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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

2012-CP-21-2184
Appellate Case No. 2015-002082

Vernell Harris.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the PCR judge committed an error of law when he ruled *sua sponte* in the order denying Petitioner's Rule 59(e) motion that Plea Counsel was ineffective for failing to advise Respondent he could not receive a sentence reduction below the mandatory minimum sentence.

2. Whether any probative evidence supports the PCR judge's finding that Plea Counsel was ineffective where Respondent entered a knowing and voluntary negotiated plea to the mandatory minimum sentence, and no prejudice has been shown.

3. Whether the PCR judge committed an error of law when he ruled that Plea Counsel was ineffective for failing to pursue a sentence reduction hearing where counsel had no duty or authority to do so.

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Respondent was true bill indicted at the January 2011 term of the Florence County Grand Jury for burglary first degree (2011-GS-21-0003), burglary first degree (2011-GS-21-0004), burglary first degree (2011-GS-21-0005), burglary first degree (2011-GS-21-0006), burglary first degree (2011-GS-21-0007), burglary first degree (2011-GS-21-0008), burglary first degree and accessory after the fact (2011-GS-21-0013), and burglary first degree and safecracking (2011-GS-21-0014). Henry M. Anderson, Esquire, represented Respondent. On August 4, 2011, Respondent pled guilty as indicted to one count of burglary first degree (2011-GS-21-0014). The remaining indictments were *nolle prossed* as part of Respondent's plea. (App.pp.86-103). The Honorable William H. Seals sentenced Respondent to a negotiated fifteen year term. Respondent did not appeal.

Respondent filed an application for PCR on August 6, 2012 (App.pp.13-19). The State made its Return. (App.pp.20-24). The matter was scheduled for an evidentiary hearing before the Honorable Edgar W. Dickson on October 8, 2014. Respondent was present and represented by Matthew N. Tyler, Esquire. The State was represented by J. Croom Hunter of the Office of the South Carolina Attorney General. (App.pp.25-61). After the evidentiary hearing, Judge Dickson held the case in abeyance until a downward departure hearing could be held. A hearing was subsequently held before Judge Seals on January 27, 2015. Respondent was present and represented at the hearing by William V. Meetze, Esquire. The State was represented by John Jepertinger, Esquire. (App.pp.62-72). In an order filed the same day, Judge Seals denied the motion for a downward departure because the motion was not filed within a year of Respondent's guilty plea and because the Court did not have authority to resentence Respondent

to a term of years below the statutory minimum. (App.p.73). Following the disposition of the downward departure hearing, in a written order signed April 30, 2015, Judge Dickson granted Respondent's application. (App.pp.74-78). The State filed a Rule 59(e) motion, asking Judge Dickson to reconsider his ruling. (App.pp.79-82). Judge Dickson denied the motion by order filed September 16. 2015. (App.pp.83-85). This Petition follows.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This Court will reverse the PCR judge's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004); Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

ARGUMENT

I. The PCR judge committed an error of law when he ruled *sua sponte* in the order denying Petitioner's Rule 59(e) motion that Plea Counsel was ineffective for failing to advise Respondent he could not receive a sentence reduction below the mandatory minimum sentence.

The issue of whether counsel was ineffective for failing to advise Respondent that his sentence could not be reduced below the mandatory minimum was not properly before the Court. In the order denying Petitioner's 59(e) motion, the PCR judge ruled, "Further, plea counsel owed a duty to Mr. Harris to advise Mr. Harris as to the benefits and disadvantages of accepting the plea bargain, and in doing so plea counsel should have realized the potential conflict between the sentence reduction statute and the fact that a mandatory minimum sentence cannot be

suspended." (App.p.84). This finding was improper because the issue was never raised to the PCR judge.

To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007); Lapp v. S. Carolina Dep't of Motor Vehicles, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010). Furthermore, to be timely for purposes of error preservation, an issue must be raised at trial and not for the first time in a post-trial motion. State v. Taylor, 399 S.C. 51, 63-64, 731 S.E.2d 596, 603 (Ct. App. 2012) (holding that an issue first raised in a post-trial motion is insufficient to preserve it for review on appeal where it was not first raised at trial). See Also Kiawah Prop. Owners Group v. Pub. Serv. Comm' n of South Carolina, 359 S.C. 105, 597 S.E.2d 145 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved). Thus, it logically follows that an issue which has not been alleged by the applicant or argued to the trial judge cannot be addressed *sua sponte* by the judge for the first time in the order denying a Rule 59(e) motion.

