

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2014-002285

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FEB 19 2016

SC SUPREME COURT

Terrance McCall, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Should this Court deny review where the record supports the PCR judge's finding that Petitioner failed to show that Counsel's performance was deficient or that any alleged deficiency prejudiced him where Petitioner pleaded guilty and received a negotiated sentence of twenty years imprisonment and where Counsel testified she never told Petitioner that he was facing a life sentence if he was tried for kidnapping?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Petitioner was indicted at the May 2010 term of the Spartanburg County Grand Jury for armed robbery and possession of firearm during commission of a violent crime (10-GS-42-2093, counts one and two), kidnapping and possession of firearm during commission of a violent crime (10-GS-42-5791, counts one and two), two counts of assault and battery of a high and aggravated nature ("ABHAN") (10-GS-42-2090, -2092), pointing and presenting firearms at persons (10-GS-42-2089), and resisting arrest with a deadly weapon (10-GS-42-2091). Petitioner was represented by Andrea Price, Esquire.

In exchange for Petitioner's guilty plea, the charges for resisting arrest with a deadly weapon (10-GS-42-2089), and kidnapping and possession of a firearm during the commission of a violent crime (10-GS-42-5791, counts one and two) were *nolle prossed*. Petitioner pleaded guilty to the remaining charges as indicted on January 31, 2011, before the Honorable J. Derham Cole. Pursuant to a negotiated sentence, Judge Cole sentenced Petitioner to confinement for concurrent terms of twenty years for armed robbery, ten years for each count of ABHAN, and five years each for pointing and presenting and possession of a weapon during commission of a violent crime.

A timely Notice of Appeal was filed on behalf of Petitioner. Pursuant to Rule 203 (d)(1)(B)(iv), SCACR, the South Carolina Court of Appeals dismissed the appeal by written Order filed April 18, 2011. The Remittitur was issued May 18, 2011.

Petitioner filed an application for post-conviction relief ("PCR") on December 12, 2011. Respondent made its Return on September 25, 2012. An evidentiary hearing into the matter was convened on January 22, 2014, at the Spartanburg County Courthouse, before the Honorable Roger L. Couch. Petitioner was present and represented by Leah B. Moody, Esquire. Applicant

testified on his own behalf and Andrea L. Price, Esquire, ("Counsel") testified on behalf of Respondent. By written Order filed October 1, 2014, Judge Couch denied and dismissed Petitioner's application for PCR.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

This Court should deny review because the record supports the PCR judge's finding that Petitioner failed to show that Counsel's performance was deficient or that any alleged deficiency prejudiced him where Petitioner pleaded guilty and received a negotiated sentence of 20 years imprisonment and where Counsel testified she never told Petitioner that he was facing a life sentence if he was tried for kidnapping.

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel's

unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial.” Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

This Court should uphold the PCR judge's findings because there is ample evidence in the record to support them. Petitioner alleged he received incorrect advice from Counsel regarding his possible exposure in that Counsel advised him that kidnapping carried a life sentence and that he would only serve sixteen years of his negotiated twenty year sentence. (App. p. 168). The PCR judge found that Petitioner "failed to meet his burden of proof as to all allegations of ineffective assistance of counsel." (App. p. 167). The PCR judge found Counsel's testimony to be more credible than Petitioner's testimony. (App. p. 168). The PCR judge also found Petitioner's testimony that he would not have pleaded guilty but for Counsel's advice about

his sentencing exposure was incredible. (App. p. 168). This Court should give deference to those findings. Drayton v. Evatt, 312 S.C. 4, 11-12, 430 S.E.2d 517, 521 (1993) ("[This Court] give[s] great deference to a judge's findings where matters of credibility are involved since [it] lack[s] the opportunity to directly observe the witnesses.").

Here, if Petitioner had been tried on all charges and convicted, he would have faced a potential total of 110 years in prison if the sentencing judge had ordered his sentences to be served consecutively rather than concurrently. (App. pp. 122-23). He was charged with armed robbery and possession of a firearm during commission of a violent crime, kidnapping and possessions of a firearm during commission of a violent crime, two counts of ABHAN, and pointing and presenting firearms at persons and resisting arrest with a deadly weapon. As part of the plea agreement, the State agreed to dismiss the kidnapping charge and the resisting arrest with a deadly weapon charge. (App. pp. 5-6; pp. 173-84). Petitioner ultimately chose to plead guilty to a negotiated 20 year sentence.

