

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2015 - 002421
Lower Court Case No. 2014-CP-40-05384

WILLIE RITTER, #337044,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

- I. Counsel was ineffective in failing to inform Petitioner of the potential sentencing range on his guilty plea to homicide by child abuse.
- II. Petitioner's guilty plea was not freely, voluntarily, knowingly and intelligently given where both Petitioner's counsel and the sentencing judge failed to inform him that he was subject to a mandatory minimum twenty (20) year sentence for homicide by child abuse.
- III. Counsel was ineffective in that he failed to file post trial motions in a timely manner.
- IV. The sentencing judge failed to adequately inform Petitioner of the potential sentencing range.

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

- I. Whether Counsel's advice to Petitioner that a suspended sentence could be imposed on his guilty plea to homicide by child abuse was reasonable under the prevailing professional norms at the time of the plea
- II. Whether Petitioner pleaded guilty freely, knowingly, and voluntarily because he was advised of the potential sentence Judge Burch could impose.
- III. Whether Counsel made the strategic decision to file a motion to reconsider the twenty year sentence imposed by Judge Burch, and thus was not deficient in failing to file a motion to vacate the guilty plea.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the September 2007 term of General Sessions for Homicide by Child Abuse (2007-GS-40-4465). Petitioner was represented by Jan S. Strifling, Esquire (hereinafter "Counsel"). On July 20, 2009, Petitioner pleaded guilty as indicted. Sentencing was deferred until September 21, 2009, where the Honorable Paul M. Burch sentenced Petitioner to twenty (20) years' imprisonment. (App. p. 208). On September 25, 2009, Petitioner filed a motion to reconsider the sentence. (App. p. 209). The court denied the motion on October 31, 2011, and also denied Petitioner's motion to vacate the guilty plea. (App. p. 210-16). A notice of appeal was filed at the South Carolina Court of Appeals. Counsel von Herrmann perfected the appeal. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence on June 18, 2014. State v. Ritter, Op. No. 2014-UP-232 (S.C. Ct. App. filed June 18, 2014). (App. p. 217-18). The Remittitur was sent on July 3, 2014.

Petitioner filed his application for post-conviction relief (PCR) on September 10, 2014. (2014-CP-40-05384). (App. p. 89-118). Respondent filed a Return on March 12, 2015. (App. p. 119-25). A hearing was held on July 15, 2015 before the Honorable G. Thomas Cooper. (App. p. 126). Petitioner was represented by Counsel William B. von Hermann. (App. p. 126). The State was represented by Assistant Attorney General J. Clayton Mitchell, III. (App. p. 126). Judge Cooper denied Petitioner relief by order filed October 29, 2015. (App. p. 196-207). A petition for writ of certiorari was filed on March 29, 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

I. Counsel's advice to Petitioner that a suspended sentence could be imposed on his guilty plea to homicide by child abuse was reasonable under the prevailing professional norms at the time of the plea.

Petitioner argues Counsel was ineffective in advising him that the mandatory minimum sentence of homicide by child abuse could be suspended. Certiorari is not warranted where Counsel merely advocated for a question of law to be interpreted in Petitioner's favor by asking Judge Burch to structure a sentence in a manner that was commonplace at the time.

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).

Analysis

Petitioner's argument is without merit. The issue raised is whether Counsel was deficient in advising Petitioner that a homicide by child abuse sentence could be suspended below the

mandatory minimum. Petitioner argues that the advice is *per se* unreasonable and, therefore, Counsel was deficient without considering how judges, prosecutors, and defense attorneys interpreted the law *at the time*. The record reflects that judges were routinely suspending sentences below the minimum prescribed by statute. Petitioner argues the advice was unreasonable because Jacobs¹ held that S.C. Code Ann. § 24-21-410 does not give trial judges the authority to suspend sentences for crimes punishable by death or life imprisonment.² That analysis is flawed because it does not consider whether the advice was within the reasonable professional norms at the time of the plea. Petitioner's position amounts to a post-hoc analysis of how Counsel should have interpreted the law. Jacobs was issued nearly two years *after* Petitioner pleaded guilty. Counsel cannot be deemed deficient for failing to anticipate that this Court would hold that mandatory minimum sentences cannot be suspended. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."); See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). This issue must be analyzed through the first prong of Strickland which requires the Court to examine whether the advice was reasonable under the prevailing professional norms.

Counsel's advice was certainly reasonable. Counsel researched the issue and concluded that a suspended sentence was legal. (App. p. 137; 142-43; 164-65; 166). This was the prevailing interpretation at the time. Judges, especially in Richland County, were routinely suspending sentences below mandatory minimum sentences. (App. p. 165-66). Notably, as mentioned by Counsel at the hearing, there was a memorandum issued by the Richland County Chief Administrative Judge for General Sessions to the solicitor and public defender that concluded the

¹ State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011).

² Homicide by child abuse carries up to life imprisonment. See S.C. Code Ann. 16-3-85(C)(1).

practice of suspending sentences was legal. (App. p. 164-65). Counsel cannot be deemed to be deficient by arguing that a statute should be interpreted in his client's favor when similar sentences were so prevalent at the time. Respondent submits that had Counsel not argued that the sentence could be suspended, then Petitioner would have a much stronger argument for deficiency. Thus, considering the prevailing professional norms at the time of Petitioner's plea and the evidence presented at the lower court, Counsel's advice was both proper and reasonable.

II. Petitioner pleaded guilty freely, knowingly, and voluntarily because he was advised of the potential sentence Judge Burch could impose.

