STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-002655

Travis Teasley, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Did trial counsel err in failing to notify Petitioner of when to appear in court and warn him of the expiration of the state's plea offer because this resulted in Petitioner's failure to appear in court as scheduled, the revocation of the plea deal, receipt of a greater sentence at the close of his trial, and a trial held improperly in his absence?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner at the November 2009 term of General Sessions for distribution of crack cocaine, third offense (2009-GS-39-1775) and distribution of crack cocaine within proximity of a school (2009-GS-39-1776). (App.pp.369-72). Steven L. Alexander, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was tried in his absence. (App.p.33). On June 23, 2010, the jury found Petitioner guilty and the Honorable Alexander S. Macaulay sealed the sentences. (App.p.281; p.288). On January 20, 2011, Petitioner appeared in court with Mr. Alexander for sentencing. The Honorable Edward W. Miller levied concurrent sentences of fifteen (15) years imprisonment on each charge. (App.p.293).

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Teasley, Op. No. 2012-UP-493 (S.C. Ct. App. filed Aug. 22, 2012). The South Carolina Supreme Court denied Petitioner's subsequent petition for writ of certiorari by order dated January 23, 2014. The Remittitur was sent on January 31, 2014.

Petitioner filed an application for post-conviction relief (PCR) on May 30, 2014 (2014-CP-39-0673). (App.pp.298-308). A hearing was held at the Pickens County Courthouse on October 19, 2015. (App.pp.314-60). Petitioner was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Perry H. Gravely denied relief in an order filed December 14, 2015. (App.pp.362-68).

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), SCRCP.

ARGUMENT

The PCR judge did not err in finding Petitioner failed to meet his burden of proving he was entitled to post-conviction relief.

Petitioner argues trial counsel erred in his "failure to communicate to [P]etitioner when he needed to accept the plea offer and/or appear for trial and the expiration date of the plea offer." (Cert. Pet., p.9). This argument is without merit.

A.

Pre-Trial Matters

At the start of trial, trial counsel noted Petitioner was not present. (App.p.6). Trial counsel stated he was unable to reach Petitioner the night before "on the phone numbers that I had for him" and that he understood Petitioner's co-defendant had also unable to contact him. (App.pp.6-7). The assistant solicitor moved to try Petitioner in his absence. (App.p.17). The trial judge marked Petitioner's bail form, bond cards, and notices as Court's Exhibits 1-3.

(App.p.17).

Tracy Littleton testified she mailed Petitioner a bond card to appear for trial on June 21, 2010 (which was the previous day). (App.p.18). Littleton testified she mailed these cards to two separate addresses (one of which was indicated as Petitioner's address on the bond form). (App.pp.18-19). Littleton noted she mailed bond cards to these addresses for four previous court dates and Petitioner appeared each time. (App.p.19). Littleton admitted on cross-examination that the bond card for the Belle Air Drive address for this term of court had been returned.[1] (App.p.22). Littleton testified this was the first time Petitioner had been sent a bond card for trial and noted one of the conditions listed in the bond paperwork was that the trial would proceed in Petitioner's absence if he did not appear. (App.p.21; p.23).

Trial counsel moved for a continuance, arguing the last address he had for Petitioner was the Belle Air Drive address, which indicates he did not receive the bond card. (App.p.25). Trial counsel stated he had last spoken to Petitioner the previous Friday and that "at every conversation I have had with him, once he was informed he was on the trial docket, was that he gave every indication he planned to be here." (App.p.26; pp.29-30).

The trial judge stated "I have heard nothing that would suggest that [Petitioner] did not know that he had actual notice" and noted it is a defendant's responsibility to appear at terms of court and "keep the State aware of his current address." The trial judge concluded Petitioner had notice of trial, waived his right to be present, and that – having been warned of this potential consequence – that his trial would proceed in his absence. (App.pp.30-33).

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[1] Littleton stated Petitioner would have to notify her if he changed addresses, as she would have no way of contacting him without a proper address. (App.pp.24-25).

B.

Petitioner's PCR Testimony

At the PCR hearing, Petitioner stated he had three meetings with trial counsel before his case was placed on the trial docket. (App.pp.317-18). Petitioner stated he and trial counsel discussed the State's five-year plea offer (for a second offense) at their last meeting but that counsel said he could "always plea out before trial." (App.pp.318-19; pp.320-21; p.326). Petitioner stated he did not receive any further notifications, did not receive a bond card, and did not change his address with the clerk of court. (App.p.320). In the three months between this last meeting with trial counsel and the trial in absentia, Petitioner stated he did not receive another plea offer or any bond cards. (App.p.321). Petitioner stated he believed he would be going back to court to plead guilty in exchange for a five year sentence but admitted trial counsel said "there wasn't no guarantee that the same plea offer would be there." (App.p.324; p.339). Petitioner stated he never declined the plea offer for five years.[2] (App.p.324).

Petitioner stated the Belle Air Drive address was his home address and he had not moved. (App.p.323; pp.339-40). Petitioner stated he did not receive the bond card for his trial at this address. (App.p.323; pp.339-40). Petitioner stated the other address the bond cards were sent to was Draper Street and he had not lived there in years. (App.pp.323-24; p.339). Petitioner denied he put the Draper Street address on his bond paperwork. (App.p.339).

