STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, Circuit Court Judge

Appellate Case No. 2016-001817

Troy M. Wright, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is Petitioner's argument preserved for review where the PCR judge did not make a finding on the issue and Petitioner failed to file a motion to alter or amend the order of dismissal?

II. Did Petitioner fail to satisfy his burden of proving ineffective assistance of counsel based on counsel's failure to ask to withdraw the plea based on the State's request for the maximum sentence?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the December 2014 term of the Charleston County Grand Jury for assault and battery of a high and aggravated nature ("ABHAN") (App. pp. 78-79). Cantrell Frayer, Esquire, represented him. On January 7, 2015, Petitioner pleaded guilty as indicted pursuant to North Carolina v. Alford.[1] (App. pp. 1-5). The Honorable Kristi Harrington sentenced Petitioner to confinement for twenty years suspended on the service of eight years of incarceration to five years of probation. (App. p. 19; p. 37). Petitioner did not appeal his sentence or plea.

Petitioner filed an application for post-conviction relief ("PCR") on March 27, 2015. (App. pp. 21-36). Respondent made its return on August 12, 2015.(App. pp. 39-42). Petitioner submitted an Amended Application on July 23, 2016. (App. pp. 44-46). An evidentiary hearing was held before the Honorable John C. Hayes in Charleston County on August 2, 2016. (App. p. 47). Judge Hayes denied and dismissed Petitioner's application for PCR by written order on August 9, 2016, and filed August 15, 2016. (App. pp. 74-77). Petitioner did not file a motion to reconsider, alter, or amend pursuant to Rule 59, SCRCP.

Facts

Petitioner was indicted for assault and battery of a high and aggravated nature after severely beating the victim, Barbara Barrett. (App. pp. 9-11). At the time of the assault, the victim worked night shifts at a gas station. (App. p. 9). She and Petitioner previously had an intimate relationship, but the relationship had ended several months prior to the incident. (App.

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

p. 9, line 24-p. 10, line 1). However, according to the victim, Petitioner continued to frequent the gas station and "hang out" in the area while she was working to "mak[e] sure no other guys came around." (App. p. 10, lines 1-5). On the night of the incident, Petitioner arrived at midnight. (App. p. 10, lines 6-7). The victim went outside to speak with him around 4:00AM. (App. p. 10, lines 7-8). Petitioner confronted her about talking to another man, grabbed her by the neck and lifted her off the ground and bit her nose. (App. p. 10, lines 9-12). He then dragged her behind a propane tank, threw her on the ground, got on top of her and began beating her severely. (App. p. 10, lines 11-17). The State was prepared to present an eyewitness who would have testified to seeing Petitioner beating the victim with an object. (App. p. 11). The State also planned to call the treating physician, who would have testified the injuries the victim sustained could not have been caused by a fist. (App. p. 11, lines 2-10). The victim suffered a nasal fracture, skull fracture, and severe lacerations on her face and received approximately 230 stitches. (App. p. 11, lines 20-25). She was hospitalized for three days. (App. p. 11, lines 20-25). The victim also had not, and likely will not, ever regain feeling in her forehead or nose area where Petitioner bit her. (App. p. 12, lines 1-6).

The State presented photographs of the victim's injuries to the plea judge, (App. p. 10), and the victim also addressed the court and stated she was suffering from paranoia, has permanent scars, and suffers occasional headaches. (App. p. 13, lines 9-13). In addition, the State provided the court with Petitioner's prior record, which consisted of a 2010 assault and battery of a high and aggravated nature, two counts of simple assault in 2008, threatening the life of a public official in 2007, and a simple assault in 2006. (App. p. 12, lines 10-14). Based on the severity of the injuries and Petitioner's lengthy record for assault, the State asked the Court to

impose the maximum. (App. p. 13, lines 19-24). Counsel argued in mitigation that Petitioner was "deeply mentally ill," and asked for a lesser sentence. (App. p. 17, line 20-p. 18, line 3).

During the plea colloquy, the plea judge asked Petitioner if he understood she could sentence him up to twenty years, and Petitioner affirmed that he understood that was the possible punishment. (App. p. 8, lines 17-21). After the Assistant Solicitor provided the factual basis for the plea, and the State requested the maximum sentence, the plea judge *again* ensured that Petitioner understood she could sentence him up to twenty years. (App. p. 18, lines 2-25). Petitioner indicated he understood. (App. p. 18, line 23). Immediately thereafter, the plea judge asked Petitioner if he still wished for her to accept his plea and if he was satisfied with Counsel. (App. p. 18, line 24-p. 19, line 5). Petitioner affirmed he wanted the court to accept the plea and that he was satisfied with Counsel. (App. p. 19, lines 1-5). The plea judge did not sentence Petitioner to the maximum, but rather, sentenced him to twenty years suspended on the service of eight years to five years of probation. (App. p. 19). Therefore, Petitioner was only sentenced to eight years of active time for the offense.

At the PCR hearing, Counsel testified Petitioner's original charge of assault and battery first degree was elevated to ABHAN due to the severity of the victim's injuries. (App. p. 60, lines 3-12). Counsel testified that the State asked that the maximum sentence be imposed. (App. p. 63, lines 1-2). Counsel further testified that had the State made a recommendation, she would have objected to the recommendation and withdrawn the plea. (App. p. 63, lines 14-16). Counsel testified she stressed to Petitioner all along that the State "wanted him to do some serious time" but was uncertain as to whether, in those conversations, she specifically told him that the State wanted him to serve the maximum. (App. p. 64, line 18-p. 65, line 1). However, Counsel later testified that when Petitioner pleaded guilty in January 2015, she told him that the State wanted

the maximum for him and that she would ask for something less, but the State was not "negotiating or making a recommendation, [and] [was] going to ask for the max." (App. p. 69, lines 19-25). Lastly, Counsel stated that a recommendation to the Court and asking for a certain sentence are two different things. (App. p. 70, lines 4-6).

