

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Court of Common Pleas
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2016-001415

RASHAWN MURPHY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

- I. Was the issue of whether Petitioner's trial counsel erred in advising Petitioner to reject the State's offer preserved for review?
- II. Regardless of preservation, is there any probative evidence in the record to support the PCR Court's finding that trial counsel was not ineffective in advising Petitioner to reject the State's plea offer in the case?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In May 2009, the Spartanburg County Grand Jury indicted Petitioner for homicide by child abuse or neglect (2009-GS-42-2210). Christopher P. Thompson, Esquire, represented Petitioner. On March 17, 2011, Petitioner proceeded to trial before the Honorable Letitia H. Verdin and a jury. The jury found Petitioner guilty as indicted. Judge Verdin sentenced Petitioner to life imprisonment.

Petitioner filed a timely notice of appeal. Lanelle Canty Durant, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals dismissed the appeal. State v. Murphy, Op. No. 2012-UP-589 (S.C. Ct. App. filed Jan. 16, 2013). The remittitur was returned to the circuit court on February 4, 2013.

Petitioner filed a PCR application on March 22, 2013 and amended on March 23, 2016 (2013-CP-42-1445), alleging he was being held in custody unlawfully. An evidentiary hearing was convened on March 23, 2016. Petitioner was present and represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire of the South Carolina Attorney General's Office represented the Respondent. The Honorable R. Keith Kelly denied and dismissed the PCR application by order filed June 19, 2016.

Petitioner filed a notice of appeal. His attorney submitted a petition for writ of certiorari and appendix on December 28, 2016. This return follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR 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. The issue of whether Petitioner's trial counsel was ineffective in advising Petitioner to reject the State's offer was not alleged in Petitioner's application for post-conviction relief or amendment thereto nor raised to the PCR court and thus not preserved for review.

Respondent submits Petitioner never alleged trial counsel was ineffective in advising him to reject the State's offer of thirty (30) years in his PCR application or amendment thereto nor did he put forth such an allegation to the PCR court during his PCR evidentiary hearing. However, the PCR court, in an abundance of caution, addressed this issue in its order denying PCR,

Failure to properly advise Applicant regarding plea of not guilty

At the PCR hearing, Applicant testified a plea offer was made on the first day of trial, and that it was an offer of thirty years. Applicant also testified that the relief he seeks in this action is a new trial. Counsel testified that he properly advised his client to proceed with trial for several reasons: (1) the State did not make an offer until the day of trial, (2) the State's offer was a sentence of 30 years, and (3) that he would not generally advise a 20 year old to enter a plea with a 30 year sentence. Counsel also testified that he felt they could get a verdict in Applicant's favor. Counsel further testified that Applicant never said he did it and that he did not exhibit any qualities that made him believe he did. This Court finds Counsel's performance in advising Applicant was not deficient.

App. 656-657 (citations omitted).

The PCR court's order based its ruling on testimony from trial counsel on behalf of the State. In fact, Petitioner never testified to receiving advice from trial counsel to reject the State's offer, simply that the State extended an offer the first day of trial. App. 609, ll. 1-2. Petitioner testified that he told trial counsel all along that he wanted a trial. App. 609, ll. 3-5. He also testified that he maintained his innocence to his trial counsel. App. 610, ll. 9-12. Although Petitioner expressed dissatisfaction with his conviction and sentence, he never complained of the

advice he received from trial counsel to reject an offer to plead guilty for a thirty (30) year sentence to a crime of which he insists he is innocent. Therefore, Respondent submits the issue, not having been properly raised to the PCR court or preserved, is not proper for this Court's review.

II. Regardless of preservation of the issue, there is probative evidence in the record to support the PCR Court's finding that trial counsel was not ineffective for advising Petitioner to reject the State's offer in the case.

There is probative evidence to support the lower court's findings. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCPC; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive

relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant 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 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

This Court should uphold the PCR judge's findings because there is ample, probative evidence in the record to support them. First, Petitioner never alleged trial counsel was ineffective in advising him to reject the State's offer of thirty (30) years in his PCR application or amended application nor did he make such an allegation during his testimony at the PCR evidentiary hearing. Petitioner told trial counsel all along that he wanted a trial. App. 609, ll. 3-5. Petitioner also maintained his innocence to his trial counsel. App. 610, ll. 9-12.

However, on cross-examination, PCR counsel asked trial counsel if he believed Petitioner should have pled at any point in his representation, to which trial counsel explained why he did not. App. 639, l. 12 – p. 640, l. 4. Trial counsel explained that he was optimistic in receiving a favorable verdict at trial, that someone in their twenties is not going to deal well with accepting a thirty year sentence, that Petitioner never confessed guilt, that trial counsel never observed any qualities in Petitioner that would make him believe Petitioner was guilty, that Petitioner wanted to go forward with trial, that he did not believe Petitioner would have pled guilty, and that nothing looked so bad that Petitioner would need to plead. App. 639, l. 16 – p. 640, l.4. Based on that testimony, the PCR Court found that Counsel's performance in advising Applicant was not deficient.

The record fails to demonstrate any deficiency perpetrated by Petitioner's trial counsel in this case. Because the record contains probative evidence that supports the PCR judge's finding that counsel's performance was not deficient and that Petitioner failed to show that but for counsel's alleged deficient performance, the result of the proceeding would have been different, certiorari should be denied.

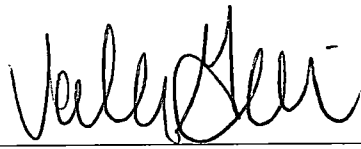
CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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April 14, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Spartanburg
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2016-001415

RASHAWN MURPHY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies of the Return in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 14th day of April, 2017



ASHLEY HAWORTH
PARALEGAL