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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2014-001952

Kevin Lee Keith, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether Petitioner was denied his right to effective assistance of counsel where Petitioner pled guilty without any recommendation and was sentenced to eighteen years incarceration after (1) plea counsel failed to timely communicate acceptance of the State's plea offer to a recommended sentence of fifteen years despite Petitioner's instruction to do so, or (2) alternatively, plea counsel incorrectly advised Petitioner that the State's offer was still available to accept on the day of the plea hearing?

STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the November 2012 term of General Sessions for three counts of first-degree burglary (2011-GS-23-9368 and 2012-GS-23-2034, -2038), financial transaction card (FTC) theft (2012-GS-23-2029), and strong arm robbery (2012-GS-23-2040). (App.pp.67-76). Symmes W. Culbertson, Sr., Esquire represented Petitioner.

On January 7, 2013, Petitioner pled guilty.¹ The Honorable Letitia H. Verdin sentenced Petitioner to concurrent terms of 18 years for each count of first-degree burglary, 15 years for strong arm robbery, and 5 years for FTC theft. (App.p.12; pp.77-81). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on April 24, 2013 (2013-CP-23-2303). (App.pp.15-24). A hearing was convened at the Greenville County Courthouse on June 17, 2014. (App.pp.30-57). 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 11, 2014. (App.pp.60-66).

¹ The State not prossed indictments for FTC fraud (2012-GS-23-2030, -2031, -5058), criminal conspiracy (2012-GS-23-2032, -2037), petit larceny (2012-GS-23-2033), first-degree burglary (2012-GS-23-2035, -2039), petit larceny, third offense or greater (2012-GS-23-5056), and FTC theft (2012-GS-23-5057).

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’s representation was deficient.

Petitioner’s argument is two-fold. First, Petitioner argues “plea counsel failed to timely communicate acceptance of the State’s plea offer to a recommended sentence of fifteen years despite Petitioner’s instruction to do so.” (Cert. Pet., p.2; p.4; pp.14-15). As the issue of whether counsel failed to timely accept the plea offer was not addressed in the order of dismissal, this issue is not preserved for review by this Court. 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.”). Further, Petitioner cannot not make this argument on appeal because he did not file a post-trial motion to alter or amend the final order of dismissal to include a ruling on this issue. 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).

Second, Petitioner argues “plea counsel incorrectly advised Petitioner that the State’s offer was still available to accept on the day of the plea hearing.” (Cert. Pet., p.2; p.4; pp.12-13). This argument is without merit.

A.

At the guilty plea hearing, the plea judge advised Petitioner of the minimum and maximum sentences he could receive on the charges and Petitioner stated he understood. (App.pp.4-5). Petitioner confirmed he had discussed the charges with plea counsel and was happy with plea counsel’s services. (App.pp.5-6). Petitioner stated he did not have any complaint to make against his attorney. (App.p.6). Petitioner stated he had not been promised anything in exchange for his guilty pleas. (App.p.6). Petitioner waived his trial rights and stated he wanted to plead guilty. (App.pp.6-7).

The assistant solicitor informed the plea judge of the factual basis for the guilty pleas and noted one of the first-degree burglary charges was on the trial docket for the following day. (App.pp.7-9). After the assistant solicitor recited Petitioner’s lengthy criminal record, plea counsel confirmed there was no plea recommendation in this case. (App.pp.9-10). Petitioner asked the plea judge “to please be as lenient as possible.” (App.p.12).

B.

