counsel testified he had adequate time to prepare this case for trial and stated "it was not a complicated case." Respondent failed to articulate what trial counsel could have

investigated or prepared if he had additional time to consider the weapons charge. The record is, in fact, devoid of any testimony or evidence to support Respondent's allegation that he suffered prejudice from the lack of a continuance on the day of trial. Without such, Respondent cannot meet his burden of proving he was prejudiced by the lack of a continuance in this case. See Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (holding the record did not support the PCR judge's conclusion that counsel's deficient performance prejudiced petitioner when the petitioner did not show how additional preparation would have resulted in a different outcome); Skeen v. State, 325 S.C. 210, 213–15, 481 S.E.2d 129, 131–32 (1997) (holding when a petitioner fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's incomplete preparation); Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) (concluding the denial of the motion for a continuance did not constitute reversible error because the petitioner failed to point to any other evidence or witnesses that could have been produced if a continuance had been granted); Kibler v. State, 267 S.C. 250, 256, 227 S.E.2d 199, 202 (1976) (noting the PCR judge will not speculate concerning what might have occurred if counsel had conducted further investigation). There is no probative evidence to support the PCR judge's finding that Respondent demonstrated he was prejudiced by the lack of a continuance.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of

Strickland – that he was prejudiced by trial counsel's performance. There is no probative evidence to support the PCR judge's finding that Respondent satisfied both prongs of Strickland.

As Respondent failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge erred in granting Respondent's application for post-conviction relief. 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 PCR judge erred in finding trial counsel was ineffective in how he handled the issue of the expired plea offer.

Certiorari is warranted in this case because the PCR judge erred in finding trial counsel was ineffective in how he handled a plea offer that expired before he assumed representation of Respondent. There is no probative evidence to support the PCR judge's findings.

At the PCR hearing, Respondent stated another attorney represented him prior to trial counsel's appointment in September 2010. (App.p.376). Respondent stated he met with trial counsel in November 2010 and was shown a plea offer[3] that had been sent to his prior attorney on May 26, 2010. (App.p.380). Respondent stated he had not seen this letter before trial counsel showed it to him. (App.p.380).

Trial counsel agreed Respondent was initially represented by another attorney and testified his first contact with Respondent was in October 2010. (App.p.395). Trial

[3] The first page of this plea offer was admitted as Applicant's Exhibit 1.

counsel confirmed he had seen Exhibit 1 but could not definitively state how he received it. (App.p.401). Trial counsel testified this plea offer expired on June 21, 2010. (App.p.401). Trial counsel testified he believed he called the prosecutor about the expired plea offer but could not recall the prosecutor's response. (App.p.402; p.405).

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent met his burden of "proving trial counsel did not properly handle the issue of the expired plea recommendation." The PCR judge found Respondent demonstrated deficiency because Respondent "said he was unsure about many of the charges contained in the offer and that he 'wanted more information' before he could have made an intelligent decision as to whether he should have accepted the offer." (App.p.413). There is no probative evidence to support the PCR judge's findings.

The PCR judge erred in finding trial counsel did not properly handle the issue of the plea offer that had expired well before he assumed representation in this case. Respondent failed to demonstrate trial counsel was deficient. The State made a plea offer in this case while Respondent was represented by his first attorney. "A prosecutor 'has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain.'" State v. Blakely, 402 S.C. 650, 658, 742 S.E.2d 29, 33 (Ct. App. 2013) (quoting State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012)). The plea offer, however, expired in June 2010 – three months before trial counsel was appointed to represent Respondent. Regardless, trial counsel testified he believed he asked the prosecutor about this expired offer (but could not recall the prosecutor's response). Even assuming arguendo this conversation did not

take place, trial counsel was not under any obligation to have asked for reinstatement of the expired plea offer. See, e.g., Van Wart v. United States, No. RWT-07-0492, 2013 WL 3788535, at *3 (D. Md. July 18, 2013) (quotation omitted) (finding trial counsel has no affirmative duty to independently pursue a plea agreement). Trial counsel cannot be expected to effectuate the reinstatement of a plea offer that expired months before he was appointed in the case. This would be unreasonable. To prove deficiency, "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2065). It would not have been reasonable under prevailing professional norms for trial counsel to be expected to attempt to resurrect a plea offer that had been expired for months before his appointment – especially when the case was on the trial docket. There is no probative evidence to support the PCR judge's finding that trial counsel was deficient in how he handled the expired plea offer.

Respondent also failed to demonstrate he suffered any prejudice because trial counsel did not somehow effectuate the resuscitation of the plea offer that expired months before he was appointed in this case. Respondent failed to demonstrate both that he would have accepted the expired offer and that the State would not have rescinded it. Rather, Respondent merely stated he was unsure about two of the charges listed in the expired plea offer and that he told trial counsel he "wanted more information" before he could say whether he wanted to plead guilty or go to trial. (App.p.381; p.392). This is not sufficient to prove prejudice. In Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399

(2012), the defendant argued – and the United States Supreme Court agreed – that his attorney was in effective in not relaying plea offers and stated he would have accepted one of these offers if he had known about it. While these facts differ from those in Respondent's case, the Frye Court's holdings are instructive. The Frye Court held:

> To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law.

Id. at 1402-03. The Frye Court further held that"[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." Id. at 1409. Respondent, however, did not testify he would have accepted the expired offer. Respondent also failed to show the State would not have rescinded this long-expired offer. It seems most likely, in fact, that the State would have withdrawn or rescinded any offer in this case, as trial counsel was clearly unsuccessful in convincing the State to revisit the plea offer after he had been appointed. Respondent failed to offer any testimony or evidence that he would have accepted the expired plea offer and the State would not have rescinded it. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814 (holding the PCR applicant bears the burden of proving the allegations in their application). As such, he failed to meet his burden of proof and there is no probative evidence to support the PCR judge's finding that Respondent demonstrated he suffered

any prejudice from the manner in which trial counsel handled the issue of the expired plea offer.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. There is no probative evidence to support the PCR judge's finding that Respondent satisfied both prongs of Strickland.

As Respondent failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By: _____
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June 15, 2015

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Appellate Case No. 2014-002397

Marshall Heath Collins, ...Respondent,

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State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

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

Robert M. Dudek, 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 15th day of June, 2015.

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June 15, 2015

RECEIVED
JUN 15 2015
S.C. Supreme Court

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

Re: **Marshall Heath Collins v. State of South Carolina**
Appellate Case No: 2014-002397
Lower Case No: 2012-CP-39-0993

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** in the above-referenced case. The Appendix was filed March 17, 2015.

Sincerely,

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

KCR/jacc
Enclosures

cc: Robert M. Dudek, Esquire
Trisha Allen, Victim Services Counselor