The PCR judge found that Petitioner "has not carried his burden of proof as to elements of his stated grounds for relief, and has not proven trial counsel was ineffective." (App. p. 76).

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)).

ARGUMENTS

I. Petitioner's argument that Petitioner is entitled to relief on the basis that counsel failed to withdraw his plea after the State requested the maximum is not preserved for review where the PCR judge did not make a finding on the issue and Petitioner failed to file a motion to alter or amend the order of dismissal.

Petitioner argues that Counsel was ineffective for failing to withdraw the guilty plea where the plea was without negotiation or recommendation, yet the State asked that Petitioner be sentenced to the maximum. As an initial matter, Respondent respectfully submits that the issue is not preserved for this Court's review because the PCR judge failed to make a finding as to that specific allegation, and Petitioner failed to file a motion pursuant to Rule 59(e), of the South Carolina Rules of Civil Procedure in order to preserve the issue for appellate review. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "Either party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2000)

(citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (issue must be raised to and ruled on by the PCR judge in order to be preserved for review); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (same)). "Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Herron, 395 S.C. at 465-66, 719 S.E.2d at 642-43.

Here, the order dismissing Petitioner's application for PCR contains a finding that Petitioner failed "to carry his burden of proof as to the elements of his stated grounds for relief, and has not proven his trial counsel was ineffective." (App. p. 76). However, the PCR judge made no specific finding regarding counsel's conduct in failing to withdraw the plea due to the State's request for a maximum sentence. Petitioner did not file a subsequent motion pursuant to Rule 59(e), SCRCP, asking the court to rule on that issue. Accordingly, Petitioner failed to preserve the issue for appeal. Therefore, Respondent respectfully requests this Court should deny review.

II. On the merits, this Court should deny review because Petitioner failed to prove that his guilty plea was involuntary on the basis that Counsel failed to withdraw Petitioner's plea after the State asked the plea court to impose the maximum sentence where Petitioner knew his exposure was twenty years and he was not sentenced to the maximum.

Should this Court find it must reach the merits of this allegation, Respondent, while not waiving its argument that the issue is not preserved, submits that despite the failure of the PCR judge's order to address the specific issue raised, Petitioner nevertheless failed to satisfy his burden of proving that his guilty plea was involuntarily entered as the result of ineffective assistance of counsel. Petitioner argues that because the plea was entered into "without negotiation or recommendation," Counsel was ineffective for failing to withdraw the guilty plea

after the State asked the plea court to impose the maximum sentence. Respondent submits Petitioner has failed to show either deficiency or prejudice as to this allegation.

Petitioner had the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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. at 442, 334 S.E.2d at 814.

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. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for

counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). In addition, statements "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)). Cf. Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) (reversing the PCR court's denial of relief and finding fact that Petitioner was informed of the sentencing range was irrelevant in prejudice analysis and that Petitioner presented sufficient evidence to show prejudice where he was under the impression the solicitor would not make a sentencing request).

Here, Petitioner was given a final opportunity after the State had requested the maximum and before the court imposed a sentence to withdraw his plea or bring any concern to the judge's attention, but he failed to do so. (App. p. 18, line 24-p. 19, line 5). Though Petitioner testified he did not understand that the State could still ask for a certain sentence even though there were no

negotiations or recommendations, (App. p. 55), his statements made under oath at the guilty plea provide evidence to the contrary. See Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007). In addition, Counsel testified that when Petitioner pleaded guilty in January 2015, she told him that the State wanted the maximum for him and that she would ask for something less, but the State was not "negotiating or making a recommendation, [and] [was] going to ask for the max." (App. p. 69, lines 19-25). Counsel testified if the State had made an actual recommendation, she would have withdrawn the guilty plea. (App. p. 63). Therefore, Respondent submits Petitioner failed to show that Counsel was deficient for failing to withdraw the guilty plea because Counsel testified she did inform Petitioner the State was asking for the maximum, and Petitioner made no indication after the State requested the maximum that he had any concerns or that he wished to withdraw the plea.

Regardless, Respondent submits Petitioner's testimony alone that he would have withdrawn the plea and proceeded to trial is insufficient to show that but for the alleged error, he would not have pleaded guilty but would have insisted on going to trial. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) ("[w]ishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences"). Further, there is no evidence in the record to suggest that the solicitor's request for the maximum sentence affected Petitioner's choice to plead guilty or the judge's sentencing determination, *especially where Petitioner did not receive the maximum sentence.* (App. p. 19, p. 58, lines 6-7). Petitioner had a lengthy record consisting of previous assaults and the victim's injuries were severe. (App. pp. 12-13). Further, the plea judge saw photographs of the victim's injuries, and the victim herself spoke at the plea. (App. pp. 10-13). Therefore, Respondent submits Petitioner failed to show that

but for the alleged deficiency of Counsel, he would have insisted on going to trial. Accordingly, this Court should deny review.

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 issues discussed above.

Respectfully submitted,

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April 24th, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
APR 27 2017
S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, Circuit Court Judge

Appellate Case No. 2016-001817
Lower Court Case No. 2015-CP-10-1828

TROY WRIGHT, #244763, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

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:

Lara M. Caudy, Esquire
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This 24th day of April, 2017.

ALICIA A. OLIVE
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