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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge
The Honorable James R. Barber, III, Post-Conviction Relief Judge

Appellate Case No. 2014-002397

Marshall Heath Collins,Respondent,

v.

State of South Carolina,Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
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STATEMENT OF ISSUES ON APPEAL

1. Did the PCR judge err in finding trial counsel was ineffective in failing to request a continuance?
2. Did the PCR judge err in finding trial counsel did not properly handle the issue of the expired plea offer?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Respondent at the June 2010 term of General Sessions for trafficking methamphetamine (2010-GS-39-0937) and at the November 2010 term for possession of a weapon during commission of a violent crime (2010-GS-39-2142). (App.pp.418-19; pp.421-22). John W. DeJong, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty.¹ On December 1, 2010, the Honorable G. Edward Welmaker sentenced Respondent to concurrent terms of twenty-five (25) years for trafficking methamphetamine (10-28 grams), third offense and five (5) years for possession of a weapon during commission of a violent crime. (App.p.317; p.417; p.420).

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. (App.pp.320-39). The court of appeals affirmed Respondent's convictions and sentences. State v. Collins, Op. No. 2012-UP-356 (S.C. Ct. App. filed June 13, 2012). (App.pp.353-54).

Respondent filed an application for post-conviction relief (PCR) on July 6, 2012 (2012-CP-39-0993). (App.pp.355-64). A hearing was held at the Pickens County Courthouse on August 25, 2014. (App.pp.371-407). Respondent was present and represented by John M. Mussetto, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. In an order filed October 23, 2014, the Honorable James R. Barber, III granted relief and ordered a new trial. (App.pp.409-16).

¹ The State also brought to trial indictments for possession with intent to distribute Alprazolam and Oxycodone (2010-GS-39-0938, -0939). After the jury indicated they could not reach a verdict on these charges, the parties agreed to accept verdicts on the other two charges only. (App.pp.308-09).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. See Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC.

ARGUMENT

I. The PCR judge erred in finding trial counsel was ineffective in failing to request a continuance.

The PCR judge erred in finding trial counsel was ineffective in failing to request a continuance after the indictment for possession of a weapon during commission of a violent crime was served upon Respondent the morning of trial. There is no probative evidence to support the PCR judge’s findings.

A.

Prior to the commencement of trial, trial counsel noted the trafficking charge was the only charge listed on the trial docket and that the indictment for possession of a weapon during the commission of a violent crime had just been served upon Respondent. (App.p.7). The assistant solicitor stated he had informed trial counsel in an email² that the possession of a weapon charge

² The assistant solicitor’s November 12, 2010 email was made a part of the record. (App.pp.9-11).

was also going to be tried and sent him a copy of the indictment. (App.pp.7-8). Trial counsel admitted he had been provided with the indictment the week before. (App.p.9). Trial counsel told the trial judge he had never discussed the possession of a weapon charge with Respondent and the court stood in recess. (App.pp.12-13). After the break, trial counsel reiterated his objection to a trial on the possession of a weapon charge but stated he could “try” to go forward. (App.pp.13-14). The trial judge found trial counsel had notice of the indictment prior to trial. (App.p.14). The jury was selected and the trial judge conducted a suppression hearing. The trial judge determined the evidence was “properly seized after a proper search” and denied trial counsel’s motion to suppress. (App.pp.109-12).

The facts as presented at trial were extremely straightforward (and substantially the same as those presented at the suppression hearing). Officer Joshua Blair saw a vehicle lingering at a stop sign at approximately 1:30 a.m. and noticed the tag light was not working. (App.pp.128-30). Officer Blair stopped the vehicle and saw the tag light was, in fact, operational but had “a faint glow” and “it wasn’t enough to make the tag where you could read it at a distance.” (App.p.131). Officer Blair noted Respondent acted suspiciously in only opening his window a few inches and failing to make eye contact. (App.pp.131-32). As Officer Blair was checking Respondent’s information, he fled the scene on foot (while putting on a backpack). (App.pp.133-34). Respondent kept running though Officer Blair yelled at him to stop. (App.pp.134-35). Respondent ran into a tree and fell to the ground. (App.pp.135-36). Officer Blair and Officer Joseph Sapp placed handcuffs on Respondent while the backpack was still on his back. (App.pp.137-38; p.227). The officers found a loaded handgun in “the lower part of the backpack that he had on, which his hands were accessible to.” (App.p.139; pp.229-30). Without removing

the handcuffs, the officers took the backpack off Respondent's back. (App.p.142; p.230). The officers determined they would take Respondent into custody and performed an inventory search of the backpack – where they found methamphetamine and pills. (App.pp.142-46; pp.231-32).