At the PCR hearing, Petitioner stated plea counsel told him the State made a 15-year plea offer and he told counsel he needed time to think about it. (App.p.40). Petitioner testified he had approximately 1 month to consider the offer. (App.p.41). Petitioner stated he received a letter that his case was going to trial on January 8, 2013

and that plea counsel came to visit him on the 7th. (App.pp.33-34). Petitioner stated plea counsel told him the 15-year plea offer was still available and that was “the only reason why I went ahead and went along with the plea.” (App.pp.33-34). Petitioner stated plea counsel told him they would go to trial if he did not accept the 15-year plea offer. (App.p.35). Petitioner stated he told plea counsel on January 7th that he wanted to accept the 15-year offer. (App.p.40). Petitioner stated plea counsel did not make any promises that he would receive the 15 years. (App.p.35). Petitioner stated he would have gone to trial if he had known the 15 year offer “was not a done deal.” (App.p.36). Petitioner stated he did not notice that the “without recommendation” box was checked on the sentencing sheets when he signed them. (App.pp.41-42). Petitioner confirmed he never brought up the alleged 15-year recommendation during the guilty plea hearing. (App.pp.42-43).

Plea counsel testified “[t]here were several offers extended to [Petitioner] during the pendency of this case.” (App.p.44). Plea counsel testified his notes reflected these offers had been conveyed to Petitioner and that he had rejected them. (App.pp.44-45). Plea counsel testified the 15-year plea recommendation at issue in this case was dated June 18, 2012. (App.p.45). Plea counsel testified he received a letter dated November 30, 2012 from the assistant solicitor confirming he had been advised Petitioner “will not accept my plea offer of 15-year recommendation and wants a trial.” (App.pp.45-46). Plea counsel testified both the June offer and the November letter were conveyed to Petitioner. (App.pp.45-46). Plea counsel testified his general policy was not to tell a client a plea offer was still available once a case was placed on the trial docket.

(App.p.48). Plea counsel testified he would never promise a client they would receive a certain sentence. (App.p.48).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving plea counsel misadvised him about the sentence he would receive if he pled guilty." The PCR judge did not find Petitioner's testimony was credible and that he knew he was pleading guilty that day without a sentence recommendation. The PCR judge found that, regardless, any potential error by counsel was cured by the guilty plea colloquy. (App.pp.64-65).

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) (citations omitted).

D.

The PCR judge did not err in finding Petitioner failed to meet his burden of proving plea counsel was ineffective. Petitioner did not demonstrate either that plea

counsel failed to communicate his acceptance of the plea offer or that he pled guilty under the false belief that he was pleading guilty pursuant to the 15-year plea offer. While Petitioner advanced these arguments at the PCR hearing, the PCR judge specifically found his testimony on this issue was not credible. (App.p.64). This Court must give great deference to the PCR judge's determinations of witness credibility. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); 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."). Further, plea counsel's testimony – which included reciting the contents of a letter received from the assistant solicitor – makes it clear that the 15-year plea recommendation was conveyed to Petitioner, he rejected it, and one of his cases was then placed on the trial docket. Plea counsel also testified he does not promise his clients will receive certain sentences and would not tell a client an offer was still available once the case was on the trial docket. The PCR judge concluded plea counsel was a credible witness. (App.p.63). See id.

The PCR judge was also correct in finding that any potential error or misunderstanding regarding whether Petitioner was pleading guilty pursuant to a 15-year plea recommendation was cured by the guilty plea process. While Petitioner argued he believed he was pleading guilty in exchange for a 15-year plea offer, that is not supported by the record. Plea counsel noted this was "a straight up plea" and Petitioner did not

object. (App.p.9). Plea counsel never mentions during his mitigation argument that there is a plea recommendation and Petitioner neither corrects this nor says anything on his own about a recommendation. (App.pp.10-12). Rather, Petitioner asks the plea judge “to please be as lenient as possible” which clearly indicates his understanding that there is no plea recommendation in his case. (App.p.12). Further, the sentencing sheets for these charges – which Petitioner signed – all have the box for “Without Negotiations or Recommendation” checked. (App.pp.77-81). It is simply not credible that Petitioner believed he was pleading guilty pursuant to a 15-year recommendation that day. There is probative evidence to support the PCR judge’s findings that Petitioner was not a credible witness and had failed to meet his burden of proof. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626.

Accordingly, Petitioner failed to prove both prongs of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by 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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August 31, 2015

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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, 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 31st day of August, 2015.


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