

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas

DEC 19 2016

The Honorable Frank R. Addy, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-000138

Shelton D. Brown,.....Petitioner,

v.

State of South Carolina,Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

ARGUMENT

 This Court should deny review because there is probative evidence to support the post-conviction relief judge’s finding there was no evidence or testimony presented showing Petitioner was prejudiced when the State requested a “significant sentence.”.....7

CONCLUSION.....11

QUESTION PRESENTED

- I. Should this Court deny review because probative evidence supports the post-conviction relief judge's finding there was no evidence or testimony presented showing that Petitioner was prejudiced when the State requested a "significant sentence?"

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

STATEMENT OF FACTS

On January 21, 2010, Petitioner and Chelsea Williams, his cousin, met a fourteen-year-old girl and went to an abandoned building. App. 5, 11. While inside the abandoned building, Petitioner and Williams held the fourteen-year-old girl down, removed her clothes, and Petitioner raped her. App. p. 11.

On April 18, 2011, Petitioner waived presentment to the Grand Jury and pleaded guilty before the Honorable R. Ferrell Cothran. App. 1. Mark Wise (hereinafter "plea counsel") represented Petitioner at the guilty plea. App. 1.

Pursuant to a written plea agreement, Petitioner pleaded guilty to criminal sexual conduct in the second degree with a minor. An unassociated kidnapping charge and criminal sexual conduct with a minor charge were dismissed as part of the plea deal. There was to be no recommendation as to sentence from the State.

At the guilty plea, the solicitor stated the following:

Because of the short time period in which all these incidents occurred and the nature of the crimes, the parents would ask that the maximum sentence be given to the defendant, Mr. Brown. Your Honor the State would concur in that, although Mr. Brown is not here pleading guilty to all of those. He was charged with them, and the State was prepared to go forward to trial on all of those if he did not accept the plea negotiation with this particular charge. Your Honor, we feel that a significant sentence would be appropriate in this case.

App. 6, 11.

Plea counsel did not object or clarify the statements made by the solicitor. App. 6. Judge Cothran sentenced Petitioner to twelve years' imprisonment out of a possible twenty year range. App. 10. Petitioner did not appeal his guilty plea or sentence.

On April 4, 2012, Petitioner filed his PCR application. App. 12. The State filed its return on September 10, 2012, requesting an evidentiary hearing. App. 20. Petitioner filed an amended

PCR application on December 23, 2013. On October 27, 2015, a PCR hearing was held before the Honorable Frank R. Addy. App. 30. C. Brad Hutto, Esquire, represented Petitioner.

In regards to the solicitor concurring with the victim's request for the maximum sentence, plea counsel testified, "I missed them saying that." App. 56. Plea counsel also testified he did not recall whether the solicitor told him the victims would be asking for a sentence on "the higher end." App. 45. Counsel's only reason for failing to object was that he did not hear it. Petitioner did not testify. No testimony was elicited that Petitioner wanted a trial at any point. No testimony was elicited that Petitioner would not have gone forward with the plea.

The PCR court issued an order of dismissal on January 8, 2016. App. 63. The PCR court found plea counsel ineffective, but found Petitioner failed to prove he was prejudiced by his counsel's failure to object or clarify. App. 68.

On August 31, 2016, Petitioner appealed the court's order of dismissal. This Return to Petition for Writ of Certiorari follows:

I. This Court should deny review because there is probative evidence to support the post-conviction relief judge's finding there was no evidence or testimony showing Petitioner was prejudiced when the State concurred with the victim's request for the maximum sentence.

Respondent interprets Petitioner's presentation of the issue as an argument that the PCR judge erred in finding Petitioner failed to satisfy his burden of proving ineffective assistance of counsel. The PCR Court found plea counsel did not provide effective representation where counsel failed to object when the State concurred in the victim's request for the maximum penalty. However, to the extent Petitioner instead challenges the PCR judge's finding that his guilty plea was voluntarily, knowingly, and intelligently entered into, Respondent submits this Court should deny review because the record contains ample evidence in support of the PCR judge's findings.

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of

reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999).

