

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2015 – 001507
Lower Court Case No. 2013-CP-32-3947

Robert Fletcher Herbert, #231709,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
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ATTORNEYS FOR RESPONDENT

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MAY 16 2016

SC SUPREME COURT

TABLE OF CONTENTS

QUESTION PRESENTED..... iii

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW.....3

ARGUMENT4

 Certiorari is not warranted where the jury charge on self-defense
 was proper and where giving a charge that a vehicle is a deadly
 weapon would be an improper charge on the facts of the case..... 4

CONCLUSION13

PETITIONER'S QUESTION PRESENTED

Whether counsel was ineffective in failing to convey a plea offer?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Petitioner was true bill indicted at the July 2012 term of the Lexington County Grand Jury on two counts of burglary, second degree (2012-GS-32-1452; -1454), intimidation of a witness (2012-GS-32-2176), manufacture of destructive device (2012-GS-32-2167), arson, third-degree (2012-GS-32-2166, and burglary, third-degree first offense (2013-GS-32-1259). Petitioner was initially represented by Matthew C. Buchanan, Esquire, and then by Sarah H. Mauldin, Esquire. On June 6, 2013, Petitioner pleaded guilty as indicted without negotiations or recommendations. The State was represented by Asst. Solicitor Angela Garrick, Esquire. The Honorable Edward B. Cottingham, Sr., sentenced Petitioner to ten (10) years' imprisonment on each burglary, second-degree violent charge, ten (10) years' imprisonment for intimidation of a witness, two (2) years' imprisonment for manufacture of destructive device; three (3) years' imprisonment for arson, and five (5) years' imprisonment for burglary, third-degree first offense. Excluding one burglary, second-degree violent charge, all sentences were to be served concurrently. Burglary, second-degree violent (2012-GS-32-1452) was to be served consecutively. Petitioner did not appeal his sentence or conviction.

Petitioner filed an application for post-conviction relief on November 12, 2013. Respondent filed a Return on April 29, 2014. An evidentiary hearing was held on October 15, 2014, at the Lexington County Courthouse. Petitioner was represented by Anna R. Good, Esquire. The matter was reconvened on February 11, 2015, at the Richland County Courthouse where the court received testimony from Counsel Buchanan. The State was represented by J.

Clayton Mitchell of the South Carolina Attorney General's Office. The Honorable DeAndrea G. Benjamin issued an Order of Dismissal on June 22, 2015, denying relief.

Petitioner filed a notice of appeal on May 5, 2015. A Petition for Writ of Certiorari was filed on November 13, 2015. This Return 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 judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Certiorari is not warranted where Counsel Buchanan properly conveyed the fifteen year plea offer to Petitioner who rejected it multiple times.

Petitioner argues the PCR court erred in finding Counsel was not ineffective in failing to convey a plea offer. Respondent submits the plea offer was conveyed to Petitioner who rejected it multiple times.

Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Discussion

Certiorari is not warranted where Counsel Buchanan conveyed the plea offer of fifteen (15) years to Petitioner multiple times. Generally, failure to convey a plea offer constitutes deficient performance. Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422(2009). The PCR

Court discounted Petitioner's testimony and relied on Counsel Buchanan's testimony in making its ruling. (App. p. 97) ("Counsel Buchanan's testimony is persuasive on all issues . . . This Court finds Applicant's testimony to be not credible. This Court finds Counsel Buchanan properly conveyed the August 24, 2012, plea offer to Applicant multiple times."). Petitioner has not set forth any argument as to why the PCR court's credibility findings were erroneous or without support. "We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). The PCR Court's credibility findings are supported by the record. Petitioner's testimony was littered with inconsistencies. At the PCR hearing Petitioner testified he was not conveyed a plea offer by Counsel Buchanan. (App. p. 56, lines 2-13). He further testified Counsel Buchanan only met with him one time. (App. p. 56, lines 5-9). Counsel Buchanan testified at a later hearing that he conveyed and explained the offer to Petitioner on January 14th and February 11th of 2013. (Supp. App. p. 8, line 9 – p. 9, line 5).

To show prejudice from a failure to convey a plea offer, Respondent must demonstrate a reasonable probability he would have accepted the offer. Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012). There was no credible evidence presented to the PCR court that Petitioner would have accepted the fifteen year plea offer.

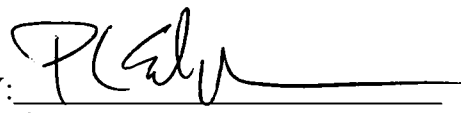
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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Assistant Attorney General

BY: 
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ROBERT FLETCHER HERBERT,

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:

Robert M. Pachak, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 16th day of May, 2016



DEONNA ROGERS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

May 16, 2016

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MAY 16 2016
SC SUPREME COURT

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

Re: Robert Fletcher Herbert v. State of South Carolina
Appellate Case No. 2015-001507
Lower Court Case No. 2013-CP-32-3947

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,

J.
J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/dgr
Enclosures

cc: Appellate Defender Robert M. Pachak (2 copies)
Trisha Allen, Victim Services