

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2014-002399

Azikiwe Archie,Petitioner,

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Did the post-conviction relief judge properly find counsel was not ineffective in failing to communicate plea offers of three years and seven years to Petitioner where counsel testified he communicated the offers and where Applicant never indicated he would accept a plea offer?
2. Did the post-conviction relief judge properly sustain Respondent's objection to Petitioner's exhibits where the exhibits were not authenticated and where the admission of the exhibits would not have changed the result of the hearing?

STATEMENT OF THE CASE

In November 2007, the Georgetown County Grand Jury indicted Petitioner for distribution of crack cocaine. (App. pp. 343-44). Richard F. Colvin, Esquire, (“counsel”) represented Petitioner. (App. p. 1) Petitioner proceeded to trial before the Honorable Steven H. John and a jury on February 28 through March 1, 2011. (App. p. 1). Petitioner was convicted as indicted. (App. p. 209, lines 11-14) Judge John sentenced Petitioner to fifteen years imprisonment. (App. p. 226, lines 5-11).

Breen R. Stevens, Esquire, perfected Petitioner’s appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Archie, Op. No. 2013-UP-075 (S.C. Ct. App. filed February 20, 2013). Petitioner filed a *pro se* response. (App. p. 316). After review of both the brief and Petitioner’s response, the South Carolina Court of Appeals dismissed the appeal on February 20, 2013. Id.

Petitioner filed an application for post-conviction relief on June 5, 2013. (App. p. 229). The Honorable Kristi L. Harrington (“the post-conviction relief judge”) convened an evidentiary hearing on the application at the Georgetown County Courthouse on August 29, 2014. (App. p. 250). Tristan M. Shaffer, Esquire, represented Petitioner. (App. p. 251). The post-conviction relief judge denied relief in an order dated October 7, 2014, and filed October 20, 2014. (App. p. 332).

A petition for writ of certiorari was filed on March 25, 2015, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). On June 18, 2015, this Court issued an order directing the parties to address certain questions. A Petition for Writ of Certiorari was filed pertaining to these questions. This return follows.

ARGUMENT

I. Probative evidence supports the post-conviction relief judge's finding counsel was not ineffective in failing to communicate any plea offers.

Petitioner asserts counsel was ineffective for “failing to communicate plea offers of three years and seven years to Petitioner.” (Pet. for Writ of Cert. p. 4). However, evidence in the record supports the post-conviction relief judge’s finding that Petitioner “failed to demonstrate trial counsel was deficient in failing to convey the State’s initial offers.” (App. p. 338). Evidence in the record also supports the post-conviction relief judge’s finding that Petitioner failed to demonstrate he would have accepted any allegedly un conveyed plea offers. (App. p. 338). Accordingly, Respondent submits the post-conviction relief judge properly denied relief.

A. Standard of review

In this post-conviction relief action, Petitioner bears the burden of proof. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). This Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). The Court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

First, Petitioner must prove counsel’s performance was deficient. Id. Under this prong, the Court measures counsel’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Generally, failure to convey a plea offer constitutes deficient performance. Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422(2009).

Second, any deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. To show prejudice from a failure to convey a plea offer, Respondent must demonstrate a reasonable probability he would have accepted the offer. Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

On appeal, this Court must affirm the circuit court’s denial of post-conviction relief when there is any probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

B. Counsel relayed all existing plea offers to Petitioner

Respondent submits the post-conviction relief judge properly found counsel was not defective because Petitioner has failed to prove counsel did not communicate any plea offers. Here, trial counsel testified he had an independent recollection¹ of the State making a three year plea offer. (App. p. 266, lines 16-25; p. 279, lines 19-23). Counsel also testified Petitioner rejected this offer. (App. p. 267, line 15; p. 268, lines 8-19). Counsel testified that he did communicate the plea offer of three years to Petitioner, and that “[i]t is always the client’s decision to decline or accept any plea offer.” (App. p. 279, line 24-p. 280, line 11). Following the rejection of this offer, Counsel testified that “the prosecutor . . . offered another plea offer of a range between three and seven.” (App. p. 268, lines 9-12; p. 280, lines 12-14). Counsel again testified that, if rejected, it would have been the Applicant that made that decision. (App. p. 280, lines 17-19).

¹ Counsel testified that he was unable to review the file due to “a chronic and systematic problem with the Fifteenth Circuit defender retaining case files.” (App. p. 261, lines 7-9). Although counsel did not have a copy of his file, his testimony established he had a clear recollection of his representation of Petitioner.

Counsel clearly recalled conveying a three year offer to Petitioner, who rejected the offer. He also clearly recalled conveying an offer for a range of three to seven years. He testified Petitioner rejected these offers. This testimony is bolstered by his testimony he was concerned about Petitioner facing a lengthy prison sentence on a “very, very bad set of facts.” (App. p. 267, lines 19-21). Counsel clearly believed Petitioner should have accepted a plea offer, so Petitioner’s arguments that he never received any plea offers is unconvincing. The record supports the post-conviction relief judge’s finding counsel conveyed a three year offer to Petitioner.

In regards to an alleged seven year plea offer, the post-conviction relief judge found Petitioner “presented no competent evidence the State made such an offer.” (App. p, 338). Counsel did not testify as to any recollection of a seven year offer. He could not authenticate a document purportedly from the State conveying a seven year plea. Petitioner testified he believed there was a seven year plea offer from reviewing his discovery. (App. p. 297, lines 17-19). However, Respondent failed to present any witnesses from the solicitor’s office to confirm that office actually extended a seven year offer. Therefore, Respondent submits the record supports the post-conviction relief judge’s finding Respondent failed to present any evidence to support his allegation counsel did not convey a seven year offer.

C. Petitioner would not have accepted any plea offers

The post-conviction relief judge also found Petitioner failed to demonstrate prejudice even if counsel did not convey any plea offers. (App. p. 338). This finding is supported by probative evidence in the record.

Counsel testified Petitioner indicated a desire to go to trial, and that “there wouldn’t have been a trial” if not for this indication. (App. p. 281, lines 4-10). Counsel

also testified Petitioner was “perhaps a little bit too optimistic about his chances at trial. (App. p. 281, lines 1-3). Petitioner even testified that he did not ask counsel to pursue a plea offer. (App. p. 299, lines 6-23). Petitioner also testified that he had pled guilty twice before on other drug charges. (App. p. 286, lines 13-23). Petitioner testified he only learned of a three year offer on the day of trial. (App. p. However, this testimony rings hollow in light of his preposterous claim counsel declined the offer without communicating it because Petitioner “wasn’t in there for a plea, [he] was in there about a bond.” (App. p. 288, lines 22-24).

Regarding any allegedly un conveyed offer, the record supports the post-conviction relief judge’s finding Petitioner failed to demonstrate a reasonable probability he would have accepted one. (App. p. 339). Although Petitioner claims he never received any plea offer, he also claims he never sought one. Petitioner understood the legal process and would have asked for a plea bargain had he wanted one. He cannot now argue he would have taken a plea when he admits he never evinced a desire for one prior to being convicted. Additionally, in specific regards to the alleged seven year offer, the record demonstrates Petitioner rejected offers of three years and a range of three to seven years. Because Petitioner rejected these offers, there is no logical basis for his claim that he would have accepted an offer of seven years. The post-conviction relief judge properly denied relief on this ground.

II. Probative evidence supports the post-conviction relief judge’s proper decision to bar certain exhibits from entry into evidence.

Petitioner asserts the post-conviction relief judge erred by “refusing to admit copies of the plea offer and acknowledgment form provided to petitioner by trial counsel in response to a request for a copy of discovery.” (Pet. for Writ of Cert. p. 6).

Respondent submits Petitioner failed to meet threshold question of authentication because the person who created those exhibits did not testify at the evidentiary hearing.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Rule 901(a), SCRE. The authenticity of a piece of evidence “must be established before [it] may be admitted into evidence.” Weir v. Citicorp Nat. Servs., Inc., 312 S.C. 511, 516, 435 S.E.2d 864, 868 (1993). “The admission of evidence is a matter left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support.” Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) (citations omitted).

Respondent submits the post-conviction relief judge did not abuse her discretion because the exhibits in this case were not properly authenticated. Counsel could not identify Exhibits 1 and 2 as the plea offer documents the State offered Petitioner in this case. (App. p. 272, lines 22-p. 273, line 16). Counsel merely testified that Exhibits 1 and 2 were “typical” of a plea offer that would have been given to him in writing. (App. p. 276, line 8). Petitioner merely testified Exhibits 1 and 2 were copies of documents sent to him by counsel’s office. (App. p. 293, line 314-p. 294, line 6). However, no one from the solicitor’s office testified at the evidentiary hearing about the genesis of Exhibits 1 and 2.

Petitioner now claims the exhibits should have been admissible under Rule 1003, SCRE, as a duplicate. This argument was not raised to the post-conviction relief judge and cannot be raised at this juncture. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (2004) (arguments must be “raised to and ruled upon by the trial court” to be

preserved for review (quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002))).

At the evidentiary hearing, respondent argued the documents were not authenticated because the proponent of the exhibits was not the person who created the exhibit. (App. p. 294, lines 14-16). Although Petitioner testified as to the nature of the exhibits, counsel could not positively identify them. Counsel merely testified Exhibit 1 appeared to be a typical cover letter regarding a plea offer and Exhibit 2 appeared to be a typical plea offer of seven years. Counsel did not testify that they actually had been given to him. Petitioner bore the burden of proof in this case. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Had he wanted to establish the solicitor extended a seven year offer to him, he could have subpoenaed the solicitor to testify at the hearing and to authenticate the exhibits. He cannot simply rely on his own speculative testimony that he “believes there was a seven-year written offer.” See Stretchline Intellectual Properties LTD. v. H&M Hennes & Mauritz LP, No. 2:10-CV-371, 2015 WL 5175196, at *7 (E.D. Va. Sept. 3, 2015) (“Although [defendant] can state that the documents offered are the documents he received from [a third party], he has no personal knowledge from which he can attest that the documents are what [defendant] claims them to be[.]”). The post-conviction relief judge properly excluded Exhibits 1 and 2.

Regardless, any error committed by the post-conviction relief judge was harmless. “To warrant reversal, an appealing party must demonstrate not only error in the court’s ruling, but also resulting prejudice.” Way v. State, 410 S.C. 377, 382, 764 S.E.2d 701, 704 (2014). An error is harmless when there is no “reasonable probability the [factfinder’s] verdict was influenced by the challenged evidence or the lack thereof.” Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Counsel adamantly maintained he conveyed a plea offer of three years to Petitioner and that Petitioner rejected that plea offer. Logically, Petitioner would not have accepted a plea offer to a lengthier sentence. The post-conviction relief judge held Petitioner would not have accepted **any** plea offer. This finding is supported by probative evidence in the record, and introduction of Exhibits 1 and 2 would not have changed the post-conviction relief judge's decision to deny relief. Thus, any error in excluding the evidence is harmless.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

November 14, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

The Honorable Kristi Lea Harrington, Circuit Court Judge

AZIKIWE ARCHIE,

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v.

STATE OF SOUTH CAROLINA,

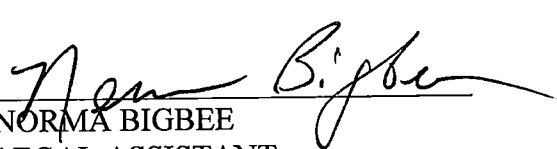
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Robert M. Pachak, Esquire
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P.O. Box 11589
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This 14th day of September, 2015.


NORMA BIGBEE
LEGAL ASSISTANT