

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-001950

Timothy Lee Owens, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether the PCR court erred in finding plea counsel effective where there was no probative evidence that plea counsel timely or fully communicated the State's plea offer of a twelve year cap to Petitioner and plea counsel took no action to address the State's failure to make any recommendation at the plea hearing such that Petitioner received a sentence of eighteen years, six years greater than the plea offer?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the November 2012 term of General Sessions for two counts of grand larceny (2012-GS-23-5463, -5470), three counts of breaking and entering a motor vehicle (2012-GS-23-5464, -5465, -5466), and second-degree burglary (2012-GS-23-5469). (App.pp.77-78; pp.80-81; pp.83-84; pp.86-87; pp.89-90; pp.92-93). Larry H. Cooke, Esquire represented Petitioner.

On December 5, 2012, Petitioner pled guilty. The Honorable William H. Seals, Jr. sentenced Petitioner to consecutive terms of one year for each count of grand larceny, one year for each count of breaking and entering a motor vehicle, and thirteen years for second-degree burglary (violent). (App.p.18).

Petitioner filed an application for post-conviction relief (PCR) on June 10, 2013 (2013-CP-23-3234). (App.pp.20-26). A hearing was convened at the Greenville County Courthouse on June 17, 2014. (App.pp.32-62). Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed August 13, 2014. (App.pp.69-75).

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

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel did not properly convey the plea offer in this case.

Petitioner argues plea counsel was ineffective because he did not properly convey the twelve-year plea offer or object when the State did not make a sentence recommendation at the plea hearing. This argument is without merit.

A.

At the guilty plea hearing, Petitioner admitted to the plea judge that he was guilty of these charges. (App.p.10). Petitioner told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced into pleading guilty. (App.pp.2-3; p.5; pp.7-10). Petitioner did not object when it was noted he was pleading guilty without a recommendation. (App.p.3). Petitioner also admitted he wanted a ten-year offer for non-violent charges but the State made a plea offer for a twelve-year cap. (App.pp.8-9). Petitioner stated he “was wrastlin’ with that” because of the second-degree burglary (violent) charge but that

under the circumstances I just want to get this over with, I wanna get everything behind me so I can go on and make my life better in the future, you know, I’m not – I’m tired of this hangin’ over me, I’m tired of tyin’ up the county’s time and money, I just wanna get it all over with. I’ve made a lotta mistakes in my life and I’d just like to get it all behind me.

(App.pp.8-9).

At the PCR hearing, Petitioner identified a plea offer letter from the State dated October 4, 2012.¹ (App.p.36). Petitioner stated he received this plea offer from the

¹ Exhibit 1. (App.pp.65-66).

public defender's office with a cover letter dated November 27, 2012,² and that it had expired by that point. (App.pp.36-38). Petitioner stated he wanted to accept this 12-year offer but that he never spoke to counsel about it. (App.pp.39-40). Petitioner stated plea counsel told him on December 4, 2012 that he would appear before a judge to plead guilty and accept the 12-year cap. (App.pp.42-43). Petitioner stated that, even though the assistant solicitor stated at the plea hearing that there was no recommendation, he believed he would receive that 12-year recommendation. (App.p.50).

Plea counsel testified he could not locate his file, so he was relying upon information on the case that was entered into the defender database used by the public defender's office. (App.p.53; p.58). Plea counsel testified that, when he receives a plea offer and his client is at the detention center, he mails it or has it delivered by an investigator. (App.pp.53-54). Plea counsel testified that, as of August 27, 2012, the State did not want to make any plea offers because of Petitioner's criminal record. (App.p.54). Plea counsel testified he received a plea offer from the State dated October 4, 2012³ and his investigator sent a copy of the offer to Petitioner on October 10, 2012. (App.pp.54-55). Plea counsel testified there was a note on October 22, 2012 that Petitioner wanted a jail visit and he believed this would have been to discuss the offer. (App.p.55; p.59). Plea counsel testified he told the State by November 26, 2012 that Petitioner would not accept the offer. (App.p.55). Plea counsel testified he believed this was because the State would not consider a non-violent charge. (App.p.55). Plea counsel testified he believed

² Exhibit 2. (App.p.67).

³ Exhibit 1.

the State then served notice of intent to seek life imprisonment without parole and put the matter on the trial docket. (App.p.55). Plea counsel testified he would not have told Petitioner on the day of the plea that the twelve-year offer was still available. (App.p.56). Plea counsel identified Exhibit 2 as a cover letter sent by his office and stated such a letter “is going to point out exactly what the public defender’s office is sending. If [the plea offer] had been in this letter, it would have been mentioned.” Plea counsel stated “I guarantee you nothing goes out of that office without it being mentioned in the cover sheet.” (App.p.57).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner “failed to meet his burden of proving plea counsel did not properly convey the plea offer in this case.” The PCR judge found credible plea counsel’s testimony that the plea offer was sent to Petitioner in October 2012. The PCR judge found Petitioner “rejected any and all plea offers made by the State and was well aware on the day of the guilty plea that he would be pleading guilty without a sentence recommendation.” The PCR judge found the plea transcript refuted Petitioner’s allegations. (App.p.73).

B.

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).

C.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel did not properly convey the twelve-year plea offer. While Petitioner stated he did not receive the plea offer until November 27, 2012, plea counsel testified his investigator sent Petitioner a copy of the offer on October 10, 2012. Plea counsel testified the plea offer would not have been sent under the November 27, 2012 cover letter because that cover letter did not list the plea offer as an attachment. Plea counsel did not have his physical file but indicated the database notes would have had him meet Petitioner in late October and that it would likely have been to review the plea offer. Plea counsel testified he informed the State at the end of November 2012 that Petitioner rejected the plea offer. The PCR judge did not err in finding plea counsel properly conveyed the plea offer in this case. 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).

Further, the PCR judge directly observed testimony from both Petitioner and plea counsel and determined plea counsel's testimony was more credible. (App.p.73). This Court must give this finding great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368

S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (“Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.”). In observing testimony from both Petitioner and plea counsel, the PCR judge clearly concluded Petitioner’s argument that he did not receive the plea offer until November 27, 2012 – which was after the offer’s expiration date – was not believable.

Regardless, the guilty plea transcript refutes Petitioner’s argument. Petitioner told the plea judge the State made a recommendation for a 12-year cap but he wanted a 10-year offer on non-violent charges. Petitioner indicated he was having difficulty with this. At no point, however, did Petitioner tell the plea judge that the offer had not been conveyed to him prior to its expiration. Rather, Petitioner stated he was satisfied with plea counsel’s representation and wanted to plead guilty and get these charges behind him. As such, the plea transcript repudiates Petitioner’s assertion that plea counsel did not properly convey the 12-year plea offer to him prior to its expiration date. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant’s claim lawyer misadvised him).

D.

Petitioner also argues plea counsel was ineffective because he did not move to withdraw Petitioner’s guilty pleas. (Cert. Pet., pp.16-18). This argument, however, it not

preserved for appeal because it is not addressed in the order of dismissal. 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.”); see also 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)). While there was some testimony at the PCR hearing on this matter, as Petitioner did not file a Rule 59(e), SCRPC motion to alter or amend the order to include a specific ruling on the issue, it 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).

E.

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.”).

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 issue discussed above.

Respectfully submitted,

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By: 
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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 in interagency mail and addressed to:

Laura R. Baer, 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 27th day of July, 2015.


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