

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BERKELEY COUNTY

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No.: 2015-001636

RECEIVED

JUL 11 2016

SC SUPREME COURT

TOMMIE WEATHERS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

- I. Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, when his criminal defense counsel induced him to plead guilty to kidnaping, strong arm robbery, and first-degree assault and battery by creating the expectation of a Youthful Offender Act sentence, even though Weathers did not meet the definition of a "youthful offender" because of the resulting conviction for kidnaping?

- II. Did Tommy Weathers, Jr. receive ineffective assistance of counsel, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution because his guilty plea counsel failed to advise him that kidnaping is a "no parole" offense that requires service of eighty-five percent of the sentence imposed followed by up to two years in the Community Supervision Program?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Petitioner was indicted at the March 2011 and November 2011 terms of the Berkeley County Grand Jury for armed robbery (2011-GS-08-0400); assault and battery, first degree (2011-GS-08-1678); and kidnapping (2011-GS-08-1677). Steve C. Davis, Esquire, represented Petitioner. On January 14, 2013, Petitioner pled guilty to strong arm robbery lesser included offense of armed robbery; assault and battery, first degree; and kidnapping. On February 11, 2013, the Honorable Kristi L. Harrington sentenced Petitioner to confinement for ten years concurrent on all charges. Petitioner did not appeal his convictions or sentences.

On October 1, 2013, Petitioner filed an application for post-conviction relief. Respondent made its Return on July 14, 2014. An evidentiary hearing into the matter was convened on February 18, 2015 before the Honorable Eugene C. Griffith, Jr., at the Charleston County Courthouse. Petitioner was present at the hearing and represented by Lance Boozer, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent. Petitioner and his plea counsel testified at the hearing. By an Order of Dismissal signed June 3, 2015, and filed June 11, 2015, the PCR Court denied and dismissed Petitioner's application with prejudice. Petitioner filed a Rule 59(e) motion on June 24, 2015. The PCR Court denied this motion by an order signed July 10, 2015, and filed July 13, 2015.

Petitioner timely filed a notice of appeal. A Petition for Writ of Certiorari was filed on or about April 11, 2016. 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 induced Petitioner to plead guilty by creating the expectation that he would receive a Youthful Offender Act sentence.

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 his advice concerning Petitioner's potential sentence.

At the guilty plea hearing, Petitioner informed the court that Counsel indicated that his sentence would be a potential YOA sentence. App. 9, ll. 19-22. The plea judge replied, "You understand that there is no one in this room that knows how I'm going to sentence you here today?" App. 9, ll. 23-25. Petitioner agreed and stated that he still wished to go forward, even when facing a potential sentence of fifty-five years. App. 10, ll. 1-11.

Petitioner's sentencing was deferred, and the judge was presented with a pre-sentence report. At the sentencing hearing, Counsel informed the court that Petitioner could potentially get a YOA sentence on the strong arm robbery. App. 29, ll. 9-12. Counsel continued to stress to the judge for her to consider a YOA sentence on strong arm robbery, presenting many mitigating factors concerning Petitioner's accepting responsibility and ability to move forward with his life. See App. 29-31.

At the PCR hearing Petitioner admitted that he told the plea court that he was not coerced to plead guilty. App. 98, ll. 15-17. He also testified that he confessed to the crimes and told the plea court that he was guilty. App. 100, ll. 8-18.

Counsel testified at the PCR hearing that his strategy concerning the YOA sentence and kidnapping was for Petitioner to receive a time-served sentence on kidnapping and a YOA sentence on the strong arm robbery. App. 110, ll. 3-8. Counsel testified that during the sentencing, the plea judge never explicitly disagreed with his theory nor did she inform

Petitioner that he would not be eligible for a YOA sentence, rather the judge merely reminded Petitioner that the sentencing was up to Her Honor. App. 110, ll. 9-13. Counsel admitted that the scenario of receiving the sentence he hoped for Petitioner was "very rare" but testified that it was feasible and he had "seen it a lot." App. 110, ll. 21, 23. On cross-examination, Counsel again testified that he has seen situations where a defendant gets a time-served "adult sentence" and a YOA sentence on another charge. App. 120, ll. 21-22.

Counsel testified that he told Petitioner that "there was no guarantee that he would get a YOA." App. 111, l. 16. He further testified that he went through every potential charge and potential sentence with Petitioner prior to the plea. App. 111, ll. 22-24. Counsel also testified that he believed Petitioner understood that he was going to ask for a YOA sentence but could possibly get an actual "adult" sentence. App. 111, l. 25 – 112, l. 3.