B.

At the PCR hearing, Respondent stated he did not know he was going to be tried on the possession of a weapon charge until he was served with it on the day of trial. (App.p.383). Respondent stated he and trial counsel discussed the matter and that trial counsel “said that he thought that maybe they was going to try and slip that in the backdoor on us. And I kind of thought it was odd why he wouldn't say that to me earlier, but I just let it be handled the way it was.” (App.p.384).

Trial counsel testified he was the second attorney in this case and filed discovery motions. (App.p.395). Trial counsel testified his first meeting with Respondent was on October 14, 2010 and that “the case got old” while Respondent's first attorney was on the case. (App.pp.395-96). Trial counsel testified he and Respondent reviewed discovery materials, elements of the charges, and penalties. (App.p.397). Trial counsel testified the assistant solicitor had told him the possession of a weapon charge would be sent to the grand jury but confirmed it was not served upon Respondent until the morning of trial. (App.p.398). Trial counsel testified Respondent did not tell him on the morning of trial that he wanted a continuance. (App.pp.402-03). Trial counsel testified he had adequate time to prepare the case for trial and noted “it was not a complicated case.” (App.p.403). Trial counsel testified that, in retrospect, he was not sure he should have requested a continuance because of the late presentment of the possession of a weapon charge because “it certainly was not the major problem we were facing.” (App.p.404).

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent "met his burden of proving trial counsel should have requested a continuance based on the fact that [Respondent] was served with an indictment for possession of a weapon during commission of a violent crime the morning of trial." The PCR judge found Respondent "demonstrated he suffered prejudice from the lack of a continuance." (App.pp.412-13). There is no probative evidence to support the PCR judge's findings.

C.

For an applicant to be granted PCR as a result of ineffective assistance of trial 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); Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) (holding a PCR applicant must show both error and prejudice to win relief) (citation omitted). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S. Ct. at 2066. 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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

The PCR judge erred in finding trial counsel was ineffective in failing to request a

continuance at the start of trial. There is no probative evidence to support the finding either that trial counsel was deficient in this regard or that Respondent suffered any prejudice. See Jordan, 406 S.C. at 448, 752 S.E.2d at 540; Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

Respondent failed to demonstrate trial counsel was deficient in failing to request a continuance. Trial counsel was in receipt of the discovery materials and, thus, would have been aware a loaded handgun was found in Respondent's possession when he was arrested. Further, trial counsel was notified prior to trial that the assistant solicitor would be presenting the possession of a weapon charge to the grand jury. Trial counsel was clearly on notice of the existence of – and evidence relating to – this charge prior to Respondent's trial.³ While trial counsel was not appointed to this case for very long, this does not automatically equate to inadequate preparation or representation on his part. "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). Based on the simplicity of the underlying facts of this case – and the fact that trial counsel was on notice that the possession of a weapon charge was tied to the drug charges and would be presented to the grand jury – it is doubtful the trial judge would have granted a continuance in this case. Further, trial counsel testified that, even in retrospect, he did not believe he needed to request a continuance. (App.p.404). Respondent failed to demonstrate trial counsel's representation was deficient and the PCR judge's finding of such is not supported by any probative evidence. See Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011)

³ An indictment is, after all, merely a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005).

(quoting Strickland, 466 U.S. at 687, 104 S. Ct. at 2064 (finding an applicant “must show that his trial counsel’s performance was deficient, meaning that ‘counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the [applicant] by the Sixth Amendment’”).

E.

Respondent also failed to demonstrate he was prejudiced by the lack of a continuance in this case. The facts of this case are simple and straightforward. Trial counsel testified he had adequate time to prepare this case for trial and stated “it was not a complicated case.” (App.p.403). Respondent failed to articulate what trial counsel could have investigated or prepared if he had additional time to consider the possession of a weapon charge. The record is, in fact, devoid of any testimony or evidence to support Respondent’s allegation that he suffered prejudice from the lack of a continuance on the day of trial. Without such, Respondent cannot meet his burden of proving he was prejudiced by the lack of a continuance in this case. See Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (holding the record did not support the PCR judge’s conclusion that counsel’s deficient performance prejudiced petitioner when the petitioner did not show how additional preparation would have resulted in a different outcome); Skeen v. State, 325 S.C. 210, 213–15, 481 S.E.2d 129, 131–32 (1997) (holding when a petitioner fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel’s incomplete preparation); Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) (concluding the denial of the motion for a continuance did not constitute reversible error because the petitioner failed to point to any other evidence or witnesses that could have been produced if a continuance had been

granted); Kibler v. State, 267 S.C. 250, 256, 227 S.E.2d 199, 202 (1976) (noting the PCR judge will not speculate concerning what might have occurred if counsel had conducted further investigation). There is no probative evidence to support the PCR judge's finding that Respondent demonstrated he was prejudiced by the lack of a continuance. See Jordan, 406 S.C. at 448, 752 S.E.2d at 540; Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

F.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. There is no probative evidence to support the PCR judge's finding that Respondent satisfied both prongs of Strickland.

As Respondent failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge erred in granting Respondent's application for post-conviction relief. 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."); see also Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC.

II. The PCR judge erred in finding trial counsel was ineffective in how he handled the issue of the expired plea offer.

The PCR judge erred in finding trial counsel was ineffective in how he handled a plea offer that expired before he assumed representation of Respondent. There is no probative evidence to support the PCR judge's findings.

A.

At the PCR hearing, Respondent stated another attorney represented him prior to trial counsel's appointment in September 2010. (App.p.376). Respondent stated he met with trial counsel in November 2010 and was shown a plea offer⁴ that had been sent to his prior attorney on May 26, 2010. (App.p.380). Respondent stated he had not seen this letter before trial counsel showed it to him. (App.p.380).

Trial counsel confirmed Respondent was initially represented by another attorney and testified his first contact with Respondent was in October 2010. (App.p.395). Trial counsel confirmed he had seen the May 2010 plea offer but could not definitively state how he received it. (App.p.401). Trial counsel testified this plea offer had expired on June 21, 2010. (App.p.401). Trial counsel testified he believed he called the assistant solicitor about the expired plea offer, but could not recall the solicitor's response. (App.p.402; p.405).

B.

In granting Respondent's application for post-conviction relief, the PCR judge found Respondent met his burden of "proving trial counsel did not properly handle the issue of the expired plea recommendation." The PCR judge found Respondent demonstrated deficiency because Respondent "said he was unsure about many of the charges contained in the offer and that he 'wanted more information' before he could have made an intelligent decision as to whether he should have accepted the offer." (App.p.413). There is no probative evidence to support the PCR judge's findings.

C.

⁴ The first page of this plea offer was admitted at the PCR hearing as Applicant's Exhibit 1.

The PCR judge erred in finding trial counsel did not properly handle the issue of the plea offer that had expired several months before he assumed representation in this case. Respondent failed to demonstrate trial counsel was deficient. The State made a plea offer in this case while Respondent was represented by his first attorney. “A prosecutor ‘has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain.’” State v. Blakely, 402 S.C. 650, 658, 742 S.E.2d 29, 33 (Ct. App. 2013) (quoting State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012)). The plea offer, however, expired in June 2010 – three months before trial counsel was appointed to represent Respondent. (App.p.395; p.401). Regardless, trial counsel testified he believed he asked the assistant solicitor about this expired offer (but could not recall his response). (App.p.402; p.405). Even assuming arguendo this conversation did not take place, trial counsel was not under any obligation to have asked for reinstatement of the expired plea offer.

