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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County
R. Ferrell Cothran, Jr., Circuit Court Judge

Russell Jackson,

Petitioner,

vs.

State of South Carolina,

Respondent.

RETURN TO PEITITON FOR WRIT OF CERTIORARI

Appellate Case No. 2014-001651
Circuit Court Case 2012-CP-02-0321

ALAN WILSON
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STATEMENT OF ISSUE ON APPEAL

Probative evidence supports the PCR court's finding that Petitioner failed to prove he did not freely and voluntarily plead guilty where probative evidence indicates counsel was prepared for trial, where Petitioner was aware of the evidence in the case, and where Petitioner failed to provide probative evidence of what additional benefits would accrue from further preparation.

STATEMENT OF THE CASE

Petitioner was indicted for Criminal Sexual Conduct with a Minor in the Second Degree. Petitioner was represented by P. Andrew Anderson, Esquire. Pursuant to a negotiated plea, Petitioner pled guilty as charged and was sentenced by the Honorable Doyet A. Early, III, to eleven and a half years imprisonment. Petitioner did not appeal his conviction or sentence.

Petitioner subsequently filed an application for post-conviction relief (PCR). An evidentiary hearing was held at the Aiken County Courthouse on July 11, 2013, before the Honorable R. Ferrell Cothran, Jr. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Undersigned counsel represented the State of South Carolina. Judge Cothran subsequently denied relief by order dated August 26, 2013. Judge Cothran denied Petitioner's motion pursuant to Rule 59, SCRCP, on June 26, 2014.

STATEMENT OF FACTS

Jackson sexually assaulted his fifteen year old biological daughter (victim). Victim's mother took her to the clinic when victim complained about vaginal bleeding and burning from urination. They went to a clinic that was closed. At this point, victim disclosed that her father had sex with her that morning. Her mother took her to the Aiken Regional Emergency Room. Medical personnel performed a sexual assault kit. Semen swabbed from victim's panties was later found to be consistent with Jackson's DNA. It was a one in 23 million match. App. pp. 26-27. Both the prosecutor and counsel noted that victim had recanted the allegations several times. App. pp. 28-29. The prosecutor attributed the recantation to family pressure and noted that victim told her several times in detail what happened. Victim also disclosed abuse to the nurse at the hospital and provided a "compelling" forensic interview providing a "very believable disclosure." App. pp. 28-29. The prosecutor reported that trial was scheduled for the following morning and victim "was prepared to tesify but it was extremely difficult for her to testify against her father about this." App. p. 29, lines 11-15. Counsel noted the dilemma as follows: "And I'm sure [victim is] telling [prosecutor] what [prosecutor] needs to hear. And she's telling us what we want to hear. But it's made this more difficult." App. p. 31.

Jackson pled guilty and advised the plea court that he understood he had a right to trial, that he wanted to plead guilty, that he was satisfied with counsel's representation, that in his opinion counsel had enough time to prepare, and that he was guilty of the charged offense. App. pp. 24-26.

At the PCR hearing, the prosecutor noted that victim's mother came into the office

and insisted the crime never happened. Victim's mother claimed that she was informed the DNA did not match, but the prosecutor informed victim's mother that this was not true, that the DNA fit, but the sample was not enough to call it a match. App. pp. 119-120. Victim's mother did not believe the prosecutor; she got back with Jackson. Mother later brought victim back to the office and said victim recanted. Victim was quiet and unwilling to talk about it. The prosecutor noted she felt she had sufficient evidence despite the recantation to go forward with trial. App. pp. 120-21.

ARGUMENT

Probative evidence supports the PCR court's finding that Petitioner failed to prove he did not freely and voluntarily plead guilty where probative evidence indicates counsel was prepared for trial, where Petitioner was aware of the evidence in the case, and where Petitioner failed to provide probative evidence of what additional benefits would accrue from further preparation.

Jackson contends his plea was involuntary because counsel's performance was ineffective. Jackson primarily relies on his own assessment and the assessment of family members that counsel was not prepared for trial. Jackson fails to show any evidence of what further investigation would have yielded. Jackson also claims he was forced to lie to the plea court. The record shows counsel was prepared for trial and the PCR court did not err in denying relief.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668 (1984).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

With respect to guilty plea counsel, an applicant must show a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would insist on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592

(2009); Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001). The Fourth Circuit has recognized that determining prejudice is an objective inquiry depending "on the likely outcome of a trial had the defendant not pleaded guilty." Meyer v. Banker, 506 F.3d 358, 369 (4th Cir. 2007).

The PCR applicant bears the burden of proving the allegations in their application by competent evidence. Bannister v. State 333 S.C. 298, 509 S.E.2d 807 (1998); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). On certiorari from a post-conviction relief proceeding, reviewing courts apply an "any evidence" standard of review. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). The findings of the PCR court will be upheld if supported by any probative evidence. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In so doing, reviewing courts give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005).

Jackson's petition is somewhat scattershot and makes a general allegation that counsel was unprepared. This is based mostly on Jackson's testimony and testimony of family members that counsel seemed unprepared. It is not backed by substantive evidence showing what additional benefits would have accrued from additional investigation. Davis v. State, 326 S.C. 283, 288 (1997) (finding circuit court erred in granting relief on claim counsel was unprepared for trial at the time of the plea because PCR applicant failed to show what additional benefits would accrue from further investigation).

In Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997), the circuit court found that Satterwhite's plea was involuntary because Satterwhite believed his counsel was not prepared for trial. Id., 325 S.C. at 258, 481 S.E.2d at 711. This Court reversed the grant of

relief, noting that at the plea, Satterwhite was satisfied with counsel's services. The Supreme Court found that Satterwhite's "*belief* that counsel was unprepared for trial [when Satterwhite pled guilty] is not evidence that counsel was, in fact, not prepared." Id., 325 S.C. at 259, 481 S.E.2d at 712 (emphasis in original).

In Whetsell v. State, 276 S.C. 295, 298, 277 S.E.2d 891, 892-93 (1981), this Court observed the following:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . . .

(quotations and citations omitted).

The PCR court concluded as follows:

> After having listened to extensive evidence and testimony presented at the PCR hearing, this Court concludes most, if not all, of the evidence was known at the time of trial, and Applicant merely chose to plead guilty to avoid uncertainty. This is the proper reason for pleading guilty. Applicant and his family's apprehension about the case and counsel does not amount to ineffective assistance of counsel, because counsel proved himself to be a capable, experienced attorney who diligently investigated the facts and law of the case and made a reasonable determination as to the likely result of trial. Applicant and his family's apprehension about the outcome of the trial was warranted. This Court believes that after a fair trial and despite the best efforts of counsel, Applicant would have been convicted. However, their apprehension concerning the quality of counsel's representation was unfounded and did not render the plea involuntary.

App. pp. 300-01 (citation omitted).

Probative evidence supports the PCR court's ruling. Several fact witnesses testified at the PCR hearing. Counsel acknowledged interviewing the witnesses and noted their testimony was consistent with his prior conversations with these witnesses. The witnesses potentially narrowed the time frame for when the assault occurred, but counsel testified there was still a window of opportunity for the crime to have been committed. App. pp. 248-49.

Counsel was also aware of victim's recantation. Further, counsel interviewed the victim. Counsel was aware though that the guardian ad litem felt Victim was being manipulated. Counsel knew it was uncertain how Victim would testify and this was a risk in going to trial. App. pp. 248, lines 13-24. But counsel is not required to know the unknowable, how victim would ultimately testify on the day of trial. Counsel despite his interview cannot reasonably have been expected to be clairvoyant and know with any certainty how victim would testify. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel was not ineffective for failure to interview the victim who already gave a damaging statement to the police – counsel, "unless clairvoyant, could not have reasonably known that any additional benefit would accrue to his client").

Jackson presented a counselor with forensic interviewing experience. However, the substance of her testimony is she believed victim's recantations, which is not admissible evidence. "[I]t is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013). Jackson further suggests the counselor could have helped prepare for trial or assist counsel in assessing victim's credibility, but ultimately, the jury would determine victim's testimony on the day she testified, and not even victim herself

could predict how she would have testified. Counsel was impressed with her testimony at the PCR hearing but admitted he did not know what she would have lent to the case. App. p. 250. The expert had little to no utility, and therefore counsel's performance in this regard was not deficient, nor was Jackson prejudiced.

Jackson further contends he should not have been allowed to plead guilty because he never admitted to counsel he was guilty. Jackson argues he was forced to lie to the plea court. Such a position is untenable; Jackson was responsible for providing truthful answers at his plea to the extent it is believable that he was lying about being guilty or being satisfied with counsel. See Wolfe v. State, 326 S.C.158, 165, 485 S.E.2d 367, 370-71 (1997) (Counsel's advice that questions were routine was not an invitation to answer the plea court's questions untruthfully). Counsel testified he "certainly didn't advise [Jackson] to lie." App. p. 251, line 15. Counsel testified he would have gone to trial if Jackson wanted a trial, but he thought it was a good plea deal. App. pp. 268-69.

Probative evidence supports the PCR court's ruling. Counsel interviewed the fact witnesses testifying at the PCR hearing. Counsel reviewed the evidence, including the DNA evidence and the forensic interview. App. p. 266. He was familiar with the incredible accidental transfer testimony presented at the PCR hearing, which the PCR court found unbelievable. App. p. 259, p. 262. Jackson failed to prove prejudice beyond extreme conjecture. The PCR court's findings are supported by probative evidence.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. If this Court should see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY: _____
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ATTORNEYS FOR RESPONDENT

November 16, 2015.

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

RUSSELL JACKSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

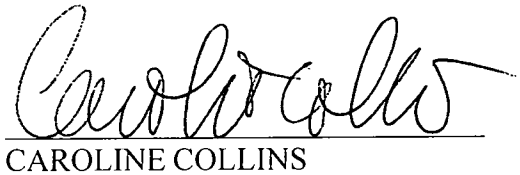
RESPONDENT.

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:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 12725
Columbia, SC 29211

This 16th day of November, 2015



CAROLINE COLLINS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

November 16, 2015

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

Re: **Russell Jackson v. State of South Carolina**
Appellate Case No. 2014-001651
Lower Court Case No. 2012-CP-02-0321

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

David Spencer
Senior Assistant Attorney General
SC Bar No. 68571

DS/cc
Enclosures

cc: Tricia A. Blanchette, Esquire (2 copies)