Petitioner further argues the PCR court erred in finding Petitioner's plea was made freely and voluntarily entered.³ This argument is also without merit because Petitioner was fully informed of the sentencing range and was advised that Judge Burch could sentence him to a suspended sentence or to life in prison. The transcript shows Petitioner understood his rights and was advised that Judge Burch believed he could lawfully issue a suspended sentence. (App. p. 4-5). In response to Judge Burch's questioning, Petitioner stated that he was not promised anything in exchange for his plea. (App. p. 7). Counsel advised Petitioner that the sentence could be suspended. (App. p. 148; 169). Petitioner concedes that Judge Burch agreed with Counsel's position that the mandatory minimum sentence could be suspended.⁴ All parties at the plea were

³ In Petitioner's fourth issue, he seems to reiterate his argument made in the second issue raised. Respondent combines the two issues and addresses each here under its second issue.

⁴ It is clear that Judge Burch believed the sentence could be suspended but chose to impose an active sentence.

THE COURT: For that particular offense, the maximum possible penalty is up to life imprisonment with a minimum sentence of 20 years. However, that is not what we term a mandatory minimum sentence . . . when I say it's not a mandatory minimum sentence, that means that that minimum sentence portion of the statute can be suspended, as I understand the law.

(App. p. 4-5). Judge Burch also acknowledged that judges were routinely suspending sentences on charges that carried up to life imprisonment: "I mean, there's not a mistake as far as the transcript; that was the understanding of most judges at that time that that was what the law was." (App. p. 85).

in agreement that the sentence *could* be lawfully suspended.⁵ Counsel advised Petitioner of Judge Burch's interpretation and argued for a suspended sentence. (App. p. 27-28; 154).

Tellingly, Judge Burch noted at sentencing that after hearing Petitioner's case in mitigation, he was going to sentence Petitioner to less time than he originally thought. (App. p. 68-69). This shows that while Judge Burch believed a suspended sentence to be legal, he did not believe the facts warranted such a sentence due to the Petitioner's egregious acts in not only leaving the child in the van for seven hours, but also in attempting to obstruct the investigation by instructing employees to lie about how the child died.

Petitioner also challenges the PCR court's prejudice analysis and ruling that Petitioner's testimony that he would have proceeded to trial had he been properly advised was not credible. The PCR court was not persuaded by Petitioner's testimony to that effect. Importantly, Petitioner's testimony was found not credible. (App. p. 199; 200; 201; 202; 203; 204). Petitioner cites his testimony in support of this argument but fails to acknowledge the PCR court's adverse credibility findings. Petitioner pled guilty, in part, because they selected what Counsel believed was an unfavorable jury. (App. p. 144; 145; 179; 192). Counsel testified that there were a number of school teachers, nurses, and working mothers with young children on the panel and did not believe it was likely that Petitioner would be acquitted. (App. p. 144-45). Petitioner agreed with Counsel and pled guilty to avoid a jury trial where the State was prepared to present overwhelming evidence of Petitioner's guilt.

III. Counsel made the strategic decision to file a motion to reconsider the twenty year sentence imposed by Judge Burch, and thus was not deficient in failing to file a motion to vacate the guilty plea.

⁵ Counsel for Petitioner even stated that while he was a prosecutor, it was his position that a homicide by child abuse sentence could lawfully be suspended. (App. p. 74).

Finally, Petitioner argues the PCR court erred in failing to grant relief because Counsel did not file a motion to vacate the guilty plea. Counsel filed a timely motion for reconsideration on September 25, 2009. Counsel von Herrmann was then retained by Petitioner. A hearing was held on October 31, 2011, where Petitioner argued that the conviction should be vacated in light of Jacobs and because the plea was not entered freely, knowingly, and voluntarily.

This argument is without merit. Counsel explained that he believed a motion to reconsider the sentence was the most appropriate motion which gave Petitioner the best chance to have the sentence reduced. (App. p. 150; 170). This was a strategic decision based on Counsel's assessment of the chances of having the sentence modified. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choices of tactics will not be deemed ineffective assistance.). Counsel reasoned that he believed a number of issues could have been argued in support of the motion to reconsider such as Judge Burch possibly holding Petitioner to a "higher standard based on his military background." (App. p. 170-71). The motion to reconsider was abandoned by Petitioner at the reconsideration hearing where a motion to vacate the plea was made.

Regarding whether Petitioner was prejudiced by Counsel's failure to file a motion to vacate the plea, Petitioner failed to present any evidence or testimony at the hearing that would have supported a motion to vacate. Petitioner conclusively argues on appeal that if the motion to vacate was filed, then it would have been successful. Petitioner fails to support the argument with any factual analysis or legal grounds on why the motion would have been successful. Furthermore, Judge Burch ruled in his order denying the reconsideration that a properly filed motion to vacate would fail on the merits. (App. p. 210-16). Judge Burch ruled that sentencing, and the knowingly and voluntary nature of the plea were not affected by Jacobs. Therefore,

Petitioner has failed to show that if a motion to vacate had been made that it would have been successful.

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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August 1, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2015-002421

Willie Ritter, #337044,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**W. Bertram Von Hermann
Von Hermann Law Firm
216 Elm Street
Conway, SC 29526-5118**

This 1st day of August, 2016.



J. Clayton Mitchell
ATTORNEY FOR RESPONDENT

SWORN to before me this 1st day of August, 2016.



Notary Public for South Carolina.
My Commission Expires: 04-28-2025