Trial Counsel's PCR Testimony

Trial counsel testified he sent a letter on June 8, 2010 advising Petitioner of his trial date

[2] Petitioner stated the prior plea offers were for twenty-two years, thirteen years, and eight years. (App.p.325).

and that he sent it to the Belle Air Drive address. (App.pp.343-44). Trial counsel testified the only address he had was the Belle Air Drive address and he was unaware of a Draper Street address. (App.p.344). Trial counsel testified he did not recall Petitioner missing a prior court date. (App.p.344). Trial counsel testified he negotiated the charge with the State to be a second offense. (App.pp.346-47). Trial counsel testified the State agreed to a five year offer, he conveyed the offer to Petitioner, and he advised Petitioner of the last day of the plea offer (and that it would be withdrawn once the case was on the trial docket). (App.pp.347-49; p.352; pp.353-54). Trial counsel testified he contacted the State about extending this offer but the State said a plea at that point would be without a recommendation and that he told Petitioner "it would be up to him but that he should consider an open plea even if they didn't offer the recommendation." (App.pp.351-52). Trial counsel testified that, when he contacted Petitioner on the Friday before the trial, they discussed that the trial was set for the following week. (App.p.356).

PCR Judge's Order of Dismissal

In denying Petitioner's application for post-conviction relief, the PCR judge found "trial counsel properly conveyed the plea offers in this case, [Petitioner] was aware of any expiration dates, and simply chose not to accept any of these offers." The PCR judge also found "[Petitioner] was aware of the trial date in his case and opted not to appear for his trial. This finding is supported by the trial record." (App.pp.365-66).

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 did not err in finding Petitioner failed to meet his burden of proving trial counsel was ineffective. Trial counsel both properly conveyed the plea offer and notified Petitioner of the date of his jury trial.

Petitioner failed to meet his burden of proving trial counsel's performance was deficient. Trial counsel testified he conveyed the five year plea offer to Petitioner. Trial counsel testified he advised Petitioner when the offer would expire and that it would be withdrawn once his case was placed on the trial docket. Trial counsel testified he and Petitioner discussed what would happen if the five year offer was not extended and that he told Petitioner "it would be up to him but that he should consider an open plea even if they didn't offer the recommendation." (App.pp.347-54). The PCR judge specifically found trial counsel's testimony on this issue was

credible. (App.p.365). This finding 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); see also 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."). Petitioner presented no credible evidence to support his allegation that trial counsel did not advise him of the expiration date of the five year plea offer. Trial counsel testified he informed Petitioner when the offer would expire and Petitioner's own testimony was trial counsel told him trial counsel "there wasn't no guarantee that the same plea offer would be there." (App.p.339). Furthermore, it is telling that Petitioner never mentioned to the sentencing judge that he believed he was entitled to be sentenced under the five year plea recommendation. Based upon the full record before this Court, it is clear there is probative evidence to support the PCR judge's finding that Petitioner knew the five year plea offer was no longer viable once his case was placed upon the trial docket. See Jordan v. State, 406 S.C. at 448, 752 S.E.2d at 540.

Trial counsel stated at both the pre-trial motion hearing and during his PCR testimony that Petitioner was aware of the date of his trial. Trial counsel spoke to Petitioner the Friday before the trial was scheduled to begin and stated Petitioner was on notice of the trial and had given every indication that he would appear. (App.p.26; pp.29-30; p.356). The PCR judge specifically found trial counsel's testimony on this issue was credible.[3] (App.p.366). As noted

[3] The sentencing judge also found Petitioner's assertion that he was a family man and not hanging out on the streets "just doesn't ring true." (App.p.296).

supra, this finding must be given great deference. See Drayton v. Evatt, 312 S.C. at 13, 430 S.E.2d at 522; see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. at 567, 629 S.E.2d at 696. Regardless of whether the bond card sent to Petitioner's address at Belle Air Drive was returned, trial counsel had properly advised Petitioner of his trial date. Initially, it should be noted bond cards were sent to both the Belle Air Drive and Draper Street addresses, as the Draper Street address was listed on Petitioner's bond paperwork. In any event, trial counsel provided credible testimony that, as of several days before the trial, Petitioner was aware of the trial date and had not given him any reason he would not appear. Both trial counsel and Petitioner's co-defendant tried – and failed – to contact Petitioner at various telephone numbers the night before. (App.pp.6-7). It is clear Petitioner merely chose not to appear for his trial, as was his right. Based upon the full record before this Court, it is clear there is probative evidence to support the PCR judge's finding that trial counsel notified Petitioner of the date of his jury trial. See Jordan v. State, 406 S.C. at 448, 752 S.E.2d at 540.

Petitioner failed to demonstrate trial counsel's performance and representation in his case were in any way deficient. See Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (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'"). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. As such, he has failed to meet his burden of proving he is entitled to post-conviction relief. See Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) (holding an applicant

must show both error and prejudice to win post-conviction relief) (citation omitted).

E.

As Petitioner failed to meet his burden of proving ineffective assistance of trial 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."); see also Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Attorney General
S.C. Bar # 68331

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

November 1, 2016

STATE OF SOUTH CAROLINA
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The Honorable Perry H. Gravely, Circuit Court Judge

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CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, 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 1st day of November, 2016.

KAREN C. RATIGAN
S.C. Bar # 68331
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT