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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-000809

Charles J. Woodruff, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- I. Should this Court deny review because the issue is not preserved for this Court's review?
- II. Should this Court deny review because the record fully supports the post-conviction relief judge's findings that Counsel was not ineffective for not objecting to the State's comments on sentencing at Petitioner's plea hearing where Petitioner adamantly rejected a twelve year plea offer twice before and knew that he was pleading "straight up" and that his exposure was five to thirty years?
- III. Should this Court deny review because the record contains ample evidence supporting the PCR judge's finding that Petitioner's plea was entered voluntarily, knowingly, and intelligently?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was true bill indicted at the December 2012 term of the Spartanburg County Grand Jury for distribution of crack cocaine—third offense (2012-GS-42-5566). James Cheek, Esquire, represented Petitioner. On February 12, 2013, Petitioner pleaded guilty without negotiations or recommendations to the lesser-included charge of distribution of crack cocaine—second offense.

Although Petitioner challenged only his conviction for distribution of crack cocaine—second offense (2012-GS-42-5566) in his Application for post-conviction relief, he also pleaded guilty on the same day to eight other charges. Petitioner pleaded to the following: two counts of distribution of crack cocaine—second offense (2012-GS-42-0684, and-5530)¹; possession with intent to distribute crack cocaine (2012-GS-42-0689)²; distribution of crack cocaine within half mile of a school (2012-GS-42-5567); trafficking in crack cocaine, 10-28 grams, second offense (pursuant to Alford³) (2012-GS-42-5532)⁴; possession of a weapon during the commission of a violent crime (pursuant to Alford) (2012-GS-42-5532A); possession with intent to distribute crack cocaine within half mile of a school (pursuant to Alford) (2012-GS-42-5564); and possession of marijuana (2012-GS-42-5533).⁵ Two other charges of distribution of crack cocaine—third offense and one count of possession with intent to distribute marijuana within half mile of a school were dismissed.

¹ These charges were each originally indicted as third offenses.

² This charge was originally indicted as a third offense.

³ North Carolina v. Alford, 400 U.S. 25 (1970).

⁴ This charge was originally indicted as a third offense.

⁵ This charge was originally indicted as possession with intent to distribute marijuana.

The Honorable Benjamin H. Culbertson sentenced Petitioner to imprisonment for concurrent terms of fifteen years of imprisonment.⁶ Petitioner did not appeal his sentence or conviction.

On April 8, 2013, Petitioner filed an application for post-conviction relief ("PCR"). On March 14, 2014, Respondent made its Return requesting that an evidentiary hearing into the matter be held. On January 14, 2015, an evidentiary hearing was held at the Spartanburg County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. James A. Cheek, Esquire, ("Counsel") and Beverly Jones, Esquire, also testified. The court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject conviction, Petitioner's records from the South Carolina Department of Corrections, the Application, the Return, and the guilty plea transcript. On April 6, 2015, Judge Jefferson filed a written order denying and dismissing Petitioner's application for PCR.

⁶ The plea court also revoked the Applicant's probation and imposed the remainder of his seven (7) year active sentence and terminated probation (App. p. 38, lines 11-13).

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)).

ARGUMENTS

I. This Court should deny review because the issue is not preserved for this Court's review.

Respondent respectfully submits, as an initial matter, that the issue, as framed, is not preserved for this Court's review. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "Either party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (issue must be raised to and ruled on by the PCR judge in order to be preserved for review); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (same)). "Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Herron, 395 S.C. at 465-66, 719 S.E.2d at 642-43.

Here, the order dismissing Petitioner's application for PCR contains no finding regarding a failure of Counsel "to object and withdraw Petitioner's guilty plea." (Br. Petr. p. 2). The PCR order only addressed the allegations that counsel was ineffective for "failing to inform [Petitioner] of the penalty ranges associated with his charges, the potential sentences he was facing, the terms of the plea offer, and the consequences of entering his plea" and that "Counsel was ineffective for failing to file a motion to reconsider" the sentence. (App. pp. 123-26). The order did not make a finding regarding counsel's conduct in failing to object to or withdraw the plea. Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, asking the court to rule on that issue. Accordingly, Respondent respectfully submits this issue, as framed, is not preserved.