The United States Supreme Court has held “there is no constitutional right to plea bargain.” Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 846 (1977). The Fourth Circuit Court of Appeals has held, in an unpublished opinion, that trial counsel “does not have a general duty to initiate plea negotiations.” See United States v. Pender, No. 12-6806, 3013 WL 1137452, at *2 (4th Cir. March 20, 2013); see also Van Wart v. United States, No. RWT-07-0492, 2013 WL 3788535, at *3 (D. Md. July 18, 2013). As there is no affirmative duty on trial counsel to engage in plea negotiations, it is clear it was not incumbent upon trial counsel to attempt to effectuate the reinstatement of a plea offer that had expired months before he was appointed. To expect this would be patently unreasonable. To prove deficiency, “the proper measure of attorney performance remains simply reasonableness under prevailing professional

norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2065); see also Edwards v. State, 392 S.C. at 456, 710 S.E.2d at 64. It would not have been reasonable under prevailing professional norms for trial counsel to be expected to successfully resurrect a plea offer that had been expired for months before his appointment – especially since trial counsel testified this case “got old” while Respondent was represented by his first attorney. (App.pp.395-96). The Strickland standard does not contemplate that counsel must undertake an affirmative duty in a situation such as the one in the instant case. There is no probative evidence to support the PCR judge’s finding that trial counsel was deficient in how he handled the expired plea offer. See Jordan, 406 S.C. at 448, 752 S.E.2d at 540; Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

D.

Respondent also failed to demonstrate he suffered any prejudice because trial counsel did not somehow effectuate the resuscitation of the plea offer that expired months before he was appointed in this case. Respondent failed to demonstrate both that he would have accepted the expired offer and that the State would not have rescinded it. Rather, Respondent merely stated he was unsure about two of the charges listed in the expired plea offer and that he told trial counsel he “wanted more information” before he could say whether he wanted to plead guilty or go to trial. (App.p.381; p.392). This is not sufficient to prove prejudice.

In Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399 (2012), the defendant argued – and the United States Supreme Court agreed – that his attorney was ineffective in not relaying plea offers and stated he would have accepted one of these offers if he had known about it. While these facts differ from those in Respondent’s case, the Frye Court’s holdings are instructive. The Frye

Court held:

To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law.

Id. at 1402-03. The Frye Court further held that “[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.” Id. at 1409. Respondent, however, did not testify he would have accepted the expired offer. Respondent also failed to show the State would not have rescinded this long-expired offer. It seems most likely, in fact, that the State would have withdrawn or rescinded any offer in this case, as trial counsel was clearly unsuccessful in convincing the State to revisit the plea offer after he had been appointed. Respondent failed to offer any testimony or evidence that he would have accepted the expired plea offer and the State would not have rescinded it. See Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814 (holding the PCR applicant bears the burden of proving the allegations in their application). As such, he failed to meet his burden of proof and there is no probative evidence to support the PCR judge's finding that Respondent demonstrated he suffered any prejudice from the manner in which trial counsel handled the issue of the expired plea offer. See Jordan, 406 S.C. at 448, 752 S.E.2d at 540; Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

E.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that trial

counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. There is no probative evidence to support the PCR judge’s finding that Respondent satisfied both prongs of Strickland.

As Respondent failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge erred in granting Respondent’s application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174; see also Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRPC.

CONCLUSION

For the reasons stated above, this Court should reverse the post-conviction relief judge's decision to grant relief to Respondent in the form of a new trial.

Respectfully submitted,

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Attorney General

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October 3, 2016

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The Honorable Edward W. Miller, Post-Conviction Relief Judge

Appellate Case No. 2014-002397

Marshall Heath Collins, Respondent,

v.

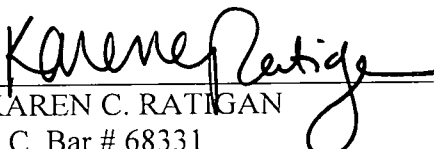
State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Petitioner upon Respondent by depositing a copy of the same in inter-agency mail, addressed to:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 3rd day of October, 2016.


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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 3, 2016

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

Re: Marshall Heath Collins v. State of South Carolina
Appellate Case No. 2014-002397
Lower Court Case No. 2012-CP-39-0993

Dear Mr. Shearouse:

Attached are the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office. The required thirteen (13) additional copies of the Appendix were filed August 17, 2016.

Sincerely,

Karen C. Ratigan
Senior Assistant Attorney General
SC Bar #68331

KCR/jacc

cc: Robert M. Dudek, Esquire
Trisha Allen, Victim Services (without enclosure)