STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

RECEIVED
JUL 15 2015
S.C. Supreme Court

Appellate Case No. 2014-001640

BOBBY RUSSELL, JR., Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
SC Bar No. 100108
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED

Is there evidence of probative value to support the post-conviction relief court's finding that counsel was not ineffective for failing to explain the Sexually Violent Predator Act[1] to Petitioner and advise him that he would be screened for civil commitment pursuant to the Act, where the plea court and counsel both advised Petitioner of the Act and his screening for commitment prior to the court's acceptance of his guilty plea and counsel had no duty to advise Petitioner of the Act prior to his guilty plea?[2]

---

[1] See S.C. Code Ann. §§ 44–48–10 to –170 (Supp. 2004), which is a civil commitment procedure for the long-term care and treatment of sexually violent predators.

[2] In his Petition, Petitioner frames his argument as whether his guilty plea was entered into freely, voluntarily, knowingly, and intelligently based on counsel's advisement of the Act and screening for civil commitment pursuant to the Act. Respondent, however, has framed the issue in its Return in accordance with the post-conviction relief court's ruling: whether trial counsel was ineffective.

STATEMENT OF THE CASE

The Dorchester County Grand Jury indicted Petitioner during the August 2009 term for two counts of committing or attempting a lewd act upon a child under 16 (2009-GS-18-1097; 1275) and one count criminal sexual conduct with a minor in the first degree (2009-GS-18-0990). The charges stemmed from sex acts committed against three different minor children at two separate residences on different dates. Paul N. Uricchio, III, Esquire, and Chad W. Fuller, Esquire, both of the Uricchio Law Firm, represented Petitioner on all three charges.

On November 8, 2010, Petitioner appeared before the Honorable Diane S. Goodstein and pled guilty to three counts of committing or attempting a lewd act upon a child under 16.[3] Pursuant to plea negotiations between Petitioner and the State, Judge Goodstein sentenced Petitioner to three concurrent terms of fifteen years imprisonment suspended upon the service of three years imprisonment followed by five years of probation. Petitioner did not appeal his guilty plea or sentences. Petitioner elected not to challenge his convictions or sentences through direct appellate review.

On November 7, 2011, Petitioner filed an application for post-conviction relief, alleging general allegations of ineffective assistance of counsel and involuntary guilty plea without any supporting facts. Respondent made its Return on January 18, 2012, requesting an evidentiary hearing be held.

The first evidentiary hearing on Petitioner's application was held on May 21, 2013, at the Orangeburg County Courthouse before the Honorable Edgar W. Dickson.

[3] Two of these counts were as indicted and the remaining count was pled to in place of the criminal sexual conduct with a minor in the first degree charge after Petitioner waived presentment to the Dorchester County Grand Jury. The first degree criminal sexual conduct with a minor charge was dismissed in exchange for Petitioner's plea to the other charges.

Petitioner was present at the hearing alongside counsel, Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Petitioner proceeded forward on the following grounds:

1. Counsel failed to explain the Sexually Violent Predator Act to Petitioner and that he would likely be screened for the civil commitment pursuant to the Act; and
2. Counsel failed to call witnesses on his behalf at his guilty plea proceeding.

Petitioner testified on his own behalf and presented testimony from his mother, Gloria Jean Holcombe. Respondent presented testimony from plea counsel, Chad W. Fuller, Esquire.[4] At the conclusion of the hearing, the court requested a subsequent hearing to take testimony from John Lewellen, the grandfather of two of the three minor victims.

The subsequent hearing was held on October 8, 2013, at the Calhoun County Courthouse before Judge Dickson. Petitioner presented testimony from John Lewellen and testified again on his own behalf. Respondent recalled Fuller to respond to the additional testimony.

After a review of all materials presented, the post-conviction relief court denied and dismissed Petitioner's application by written order signed June 30, 2014, and filed on July 14, 2014.

Petitioner filed a Notice of Appeal on July 28, 2014, challenging the post-conviction relief court's denial and dismissal of his application. Thereafter, Petitioner filed a Petition for Writ of Certiorari on June 15, 2015. This Return follows.

[4] Petitioner was also represented by Paul N. Uricchio, III, Esquire, who passed away in 2012. Fuller was an associate at Uricchio's law firm and the two jointly represented Petitioner.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "*any* evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his 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 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an 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, at 688. 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.

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that counsel was ineffective and 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). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). 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. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

ARGUMENT

There is evidence of probative value to support the post-conviction relief court's finding that counsel was not ineffective for failing to explain the Sexually Violent Predator Act to Petitioner and advise him that he would be screened for civil commitment pursuant to the Act, where the plea court and counsel both advised Petitioner of the Act and his screening for commitment prior to the court's acceptance of his guilty plea and counsel had no duty to advise Petitioner of the Act prior to his guilty plea.

Petitioner argues that counsel was ineffective for failing to inform him of the Sexually Violent Predator Act (hereinafter "the Act") and for failing to advise him that he would be screened for civil commitment pursuant to the Act as a sexually violent predator as a result of his guilty plea. However, Petitioner conceded both at the evidentiary hearing and in his Petition that he was advised about the Act and that he would likely be screened for civil commitment as a sexually violent predator pursuant to the Act by counsel and the plea court. Despite this concession, Petitioner argues that counsel was ineffective because he was led to believe his sentence would result in a short period of incarceration before he would be allowed to return home and seek treatment for his illicit sexual proclivities while on probation. Petitioner contends that because he was civilly committed as a sexually violent predatory pursuant to the Act, he was unable to return home, thus rendering his guilty plea involuntary and counsel's performance ineffective. Petitioner presented this argument and numerous witnesses to the post-conviction relief court during two evidentiary hearings. After listening to all testimony and a thorough review of the record below, the post-conviction relief court correctly denied and dismissed this allegation with prejudice.

In its Order of Dismissal, the post-conviction relief court found Petitioner failed to satisfy his burden of proof regarding the alleged deficiency of plea counsel for failure

to inform Petitioner of the Act and that he would be screened for civil commitment pursuant to the Act, citing that counsel's testimony from evidentiary hearing and the transcript from Petitioner's guilty plea proceeding that squarely refuted this allegation. (App. p. 201). The court also found that although counsel did inform Petitioner of the Act and possible civil commitment pursuant to the Act, counsel was under no obligation to inform Petitioner of the civil commitment process under the Act, citing Page v. State, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005) ("We conclude Petitioner's counsel had no duty to inform him about the civil commitment process under the SVPA. Although eligibility for civil commitment under the SVPA is triggered by conviction of a "sexually violent offense," civil commitment can be imposed only after testing, evaluation, a probable cause hearing, and a trial by either the court or jury. No one can be civilly committed as a "sexually violent predator" unless the State proves beyond a reasonable doubt the person suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexual violence if not confined in a secure facility. Consequently, a person may be convicted of a predicate offense, and yet not be committed under the SVPA because the evidence is not sufficient to find that his or her present mental condition creates a likelihood of future sexually violent behavior. Thus, any possible civil commitment of Petitioner would not flow directly from his guilty plea, but rather from a separate civil proceeding as a collateral consequence.")

The post-conviction relief court then found that Petitioner failed to establish any resulting prejudice from this allegation, citing counsel and the plea court's full advisement of all of Petitioner's rights and possible consequences, including that he would likely be screened for civil commitment pursuant to the Act. (App. p. 202). The

court noted that Petitioner still admitted his guilt and voluntarily waived his rights and pled guilty with full understanding of possible commitment pursuant to the Act. The court concluded that there was no reasonable likelihood that Petitioner would not have pled guilty absent counsel's alleged deficiencies and therefore could not establish the requisite prejudice required for relief. The post-conviction relief court also determined "Counsel's testimony [was] very credible while Applicant's testimony, along with the testimony of Applicant's witnesses, [was] lacking credibility." There is ample evidence in the record to support the post-conviction relief court's findings and this Court should affirm. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

During Petitioner's plea hearing, the plea court asked him if he was aware of the Act and Petitioner responded affirmatively. (App. p. 8). Specifically, the following exchange occurred between Petitioner and the plea court:

> THE COURT: Okay. Very well. Do you also understand that there's something called the "Sexually Violent Predator Act"? Do you understand that?
>
> PETITIONER: Yes, ma'am. I've — I've heard of it.
>
> THE COURT: Yes. And -- it is a procedure and there is a committee that reviews folks who are coming out of SCDC or otherwise, and they make a determination regarding whether or not they believe there's probable cause that this individual is a sexually violent predator. If they believe that that individual is a sexually violent predator, then they send it to a circuit court judge to confirm or not confirm probable cause to believe that someone is a sexually violent predator. And in the event that that occurs, then there's an evaluation. And in the event that the evaluation comes back and there is a determination that that person has a mental abnormality that–that causes them to be a sexually violent predator, then ultimately they–that person can stand trial. And if it is determined that that person is a sexually violent predator, then they are forcibly held and treated until such

> time as the abnormality and risk to the community no longer exists. Do you understand that?
>
> PETITIONER: Yes, ma'am.
>
> THE COURT: All right. Very well. And there's some discussion about whether or not the abnormality goes away, but for sure, the risk to the community has to go away. You understand?
>
> PETITIONER: Yes, ma'am.