II. This Court should deny review because the record fully supports the post-conviction relief judge's findings that Counsel was not ineffective for not objecting to the State's comments on sentencing at Petitioner's plea hearing where Petitioner adamantly rejected a twelve year plea offer twice before and knew that he was pleading "straight up" and that his exposure was five to thirty years.

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).

This Court should deny review because there is ample evidence in the record to support the PCR judge's finding that Petitioner failed to show Counsel's performance fell below an objective standard of reasonableness or that he was prejudiced as a result. At Petitioner's guilty plea, the plea judge went through all of his charges, explained all of the potential penalties, and told Petitioner that if he sentenced him to the maximum terms of imprisonment on each and ordered that Petitioner serve them consecutively, he was "looking at 175 years in jail." (App. p. 13, lines 1-22). Petitioner indicated he understood. (App. p. 13, lines 21-22). Petitioner also acknowledged this at his PCR hearing. (App. p. 76, lines 1-12). The judge also explained that several of the charges including the subject charge carried a minimum of five years in prison. (App. p. 14, lines 1-9).

At the guilty plea hearing, the solicitor stated at the beginning of the proceeding that there was "no recommendation." (App. p. 4, line 20). After providing the facts, he informed the judge that "the State [had] something more to add for sentencing at the appropriate time." (App. p. 34, lines 20-21). The solicitor then stated the following:

"Yesterday the officers were prepared to come and address the Court. They are not able to do so today. . . [W]e did negotiate with the defense attorneys to come up with a range where he could look at five to thirty [year] sentence with the understanding they could come in and ask for five and we on behalf of the State and the police may ask for something else. Having said that we told them essentially what we were going to ask for and that would be in the 15 to 20 range."

(App. p. 34, line 24-p. 35, line 21). The court then asked "But you all said you were not making any recommendation; is that correct?" (App. p. 35, lines 24-25). The State stated it "made a recommendation as to the sentencing range with the understanding that we could come in and

ask for a specific number of years and [Counsel] and . . . all along we have negotiated with that in mind." (App. p. 36, lines 1-6). Counsel agreed and added Petitioner "really lobbied for this range because he was hoping the court would consider the minimum sentence[.]" (App. p. 36, lines 9-19).

Petitioner testified at the PCR hearing that on the day of his plea, he understood he was exposed to a sentencing range of five to thirty years. (App. p. 64, lines 9-17). Petitioner testified his understanding of the offer from the state was that there was "no recommendation[.]" and that he "[left] it up to the judge and make the decision from five to thirty years." (App. p. 64, lines 9-17). Petitioner testified he pleaded before Judge Culbertson on an "open" or "straight up" plea. (App. p. 65, lines 8-11). Petitioner testified at the PCR hearing that the solicitor told him "narcotics was . . . [going to] ask the judge for the 15 to 20 years." (App. p. 66, lines 20-24).

Counsel testified Petitioner "was looking at third offenses again and he was looking to go to trial on the third offenses." (App. p. 91, lines 5-9). Petitioner turned down two previous plea offers from the State; the first was a recommendation of twelve years, and the second was a negotiated twelve years. (App. p. 94-95). Counsel testified he explained to Petitioner that

the State meaning the Solicitor's Office, would stand and remain silent on the sentencing explaining to the Court they had already agreed to a reduction in the charges, and it's typically their position, that once they agree to a reduction in the charges, they don't make a recommendation . . . to sentencing, and that would give [Petitioner] the benefit of five to thirty years, State remain silent on the sentencing as far as their recommendation is concerned, and that the narcotic's agents would appear asking for the 15 to 20.

(App. p. 89, line 19-p. 90 line 6).

Counsel testified that at the plea, they waited for "for the narcotics people to come back" to make their recommendation for fifteen to twenty years, but they were not able to come back. (App. p. 91, lines 16-21). Counsel testified that because they could not come back, the solicitor

"put on the record that the State was not making a recommendation, but that had the officers from narcotics been present, they would have asked for 15 to 20 year range of sentencing" and that the solicitor said that "as an officer of the Court, that he had to make the Court aware of what the narcotic agents would have asked for" had they been there. (App. p. 91, lines 21-p. 92, line 5).

Counsel further testified that Petitioner knew that if he went to trial he would have faced twenty-five to thirty years and that he would eventually "be looking at life without the possibility of parole" on those charges. (App. p. 92, lines 12-25). Counsel testified that the State initially did not want to allow Petitioner to plead to anything other than third offenses, which carried a minimum of twenty-five years, so his "efforts were toward getting it down to seconds, which is five to thirty." (App. p. 97, lines 9-14). Counsel testified that the day before Petitioner pleaded guilty, he had worked out a deal with the solicitor in which the State would allow Petitioner to plead guilty pursuant to a negotiated twelve year sentence. (App. p. 98). On that day, the narcotics agents were present and were waiting. (App. p. 99, lines 1-2). He testified "they went along with the twelve years that day" even though they "didn't want to go to twelve years." (App. p. 99, lines 1-7). Counsel testified that when Petitioner turned down the plea offer, they were furious. (App. p. 99, lines 7-9).

Counsel testified he did not recall Petitioner asking him to make a motion for reconsideration, but that even if he had, he would not have done so because it was not in his best interest. (App. p. 99, line 16-p. 100, line 25). Counsel reiterated that Petitioner had been on bond with charges pending when the subject offenses occurred and that "he had been looking at thirty years, and, with his record, and with his handling of the situation," the State and narcotics agents would have requested twenty-five to thirty years on reconsideration. (App. p. 100, lines 2-16).

The PCR judge found that Counsel's testimony was more credible than Petitioner's testimony with regard to all allegations. (App. p. 121). On review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)). Accordingly, this Court should give deference to the PCR judge's finding that Counsel's testimony was more credible.

Here, the record contains ample evidence to support the PCR judge's findings. The State informed the plea judge that the plea was without recommendations or negotiations at the beginning of the plea. The judge then confirmed that it was without recommendation right before he accepted the plea, but after the solicitor informed the court that the State was asking for fifteen to twenty years. Petitioner testified that he understood that he was entering an open plea and that he was exposed to a range for five to thirty years. Petitioner testified he knew that the narcotics officers were going to ask for a fifteen to twenty year sentence. Counsel testified at length regarding his attempts to negotiate a sentence and testified Petitioner rejected a negotiated sentence of twelve years. The record supports the PCR judge's finding that "Counsel did all he could on [Petitioner's] behalf, conveyed all plea offers, and zealously advocated for [him]" and that there was "no evidence that [Petitioner] would have proceeded to trial, but for, any advice from Counsel." (App. p. 122). Accordingly, the record contains ample evidence of probative value to support the PCR judge's findings that Petitioner failed to satisfy his burden of showing that Counsel's performance fell below an objective standard of reasonableness or that Petitioner was prejudiced as a result.

III. This Court should deny review because the record contains ample evidence supporting the PCR judge's finding that Petitioner's plea was entered voluntarily, knowingly, and intelligently.

Lastly, Respondent interprets Petitioner's presentation of the issue as an argument that the PCR judge erred in finding Petitioner failed to satisfy his burden of proving ineffective assistance of counsel. However, to the extent Petitioner instead challenges the PCR judge's finding that his guilty plea was voluntarily, knowingly, and intelligently, Respondent submits this Court should deny review because the record contains ample evidence in support of the PCR judge's findings.

In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Here, Petitioner was fully advised and aware of the charges, possible sentences and enhancements. (App. pp. 10-11; 16-17). The plea judge reviewed Petitioner's constitutional

rights with him at the plea. (App. p. 12). Petitioner indicated he understood the nature of the plea, was pleading freely and voluntarily, and was satisfied with his attorney. (App. p. 19-20). Finally, Petitioner indicated he knew he was facing a potential 175 years in prison if each charge was run consecutively. (App. p. 13). Accordingly, for these reasons and the reasons argued above with respect to ineffective assistance of counsel, the record provides ample support for the PCR judge's finding that Petitioner's guilty plea was entered freely and voluntarily, and this Court should deny review.

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: 
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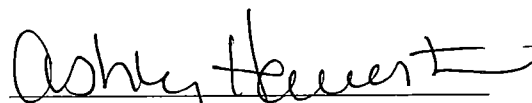
RESPONDENT

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
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This 3rd day of March, 2016


ASHLEY HAWORTH
LEGAL ASSISTANT