STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
Court of Common Pleas
William Jeffrey Young, Circuit Court Judge

2010-CP-14-00076
Appellate Case No. 2014-002624

JEREMY SWEAT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I. Whether any probative evidence supports the PCR court's finding that Plea Counsel was not ineffective for advising Petitioner that he faced the possibility of a life sentence, where Petitioner faced a possible 140 year sentence and the plea judge advised Petitioner of the minimum and maximum sentences for each charge?

II. Whether any probative evidence supports the PCR court's finding that Plea Counsel was not ineffective during mitigation, where Petitioner was simply responding to the Plea Judge's question and Petitioner received a lawful sentence?

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was indicted at the October 2007 term of the Clarendon County Grand Jury for (1) Kidnapping and (2) Criminal Sexual Conduct (First Degree) (2007-GS-14-0363). The Applicant was also indicted for (1) Kidnapping, (2) Criminal Sexual Conduct, and (3) Assault and Battery with Intent to Kill ("ABWIK") (2007-GS-14-0364). He was represented by Harry Devoe, Esquire. On March 10, 2008, the Applicant entered a guilty plea before the Honorable George C. James, Jr. Applicant was sentenced to concurrent terms of thirty (30) years each for Criminal Sexual Conduct (First Degree) and Kidnapping (2007-GS-14-0363). He was also sentenced to thirty (30) years for Kidnapping, to twenty (20) years for ABWIK, and to thirty (30) years for Criminal Sexual Conduct (2007-GS-14-0364). The sentences for 2007-GS-14-0364 were to be served concurrently with those for 2007-GS-14-0363 but consecutively to each other.

A notice of appeal was filed. The appeal was dismissed on June 19, 2009, for failure to establish any preserved issues for review.

Petitioner filed an application for post-conviction relief on February 10, 2010. Respondent filed a Return August 23, 2010. An evidentiary hearing into the matter was convened at the Sumter County Courthouse on March 22, 2012, before the Honorable W. Jeffrey Young. Petitioner was present at the hearing and represented by Christina Dixon Parnall, Esquire. Judge Young dismissed Petitioner's post-conviction relief application by Order on July 5, 2012. Petitioner filed a Rule 59(e) motion to alter or amend judgment on or about July 12, 2012. Judge Young denied Petitioner's motion on October 16, 2014. Petitioner filed his Petition for Certiorari on or about June 26, 2015.

This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing 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).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner 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, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner's 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 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner 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. Second, counsel's deficient performance must have prejudiced the petitioner 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.

ARGUMENT

I. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for allegedly coercing Petitioner to plead guilty by advising him that that he faced the possibility of a life sentence.

Petitioner argues the PCR court erred in finding the Plea Counsel was not ineffective when he allegedly advised Petitioner that he faced the possibility of a life sentence. Initially, Respondent submits that this issue is clearly not preserved for appellate review. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. 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."); State v. Sheppard, 391 S.C. 415 --, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011).

Respondent submits this issue is not preserved for this Court's review. The allegation that Plea Counsel was ineffective for coercing Petitioner into pleading guilty by advising him that he faced a life sentence was not raised to or ruled upon by the PCR Court. The Final Order of

Dismissal does not address the issue of whether Plea Counsel was ineffective for coercing Petitioner into pleading guilty by advising him that he faced a life sentence. Petitioner also failed to raise this issue in his Rule 59(e), SCRCP, in an attempt to have the PCR Court rule upon the issue. This Court should find this allegation is not preserved.

Assuming arguendo that this Court finds the issue is preserved, it is wholly without merit. While Petitioner technically did not have one individual charge that carried up to life without parole sentence, Petitioner still faced the possibility of being sentenced to a total of 140 years imprisonment. To argue that Petitioner did not face a life sentence because none of his individual charges carried a maximum penalty of a life sentence wholly ignores the real possibility that Petitioner could serve the remainder of his life in jail based on the totality of the charges he faced.[1] Plea Counsel certainly is not deficient when he properly advised Petitioner that he faced the possibility of spending the rest of his life in prison based on the aggregate sentence exposure.