(App. pp. 8-9). Petitioner also told the plea court that he understood Megan's Law, which would require him to be tracked by GPS monitoring for the remainder of his life. (App. pp. 9). The trial court also informed Petitioner that he "need[ed] to count on serving day for day [his] sentence," which he said he understood. (App. pp. 9). Later during the plea, the court stated that she believed Petitioner met the prima facie case for a sexually violent predator, would be evaluated pursuant to the Act, and "hopefully get [Petitioner] the appropriate treatment that he needs." (App. p. 32). Based on the record of Petitioner's guilty plea proceeding, it is undisputed that he was advised of the Act, possible civil commitment under the Act, and that he would more likely than not be screened for commitment based upon his guilty plea. It is also undisputed that Petitioner acknowledged under oath that he was already aware of the Act prior to his guilty plea.

At the first evidentiary hearing in May, Petitioner testified that counsel did inform him of the Act and possible commitment but not until the day of his guilty plea. (App. pp. 83). He acknowledged that the plea court asked him if he was aware of the Act and explained the Act and civil commitment pursuant to the Act to him. (App. pp. 84, 97). He further testified that he told the trial court that he understood the Act and possible civil commitment pursuant to the Act, but that he was not concerned with it because "[he] was told by [his] attorneys [he] didn't meet the criteria." (App. pp. 84). Petitioner repeatedly

testified to that effect. (App. pp. 97, 98, 102-03). Petitioner also repeatedly testified that "[he] was informed by [his] lawyer to say yes" to all of the plea court's questions regardless of the true answer. (App. pp. 95-97). At the subsequent hearing in October, Petitioner testified that counsel informed him that he would be evaluated pursuant to the Act but that he "wouldn't be found as a sexual[ly] violent predator." (App. pp. 171, 174-75). Petitioner testified that he did not recall the plea court going over the Act with him at the guilty plea. (App. pp. 173-74, 175). He elaborated: "There's a lot of stuff in the transcript that [the plea court] didn't say," challenging the authenticity of the plea transcript. (App. pp. 174). He also testified that counsel told him to say "yes ma'am" and "no ma'am" to all questions. (App. pp. 175). After listening to his testimony, the post-conviction relief court found his testimony lacked credibility.

In contrast, counsel testified that he discussed the Act and possible civil commitment with Petitioner well before his guilty plea. (App. pp. 126-27, 140-41, 182). He testified that Petitioner understood he would be screened for commitment pursuant to the Act in a separate proceeding. (App. pp. 127). He testified that the plea court advised Petitioner of the Act and civil commitment pursuant to the Act during the guilty plea. (App. pp. 128-29). Counsel also testified that he did not recall Petitioner indicating that he did not understand Act or that he did not want to go forward with his plea after the plea court's advisement of the Act. (App. pp. 129). Counsel further testified that he and Uricchio understood that Petitioner would be screened for civil commitment pursuant to the program, but that they thought he would likely not be committed and would be able to continue outpatient treatment while on probation. (App. pp. 140). Counsel testified that

he and Uricchio made Petitioner aware that he would be subject to an evaluation through the program before Petitioner pled guilty. (App. pp. 141).

Counsel testified that he and Uricchio prepared extensively for trial, including hiring two private investigators, talking to potential witnesses, and hiring a forensic analyst. (App. p. 123).Counsel also testified that he and Uricchio retained an independent expert, Dr. Burke, who conducted a sexual deviance test on Petitioner. (App. p. 119). He testified that the original hope was that Dr. Burke would be able to testify that Petitioner was not a risk to society. (App. p. 119). However, Dr. Burke's sexual deviancy test revealed that Petitioner was a moderate risk and had responded inappropriately to stimuli involving minors. (App. pp. 119-120). Specifically, Petitioner's largest stimulus was a role playing stimulus of a young child who was a neighbor, a similar scenario to his pending charges. (App. p. 120). Counsel testified that based on the results of Dr. Burke's assessment, the defense strategy changed due to concerns that Dr. Burke would have to testify negatively for Petitioner if the case proceeded to trial and he was called as a witness. (App. pp. 121-22). He testified that they tried to secure an Alford plea, but that the plea court was unwilling to accept a plea without Petitioner admitting his guilt. (App. pp. 122-23). He testified that the best offer was the one that Petitioner ended up accepting. (App. pp. 123-26). Counsel testified that the offer from the State was a "very, very good offer." (App. p. 138). The post-conviction relief court found counsel's testimony credible and afforded it great weight.