At no point in the proceedings before the PCR judge was the issue of whether plea counsel was ineffective for failing to advise Respondent that he could not receive a sentence reduction below the mandatory minimum raised. In fact, the issue was never addressed until Respondent received his belated sentence reduction hearing in front of a separate judge, after the close of the PCR evidentiary hearing.[1] Furthermore, the PCR judge's order granting Respondent's application, which was written after the sentence reduction hearing, makes no reference to the issue. The only place the issue is raised or addressed is in the PCR judge's order

[1] Petitioner contends it was improper for the PCR judge to attempt to arrange for and hold his ruling in abeyance until the outcome of the sentence reduction hearing, which Petitioner contends was never guaranteed to Respondent as part of his guilty plea negotiation.

denying Petitioner's 59(e) motion. The *sua sponte* inclusion of this ground for relief was improper and without legal foundation. Accordingly, Petitioner submits the PCR judge committed an error of law by including the ground in the order denying the 59(e), and the PCR judge had no authority to grant relief on that basis.

II. No probative evidence supports the PCR judge's finding that Plea Counsel was ineffective where Respondent entered a knowing and voluntary negotiated plea to the mandatory minimum sentence, and no prejudice has been shown.

There is no probative evidence to support the PCR judge's finding that, "the applicant Harris was deprived of effective assistance of counsel due to the conditions of his plea agreement not being upheld." (App.p.78). 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 pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). 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. 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)).

Respondent entered a negotiated plea to the mandatory minimum sentence of fifteen years imprisonment to one count of burglary first degree. In exchange, the State *nolle prossed* a number of other indictments for burglary first degree. (App.pp.86-103). It is clear from the testimony and the record from Respondent's guilty plea that a sentence reduction was never guaranteed as a condition of the plea; only that it was a possibility. (App.p.8). At the guilty plea, the solicitor told the plea judge,

> "There's, there's been a lot of crimes solved because of Mr. Harris ... So, that's, that's the reason for our negotiation of 15 years, Your Honor. There is also a new statute that's passed within the last year, Your Honor. It's South Carolina Code 17-25-65 that says if Mr. Harris or any Defendant provides the State with useful information in solving crimes after a sentence that they may be eligible to come back into court for some consideration to be given by the judge. You know, if that happens I think the law sets out that he is eligible to come back to see if there's anything that can be done for him. We wouldn't be opposed to that, Your Honor."

(App.p.8, lines 12-24).

Later, Plea Counsel told the judge, "As Mr. DeBerry said under 17-25-65 we anticipate that, you know, hopefully he'll be back in the near future to be before the Court to see whether or not he's eligible for another time reduction." (App.p.10, lines 13-16).

At the PCR hearing, Respondent testified the solicitor did not tell him about the possibility of a sentence reduction until the day of the plea. (App.p.36, lines 11-12). Additionally, the following exchange took place,

> Attorney General: Do you recall the judge telling you that the charge you were pleading to carried fifteen years to life?
> Respondent: Yes, I remember.
> Attorney General: Mandatory fifteen years?
> Respondent: Yeah.
> Attorney General: So you were getting the lowest sentence you could possibly get?
> Respondent: Yes.

(App.pp.37-38, lines 19-1).

And then,

> Attorney General: Okay. But you understand that if you had gone to trial and been convicted that you could not have gotten less than fifteen years in prison?
> Respondent: Yeah, I understand.

(App.p.38, lines 7-10).

Despite the PCR judge's finding that Plea Counsel was ineffective, the record is bereft of any evidence to support that conclusion. While the plea transcript indicates all parties acknowledged that a future sentence reduction hearing might occur, at no point did the solicitor or Plea Counsel make a promise that it would happen. The solicitor told the judge, "You know, if that happens I think the law sets out that he is eligible to come back to see if there's anything that can be done for him." (App.p.8, lines 21-24). The solicitor does not say Respondent has any right to a sentence reduction as part of his plea, he merely states that should Respondent provide substantial assistance in the future, that he may be eligible to determine **if** there's anything that can be done for him. This is corroborated by Plea Counsel's statement that he hopes Respondent will be back "to see whether or not he's eligible for another time reduction," not that he is guaranteed a sentence reduction. (App.p.10, lines 15-16). Respondent even acknowledged at the PCR hearing that a possible sentence reduction was not mentioned to him until the day he pled guilty. Those statements, when examined in light of the entire record indicate a sentence reduction hearing was not a negotiated part of Respondent's guilty plea.