Furthermore, Petitioner can show no prejudice as the plea court properly advised him of the possible sentencing ranges. See Bennett v. State, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006) (reversing grant of PCR and stating that "even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range"); Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (reversing grant of PCR and holding that even if plea counsel erroneously informed defendant that his sentence would only be three years, the information conveyed at the plea hearing cured any misconception caused by counsel's alleged inaccurate advice); Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (reversing grant of PCR on the ground that there was no evidence to support the PCR judge's finding that applicant received ineffective assistance of

[1] Plea Counsel's fears rang true as Petitioner was sentenced to eighty years in prison and will most likely spend the rest of his natural life in prison.

counsel due to erroneous sentencing advice where "any misconception was cured at the plea hearing"); Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (reversing grant of PCR and recognizing that in considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing).

In the instant case, the plea court properly advised Petitioner of the sentencing range for each individual charge, explained the difference between concurrent and consecutive sentences, and advised Petitioner that he could be sentenced up to 140 years. (App. p. 9 line 11—p. 13 line 14). Based off of the foregoing, Petitioner can show no prejudice as he was properly advised by the plea court about the possible sentencing ranges.

II. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective in presenting mitigation evidence, where plea counsel was merely responding to the plea court's question and Petitioner was sentenced within the statutory ranges.

Petitioner argues that Plea Counsel was ineffective for presenting mitigation evidence about his pre-trial detention circumstances because it was contrary to Petitioner's claim that he was the follower and not the aggressor. However, this claim is meritless, as ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

It is clear from the record that Plea Counsel's strategy during mitigation was to attempt to garner sympathy for Petitioner based off of the circumstances of the crime, his lack of mental intelligence, and the fact that he was incarcerated in a correctional institution during pretrial. Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) (noting that a strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have

to personally identify his or her thinking. It is enough that the record shows a basis for strategy, not that counsel announce that strategy on the record). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

During mitigation, Plea Counsel noted that Petitioner had a sixth grade education, came from an unstable family environment, and was diagnosed with major depressive disorder, recurrent, with severe psychotic features. (App. p. 38 lines 23—p.39 line 3). Plea Counsel noted that Petitioner's mental evaluation stated that he had a low level of learning. (App. p. 39 line 4-6). Plea Counsel noted that Petitioner suffered psychological trauma from alcohol and drugs. (App. p. 39 lines 14-16). Plea Counsel further noted that the State's forensic examiner noted that Petitioner was following the orders of his codefendant as if he was codefendant's "henchman." (App. p. 41 lines 15-24). Plea Counsel stated that the report revealed that Petitioner was "bothered" by what they had done to one of the two victims. (App. p. 41 line 25—p. 42 line 1). Plea Counsel further noted that one of the two victims felt as though Petitioner raped and stabbed her nine separate times because his codefendant told him to do so. (App. p. 42 lines 2-6). Plea Counsel noted that Petitioner was older than his codefendant but mentally he was much younger. (App. p. 42 lines 12-14). Plea Counsel further noted that "the codefendant set this whole thing up..." (App. p. 42 line 15).

Continuing with his mitigation strategy, Plea Counsel noted that Petitioner was in the correctional institution for twenty months. (App. p. 40 lines 2-4). Plea Counsel noted that "it is a very depressing place, a depressing situation, with nothing to entertain, nothing to stimulate;

was placed in solitary for a long time. Not even access to a pencil or piece of paper to write a letter." (App. p. 40 lines 8-12). When asked by the plea court about why Petitioner was incarcerated in an institution instead of a county prison, Plea Counsel responded, stating "they took him out of clarendon county on an order to separate him from the co-defendant. They were both in the jail and he was the one at one point who was more verbally abusive." (App. p. 40 lines 19-23).

Based off of the forgoing, it is clear from the record the Plea Counsel's discussion about Petitioner's housing circumstances fell squarely in line with his mitigation strategy of garnering sympathy for Petitioner. Notably, Petitioner is not challenging Plea Counsel's overall strategy of pursuing sympathy on his behalf, but instead challenges minute information presented by Plea Counsel in response to the plea judge's question.

Regardless, even if Plea Counsel was deficient in presenting the mitigation evidence in question, Petitioner can still show no prejudice as Petitioner received a lawful sentence. Petitioner simply speculates that the sentence would have been different had Plea Counsel not presented the mitigating evidence in question. To the contrary, once the plea judge sentenced Petitioner to eighty years, Plea Counsel filed a motion to reconsider his sentence. In support of his motion, Plea Counsel reasserted the various mitigation testimonies without including the mitigation evidence in question. Yet, the plea court affirmed Petitioner's eighty year sentence. (App. p. 52-53).

CONCLUSION

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

Respectfully submitted,

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October 12, 2015

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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:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
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This 12th day of October, 2015

CAROLINE COLLINS
LEGAL ASSISTANT