STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Union County

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2015-001605

MICHAEL TIM GRAY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTION PRESENTED

I. Does the record support the PCR court's finding that plea counsel was not deficient in failing to relay the State's plea offer to Petitioner where she sent emails to the solicitor acknowledging that Petitioner did not have reliable access to a phone line; where Petitioner gave her two email addresses to reach him; and where instead of emailing him, she called and left one message and sent a letter to his mother's address?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. Petitioner was indicted at the January 2012 term of the Union County Grand Jury for two counts of petit larceny (2012-GS-44-0022, -0025). He was also indicted at the May 2012 term of the Union County Grand Jury for first degree burglary. Melinda Butler, Esquire, represented him. On August 15, 2012, Petitioner pled guilty before the Honorable Michael G. Nettles to both counts of petit larceny, 3rd or subsequent offense as indicted, and second degree burglary as a lesser included offense of first degree burglary. Judge Nettles sentenced Petitioner, pursuant to negotiations, to confinement for ten (10) years for one count of petit larceny, 3rd or subsequent offense; ten (10) years, consecutive, for second degree burglary; and fifty-six (56) days, credit for time served, for the second petit larceny charge. Petitioner did not appeal his conviction or sentence.

On February 4, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on or about August 22, 2013, requesting that an evidentiary hearing be held. An evidentiary hearing was convened on December 10, 2013, in Union County before the Honorable John C. Hayes, III. Laura Saunders, Esquire, represented Petitioner at the hearing. J. Rutledge Johnson, Esquire, of the South Carolina Office of the Attorney General, represented Respondent. Petitioner and his plea counsel testified at the hearing. By an Order of Dismissal signed December 16, 2013 and filed December 17, 2013, the PCR Court denied and dismissed Petitioner's application with prejudice.

Petitioner filed a notice of appeal on or about July 21, 2015. A Petition for Writ of Certiorari was filed on or about December 18, 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

Petitioner argues that the PCR Court erred in failing to find Petitioner's plea counsel (hereinafter "Counsel") ineffective where Counsel allegedly did not take proper measures to relay an eight-year plea offer.

Relevant Law

In a PCR action, the petitioner 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 petitioner 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, 104 S.Ct. 2052, 2064 (1984); Butler, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove plea counsel's performance was deficient. Id. Under this prong, the Court measures plea counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. Because

Petitioner pled guilty, he must show there is a reasonable probability that, but for plea 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).

I. There is evidence of probative value to support the post-conviction relief court's ruling that Counsel was not ineffective in relaying the State's plea offer.

At the guilty plea hearing, Counsel testified she talked to Petitioner on the phone many times in the five months since being appointed to his case. App. 4, ll. 12-13. She also testified that Petitioner never came to her office during this time because of a pending bench warrant but had email communication back and forth with Petitioner's girlfriend regarding these charges. App. 4, ll. 13-18.

The solicitor informed the plea judge that Petitioner's original plea offer expired in April 2012 after he had been given notice of the offer and expiration date and chose not to accept it. App. 9, ll. 19-22. The solicitor stated that Petitioner's case was then placed on the May 2012 trial list and bench warrants were issued after he did not show up for court. App. 9, ll. 22-25. The solicitor further informed the plea court that Petitioner fled the state and got a job in Galveston, Texas. App. 10, ll. 1-3.

Petitioner pled guilty to a negotiated sixteen-year sentence and informed the court that he wished to plead guilty because he was indeed guilty. App. 12, ll. 5-8. The plea court also informed Petitioner of the potential sentences he was facing and the constitutional rights he was giving up by pleading guilty. Petitioner also informed the plea court that he had not been promised anything or threatened to plead guilty and that he was satisfied with Counsel. Ultimately Petitioner pled guilty to burglary second degree (non-violent) as opposed to the original charge of burglary first degree (violent).

At the PCR hearing, Counsel testified that she was appointed to represent Petitioner on March 1, 2012. App. 34, ll. 16-17. She testified that she communicated with the solicitor about pleading or going to trial, and the final plea offer to which Petitioner ultimately pled guilty dismissed two charges. Counsel testified that there were many plea offers from the solicitor that Petitioner did not want to take. App. 36, ll. 17-18.

Regarding her communication with Petitioner, Counsel testified that she was trying to work out his case but when Petitioner was on the run in Texas, she sent letters to his mother's address in Laurens. App. 37, ll. 15-19. She further testified that Petitioner would contact her office by phone every once in a while and they would discuss his case through a phone meeting. App. 37, ll. 20-23. Counsel testified that she was never given an accurate phone number for Petitioner and every time he called, his number would show up as being private or restricted because he was on the run and did not want to be found. App. 37, l. 25 – 38, l. 6.

Counsel testified that the solicitor initially offered a plea recommending a cap of eight years and concurrent sentencing on March 20, 2012, and the offer would expire April 9, 2012. App. 38, ll. 11-18. She further testified that this she sent a letter to Petitioner relaying this plea offer but Petitioner never contacted her office until April 20, 2012. App. 38, ll. 18-20. Counsel also testified that she received this offer via email and forwarded this email to Petitioner at an address that he left with her. App. 65, ll. 9-18. She again reiterated that Petitioner never replied until he contacted her about this offer until April 20, 2012. App. 65, ll. 19-21. Although Counsel testified that she sent an email to Petitioner on April 12, 2012, Court's Exhibit 1 shows this was in relation to the solicitor informing Counsel that Petitioner's case would be on the trial list for May. App. 68.