Here, Petitioner was fully advised and aware of the charges, possible sentences and enhancements. (App. p. 2). The plea judge reviewed Petitioner's constitutional rights with him at the plea. (App. p. 3-4). Petitioner indicated he understood the nature of the plea, was pleading freely and voluntarily, and was satisfied with his attorney. (App. p. 3). Finally, Petitioner indicated he knew he was facing a potential twenty years in prison. (App. p. 2).

At the evidentiary hearing, Petitioner did not testify. No evidence was entered or testimony given that indicated Petitioner would have withdrawn his plea offer if he had known the State would concur with the victim's request for the maximum sentence. Petitioner has failed to present reasons why he should be allowed to depart from his guilty plea. Petitioner has failed to present evidence to establish the second prong of Roscoe, that 'but for' counsel's alleged error Petitioner would have insisted on going to trial. Petitioner carries the burden of proof. There is probative evidence to support the PCR Court's finding that Petitioner failed to prove prejudice.

To the extent Petitioner seeks to characterize the State's request for a substantial sentence as a recommendation on sentencing. The State disagrees. In the context of a guilty plea, a recommendation from the State is a number or range of years, agreed upon between the State and defense counsel, as a settlement between the two parties. The post-conviction relief judge recognizes this fact when he asks the following:

Is this a situation where basically you simply missed what the solicitor was saying or is it a situation where everybody gets to say what they want; the victims get to say, Hey, I want the max; and you get to say, I want probation; and the Judge gets to make the call? How does that usually play out or what is your understanding of what that sentencing agreement or plea agreement means?

App. p. 51.

In a 'straight up' plea the professional norm is not the complete silence of the State. Asking the Judge for a "significant sentence" did not violate the plea agreement. Following the prevailing norm a sentencing judge closely follows the State's recommendation or if he chooses to disregard the State's recommendation the judge diverges from the recommendation only marginally. Many judges will give the defendant the opportunity to withdraw their plea if they are inclined to make an upward departure from the recommendation. Much like the example the judge gave at the PCR hearing, a 'straight up' plea does not require the State to give no opinion on the case unless that is the understanding between the two parties.

However, in this case, the State concurred with the victim's request for the maximum sentence. This Court has held that defense counsel is ineffective for failing to withdraw a defendant's guilty plea when the State disregards the plea deal and requests the maximum sentence. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000). The instant case, while not analogous to Thompson in that the State only concurred with the victim instead of directly asking the court for the maximum sentence, is similar enough that the State concedes plea counsel was in error for failing to clarify the issue. There was no error when the State requested a "significant sentence," as argued by Petitioner's motion, nor would the error have been prejudicial. Petitioner did not receive the maximum sentence or anywhere close to the maximum sentence, nor did the Petitioner present any evidence that he would have withdrawn his plea had

he been given the opportunity to do so. In both Thompson and Jordan¹, the guilty plea was undertaken only after intense negotiations on the eve of trial. In the instant case, the evidence against Petitioner was overwhelming and he never requested or pushed for a jury trial. The only testimony presented was that Petitioner decided to take the plea offer because his cousin, who was alleged to have witnessed the rape, and the victim were going to testify against him. Furthermore, Petitioner had not even been indicted by the grand jury at the time of his guilty plea. Petitioner waived grand jury presentment in order to plead guilty. Pleading guilty was a certainty in this case. Whereas in Thompson and Jordan, the Petitioners received better plea deals at the eve of trial to entice them to plead guilty.

¹ Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988)

CONCLUSION

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

Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

December 19, 2016.

STATE OF SOUTH CAROLINA
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CERTIORARI TO ORANGEBURG COUNTY
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The Honorable Frank R. Addy, Circuit Court Judge

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SHELTON D. BROWN,

PETITIONER,

v.

THE 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:

Tiffany L. Butler, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, SC 29201

This 19th day of December, 2016


BRIANNA ARNONE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 19 2016
S.C. SUPREME COURT

December 19, 2016

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

Re: Shelton D. Brown v. State of South Carolina
Appellate Case No. 2016-000138
Lower Court Case No. 2012-CP-38-0468

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Ruston W. Neely
Assistant Deputy Attorney General
SC Bar No. 100192

RWN/bea
Enclosures

cc: Tiffany L. Butler, Esquire (2 copies)