The post-conviction relief court's findings are clearly supported by ample evidence in the record. Despite the support for its ruling, Petitioner argues that the lower court erred because "[t]he evidence presented at the [evidentiary] hearing supported the

claim of the Petitioner . . . that he was not going to be eligible for the Sexually Violent Predator program." (PWC p. 7). This is clearly contradictory to the record from both evidentiary hearings and Petitioner's guilty plea proceeding. Furthermore, although counsel did advise Petitioner correctly about the Act and possible commitment, there is no duty to advise a defendant regarding such a collateral consequence.

This Court has held that counsel has no duty to inform a client about the civil commitment process under the Act, as civil commitment can only be imposed after testing, evaluation, a probable cause hearing, and a trial. Page v. State, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005). See also Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (2013) (holding Hamm was not entitled to relief because commitment pursuant to the Act does not automatically flow from the conviction, rather a civil proceeding occurs where the defendant is evaluated before commitment is certain). In Petitioner's case, counsel testified that he and co-counsel informed Petitioner of the Act and his possible civil commitment under the Act as a result of his guilty plea in advance of his plea, going beyond their professional duties and requirements under Page. Therefore, the post-conviction relief court properly discerned that counsel was not deficient. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Furthermore, the post-conviction relief court also properly held that Petitioner could have been prejudiced by the alleged deficiency, as counsel had no duty to inform his client of the civil commitment process as set forth in Page.

Additionally, this case is similar to Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). In Moorehead, this Court held that "even if trial counsel erroneously informed respondent that his sentence would be probationary [regarding a criminal sexual conduct charge], any misconception was cured at the plea hearing." Id. at 333, 496 S.E.2d

at 416-17. In Moorehead, the applicant "claimed he answered the trial judge's questions regarding the plea affirmatively because 'I done what [counsel] told me to do. . . . He said the judge knew about all of this and that's how things was done around here. That's why I told the judge that.'" Id. at 332-33, 496 S.E.2d at 416. However, counsel testified "he never promised respondent a straight probationary sentence although they did discuss probation to follow his active jail time as part of the plea negotiations." Id. This Court reasoned that the alleged "promise" of a probationary sentence was cured when the trail judge asked the respondent if he understood the possible sentence for a criminal sexual conduct charge, to which the applicant replied affirmatively. Id. at 333, 496 S.E.2d at 416. This Court further noted that "[applicant]'s explanation that he answered the trial judge affirmatively on counsel's alleged advice that the questions were meaningless does not support the grant of PCR." Id. at 333, 496 S.E.2d at 417 (citing Wolf v. State, 326 S.C. 158, 485 S.E.2d 367 (1997)).

Similarly, in the present case, Petitioner alleges that counsel informed him that he would be going home the weekend after his plea and that plea counsel told him to respond to the trial court's questions at the plea hearing with "yes ma'am" or "no ma'am." Even if counsel had informed Petitioner he would be going home that weekend[5], any alleged error was cured by the plea court informing Petitioner in depth of the Act and possible civil commitment pursuant to the Act. Furthermore, there is no credible evidence to support Petitioner's allegation that plea counsel told him to respond affirmatively to the trial court's questions. The post-conviction relief court properly denied Petitioner's allegation.

[5] There is no credible evidence to support Petitioner's assertions that counsel told him he would be home by the weekend.

Based on the foregoing, there is clearly ample evidence in the record to support the post-conviction relief court's findings. Additionally, the post-conviction relief court's findings are not controlled by an error of law, but rather, are supported by abundant case law. This Court should affirm the post-conviction relief court's findings and denial of relief to Petitioner.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
SC Bar No. 100108
Assistant Attorney General

By: Megan Harrigan Jameson
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

July 15, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

RECEIVED
JUL 15 2015
S.C. Supreme Court

Appellate Case No. 2014-001640

BOBBY RUSSELL, JR., Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, 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
Post Office Box 88
Irmo, SC 29063

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

This 15th day of July, 2015

Megan Harrigan Jameson

MEGAN HARRIGAN JAMESON
ASSISTANT ATTORNEY GENERAL

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 15 2015
S.C. Supreme Court

July 15, 2015

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

Re: Bobby Russell, Jr. v. State of South Carolina
Appellate Case No. 2014-001640

Dear Mr. Shearouse:

I am enclosing the original and six copies of the Return to Petition for Writ of Certiorari in the aforementioned case.

Sincerely,

Megan Harrigan Jameson

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MHJ
Enclosures

cc: Tommy A. Thomas, Esquire
Trisha Allen, Victim Services