After the plea's expiration, Counsel testified that Petitioner was noticed for trial at the May 2012 term and a bench warrant was issued after he did not appear. App. 39, ll. 3-9. Counsel testified that she absolutely tried to contact Petitioner for this trial date by sending letters to the address they had for him, since she was never given a contact phone number. App. 39, ll. 19-22.

Counsel testified that she had a phone conversation with Petitioner on June 8th, June 12th, June 19th, and July 31st and visited him in jail after he was picked up on the bench warrant on August 10th. App. 40, l. 20 – 41, l. 5. She testified that the ultimate plea offer was made the day of the plea after the solicitor rejected her counter offer. App. 41, l. 17 – 42, l. 2.

Petitioner testified that the email relaying the eight year offer was not forwarded to him until after the deadline on April 12, 2012 at 3:45PM. App. 51, ll. 5-8. The Court's Exhibit #1, which Petitioner is referring to, says nothing about relaying the eight year offer. Nothing in that chain of emails, ending with Counsel's email notifying her assistant to send a letter to Petitioner, describes the plea offer at all. The April 12, 2012 emails only consist of the following: (1) an email from Counsel to the solicitor correcting the solicitor and notifying him that Petitioner did in fact attend roll call on April 9; (2) a reply email from the solicitor acknowledging that Petitioner did in fact attend roll call and notifying Counsel that his case will be on the May trial list; and (3) an email from Counsel to her assistant advising her to read the solicitor's response and send a letter to Petitioner. App. 68-69. Again, this April 12, 2012 email clearly has nothing to do with Counsel relaying the eight year offer to Petitioner.

In its Order of Dismissal, the PCR Court dismissed Petitioner's application, finding that Petitioner was on the run and did not want to be found for a period of time which contributed to Counsel's difficulty in communication. App. 77. The Court further found that Counsel never had an email for Petitioner and used an email address to forward the plea offer. App. 77.

Analysis

Petitioner's argument is without merit. There is certainly evidence of probative value to support the PCR Court's ruling. Counsel called and left a voicemail to Petitioner, sent a letter to his mother's house (the address she was provided for Petitioner), and emailed Petitioner. However, she was never given a proper phone number to contact Petitioner and only received responses via phone calls from private and restricted phone numbers. Counsel believed that Petitioner used restricted numbers because he did not want to be found. Furthermore, Counsel's communication with Petitioner was hindered greatly when he decided to abscond to Texas for three months. Counsel was able to talk to Petitioner on the phone on three occasions in June and one time in July and spoke with him in jail when he finally returned to this jurisdiction and was picked up on the bench warrant.

Petitioner did not provide the PCR Court with any email documentation from his email address showing that Counsel was late when she relayed the eight year plea offer. As stated above, Petitioner seemed to believe at the PCR hearing that the PCR Court's Exhibit #1 showed that Counsel forwarded him the offer on April 12, 2012, however there is nothing in the three emails in Exhibit #1 that supports his contention. When one actually reads the emails, it is clear that they were referring to Petitioner's appearance at roll call and the solicitor setting his next trial date. He never provided the supposed email that relayed the offer past the deadline, nor did he provide any evidence to meet his burden of showing that Counsel did not relay the plea offer other than his own testimony.

Petitioner bases his current argument on the notion that the entirety of Counsel's communication of the eight year offer lies in her sending a letter to his mother's house in March and in her email to the solicitor where she stated that she left a voicemail. However it is

speculation to assume that Counsel's voicemail was referring to the relaying the plea offer in that sentence and that that sentence contains Counsel's entire communication history with Petitioner. Petitioner made the choices to be on the run, difficult to communicate with, never give Counsel his phone number, and only call from restricted or private numbers. Counsel's own testimony shows that she relayed this offer via an email. Petitioner's testimony says "we never discussed [the eight year offer on the phone]. I didn't get them until the emails." App. 53, ll. 16-18. Thus there is probative evidence to show that Counsel relayed the plea offer.

Accordingly, Petitioner has failed to prove both prongs of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms and that he was prejudiced by Counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

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, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012). There was no credible evidence presented to the PCR Court that Petitioner would have accepted the eight 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. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: _____
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MAY 25th, 2016

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Certiorari to Union County
The Honorable John C. Hayes, III., Circuit Court Judge

MICHAEL TIM GRAY,

PETITIONER,

v.

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:

Mr. Benjamin John Tripp
S.C. Commission on Indigent Defense
PO Box 525
Beaufort, SC 29901-0525

This 25th day of May, 2016.

JOCELYN BAKER
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 25 2016
SC SUPREME COURT

May 25, 2016

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

Re: **Michael Tim Gray v. State of South Carolina**
Appellate Case No. 2015-001605
Lower Court Case No. 2013-CP-44-0035

Dear Mr. 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,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/jyb

Enclosures

cc: Benjamin J. Tripp, Esquire
Trisha Allen, Victim Services (w/o enclosures)