Respondent did not show any prejudice or indicate he would not have pled guilty if not for the alleged promise of a sentence reduction hearing. Respondent's testimony at the plea and at the PCR hearing indicates he was well aware the negotiation was for a fifteen year sentence, and fifteen years was the minimum amount of time he could receive for first degree burglary. Most importantly, Respondent never testified that he would have preferred to go to trial, and such testimony would not have been credible given the extraordinary number of indictments that

were dismissed as part of his plea. All of the credible evidence before the Court indicates Plea Counsel did an exceptional job by getting Respondent the minimum sentence. Furthermore, Respondent indicated at his plea that he was satisfied with Plea Counsel's performance, and he wanted to plead guilty. (App.p.37, lines 11-18). Finally, Respondent cannot show any prejudice because he could not be sentenced to less than the amount of time he already received. This goes back to the solicitor's statement that they might come back to see **if** there was anything that could be done to reduce his sentence. Clearly there was nothing that could be done to reduce the sentence; thus, there can be no prejudice where Respondent is already serving the minimum.

III. The PCR judge committed an error of law when he ruled that Plea Counsel was ineffective for failing to pursue a sentence reduction hearing where counsel had no duty or authority to do so.

The PCR judge improperly found that Respondent was prejudiced by Plea Counsel's performance in failing to pursue a sentence reduction hearing, when counsel had no authority or duty to pursue a sentence reduction.

In the order granting post-conviction relief, the PCR judge wrote, "This court finds that there were a number of discussions between Attorney Anderson and Mr. Harris following his plea, which included ... sentence reduction. However, Attorney Anderson failed to take any action whatsoever with regard to a motion under §17-25-65." (App.p.77). However, Respondent submits the PCR judge erred in finding Counsel was ineffective in failing to pursue the downward departure hearing because the language of S.C. Code Ann. § 17-25-65 clearly indicates the State, not defense counsel, is the party who must move for a sentence reduction. The statute reads, in part:

> (A) Upon the state's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided: (1) substantial assistance in investigating or prosecuting another person;
>
> (C) A motion made pursuant to this provision shall be filed by that circuit solicitor in the county where the defendant's case arose.

S.C. Code Ann. § 17-25-65.

The statute unambiguously sets forth that it is incumbent on the State, not defense counsel to move for a sentence reduction hearing. It is not logical or prudent to find counsel ineffective for failing to do something which he has no statutory authority to do. Such a finding would effectively misconstrue the statute to include defense counsel as a party with an obligation to move for a sentence reduction. In construing a statute, the Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008); Lancaster Cty. Bar Ass'n v. S. Carolina Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). Petitioner submits such a finding of ineffectiveness, and its resulting effect on statutory interpretation would indeed be absurd.

Furthermore, the statute includes no language to indicate that defense counsel retains any duties of representation past the disposition of the charges, in contemplation that a sentence reduction hearing may at some point come to fruition. As such, Petitioner submits the PCR judge erred in finding, "Defense counsel was ineffective for not remaining diligent in his continued representation of applicant, as he should have followed up with the State and pursued the outcome that applicant was promised." (App.p.78). The Sixth Amendment only guarantees effective assistance of counsel at critical stages of a prosecution. State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995). However, a post-trial motion is not a critical stage of criminal proceedings. Id. Clearly a sentence reduction hearing at some nebulous point in time

after the conclusion of a plea or trial would be a post-trial motion; therefore, Plea Counsel was absolved of any further duties of representation. To rule otherwise would extend the duty of representation in all criminal cases past the disposition of the charges. As such, Respondent submits Plea Counsel could not have been ineffective for discontinuing his representation after Applicant pled guilty, and the PCR judge's finding of such was an error of law.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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April 18, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Supreme Court
The Honorable Edward W. Dickson, Circuit Court Judge

VERNELL W. HARRIS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

CERTIFICATE OF SERVICE

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

Chief Appellate Defender Robert M. Dudek
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This 18th day of April, 2015

NORMA BIGBEE
LEGAL ASSISTANT