In its Order of Dismissal, the PCR Court found that Counsel's advice regarding sentencing was not deficient. App. 137. The PCR Court found that "Counsel provide[d] credible testimony that he did not promise [Petitioner] a YOA sentence, but that his strategy for sentencing was to try to obtain a time served sentence for the kidnapping charge so that [Petitioner] would be eligible for a YOA sentence on the remaining two charges." App. 137. The PCR Court further found that Counsel's advice was not improper because Petitioner's strong arm robbery and assault and battery offenses were eligible for YOA sentences even though the kidnapping offense was not eligible. App. 137. The PCR Court found that the sentencing scheme Counsel hoped for was feasible and the sentencing judge had the discretion to sentence Petitioner accordingly. App. 137. The PCR Court also found that Petitioner did not suffer any prejudice as his sentence prediction was wishful thinking and he failed to show that he would have gone to trial but for Counsel's advice.

Analysis

Petitioner's argument is without merit. There is certainly evidence of probative value to support the PCR Court's ruling. First, it is important to note that the PCR Court found Counsel's testimony to be credible and Petitioner's testimony to be not credible given that Petitioner admitted during the PCR hearing that he lied during the guilty plea. App. 137. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

Respondent contends that there is certainly probative evidence to support the PCR Court's ruling that Counsel was not ineffective in advising Petitioner about his potential to receive a YOA sentence on strong arm robbery. The sentencing hearing record and the PCR hearing record reflect that Counsel never advised Petitioner that he would receive a YOA sentence on the kidnapping charge. It was clear from the plea and sentencing transcripts that Petitioner was aware that he was facing a total of fifty-five years and that only the judge had sentencing discretion. Petitioner was informed of the potential sentences of each charge and agreed that he still wished to go forward. See App. 5-6, 8-9. The plea judge even informed Petitioner, "You should assume, sir, you are facing a potential of 55 years" to which Petitioner agreed that he understood. App. 10, ll. 5-11.

Additionally, the PCR Court was correct in finding that Counsel's strategy was not improper. A "Youthful Offender" under S.C. Code Ann. § 24-19-10 is defined as a person who is

"seventeen but less than twenty-five years of age at the time of conviction for an offense that is riot a violent crime, as defined in Section 16-1-60, and that is a misdemeanor, a Class D, Class E, or Class F felony, or a felony which provides for a maximum term of imprisonment of fifteen years or less". Kidnapping is defined as a violent crime in S.C. Code Ann. § 16-1-60 making it ineligible for a Youthful Offender Act Sentence. First degree assault and battery and strong arm robbery are not classified as violent crimes. It would have been completely feasible for the sentencing judge to sentence Petitioner to time-served on the kidnapping charge, as he had already served ten months, and then sentence Petitioner to a YOA sentence on strong arm robbery and first degree assault and battery. Given the many times that Petitioner was informed by Counsel and the plea judge as to the potential sentences he was facing, the PCR Court was correct in characterizing Petitioner's allegation as a result of wishful thinking.

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.").

II. There is evidence of probative value to support the post-conviction relief court's ruling that Counsel was not ineffective in failing to advise Petitioner that kidnapping is an eighty-five percent, no parole offense followed by Community Supervision.

At the PCR hearing, Petitioner testified that he was never informed that he would have to participate in the Community Supervision Program after serving his kidnapping sentence. App. 97, ll. 20-25. Counsel testified that he did not recall telling Petitioner anything about the

Community Supervision Program. App. 122, l. 25. The PCR Court found that Counsel was not deficient in his advice to Petitioner regarding the nature of the charges he was facing and the consequences of pleading guilty. App. 138.

Analysis

This argument is without merit. Post-conviction relief is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). A credit-related claim or challenge to other conditions of confinement are administrative matters and, thus, cannot be raised in a post-conviction relief proceeding. Id.

Our courts have held that community supervision is a collateral consequence of sentencing, of which a defendant is not required to be informed prior to pleading guilty. See Jackson v. State, 349 S.C. 62, 63-64, 562 S.E.2d 475, 475-76 (2002) (rejecting a PCR applicant's argument that his guilty plea was involuntary because his counsel failed to inform him about mandatory participation in a Community Supervision Program in advising him whether to plead guilty while also holding that the applicant's counsel was not ineffective for failing to inform his client about mandatory CSP participation in advising him whether to plead guilty because participation in a CSP is a collateral consequence of sentencing); State v. McGrier, 378 S.C. 320, 331, 663 S.E.2d 15, 21 (2008) (stating that community supervision is a collateral consequence of a conviction for a "no-parole offense"). Respondent submits that this Court should continue to recognize precedent and hold that Counsel was not ineffective for failing to advise Petitioner that he would have to participate in a Community Supervision Program as a result of his kidnapping conviction.

Additionally, Petitioner has failed to show that he was prejudiced by Counsel's lack of advice, as he has provided no credible evidence that he would have rather gone to trial but for the lack of advice about the Community Supervision Program. As such, the PCR Court's ruling should be upheld.

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,

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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:

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This 11th day of July, 2016


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