The plea court informed Petitioner that parole eligibility is determined by state law and the parole board makes the decision if there is to be an early release. (App. p. 14-15; p. 17-18). The PCR judge correctly found the issue of 80% versus 85% for parole eligibility was a collateral matter and would not constitute an error such that a PCR should be granted. Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983) (affirming the denial of post-conviction relief because appellant failed to prove his attorney's erroneous advice concerning parole eligibility induced guilty plea); Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994) abrogated by Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998).

Petitioner alleged he received ineffective assistance of counsel because he was under the impression he would have to serve 80% of his 20 year sentence as opposed to 85%. Applicant

also alleged that Counsel advised him he was facing a life sentence if he was convicted of the kidnapping charge. Counsel testified that she "felt that, under the circumstances, with all the time he could potentially face, that the negotiated 20 was [an] excellent option for him. And [she] urged him to accept the offer." (App. p. 130, lines 19-21). Counsel further testified that she "advise[s] all of [her] clients that ultimately the discretion of how much time they will serve is determined by the department of corrections." (App. p. 133, lines 1-6). Counsel further testified that she does not usually discuss 85%, but, rather, tells her clients to be prepared to serve their entire sentence. (App. p. 133, lines 6-8).

Petitioner testified at the PCR hearing that Counsel told him he was facing a life sentence on his kidnapping charge if he went to trial. (App. p. 85, lines 7-10). Petitioner testified he chose to plead guilty rather than face life. (App. p. 89, lines 6-9). Counsel testified she never informed him he was facing a life sentence, but rather testified that she informed him kidnapping carried up to 30 years (App. p. 141, line 11-p. 142, line 14) and that on the date of his plea he understood that kidnapping carried up to 30 years. (App. p. 149, lines 9-17). Counsel testified that she told Petitioner that if he "went to trial and the judge chose to run [his sentences] consecutively—which that is always his or her choice—that, that carried 30 years, as well as his other charges, which were very substantial, and if those were run consecutively, it could amount to a life sentence for him at his age, as I was—he was in his early 40s when I began representing him."(App. p. 126, lines 21-25).

The PCR judge denied and dismissed Petitioner's PCR finding Petitioner failed to satisfy his burden of proving ineffective assistance of counsel. The PCR judge further found that Petitioner faced serious charges and substantial time resulting from an altercation with police in which Petitioner took an officer's gun, and found that Counsel properly advised Petitioner to

take the plea offer of a negotiated twenty years with the dismissal of the kidnapping charge, especially in light of the fact that the victims were police officers and the victims were present at the plea.

This Court should deny review because there is ample evidence in the record to support the PCR judge's findings. Proof of ineffective assistance requires proof of both deficient performance and prejudice. Here, Counsel testified she did not tell Petitioner he was facing life on the kidnapping charge. The judge found her testimony was more credible than Petitioner's. Accordingly, the judge correctly found there was no deficiency or prejudice.

Likewise, regarding Petitioner's claim that Counsel misadvised him that he would only serve 16 years, or 80% rather than 85%, Counsel testified not only that she tells her clients to be prepared to serve their entire sentence, but also that the decision as to how much time they serve is determined by the Department of Corrections. (App. p. 133, lines 4-8). Petitioner was sentenced to twenty years pursuant to a negotiated plea, and in exchange for his plea, the State dropped the kidnapping and resisting arrest with a deadly weapon charge. Counsel testified that Petitioner agreed that he took the gun from the police officer at the traffic stop. (App. p. 134). Counsel testified that the officers were present at the courthouse to testify at Petitioner's trial and that she advised Petitioner that "it is always hard to determine what a jury is going to say or do, but that, if they believed the officer, then, [he] was looking at some very substantial time." (App. p. 137, lines 5-7). The record reflects that Petitioner was likely to be convicted of most, if not all charges. Accordingly, the record supports the PCR judge's finding that Counsel's performance was not deficient and that Petitioner failed to show that but for counsel's alleged deficient performance, he would not have pleaded guilty but would have insisted on going to trial.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's 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: 
ATTORNEYS FOR RESPONDENT

February 19, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge
Appellate Case No. 2014-002285

TERRANCE MCCALL, #339911,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

Tiffany L. Butler, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 19th day of February, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

February 19, 2016

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FEB 19 2016

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Terrance McCall v. State of South Carolina
Appellate Case No.: 2014-002285

Dear Ms. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: Tiffany L. Butler, Esquire