STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
Court of Common Pleas
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2016-001819

WILLIAM DAVID WOOTEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

Is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing plea counsel was ineffective regarding plea offers conveyed during his representation of Petitioner?

STATEMENT OF THE CASE

Procedural History

Petitioner is confined with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. During its October 2011 term, the Pickens County Grand Jury indicted Petitioner for two counts of lewd act upon a child (2011-GS-39-1763, -1765). Petitioner was subsequently indicted during the February 2012 term for first-degree criminal sexual conduct (CSC) with a minor (2012-GS-39-0492), and second-degree CSC with a minor (2012-GS-39-0493). S. Paul Aaron, Esquire, represented Petitioner. On February 27, 2012, Petitioner appeared before the Honorable Brooks P. Goldsmith and pled guilty to one count of lewd act upon a child and first-degree CSC with a minor. Petitioner's other charges of lewd act upon a child and second-degree CSC with a minor were dismissed. Pursuant to negotiations between the State and Petitioner, Judge Goldsmith sentenced Petitioner to concurrent terms of fifteen years imprisonment for lewd act upon a child and twenty-five years imprisonment for first-degree CSC with a minor. Petitioner did not appeal his guilty pleas or convictions. (App.p. 312).

On August 17, 2012, Petitioner filed an application for post-conviction relief (PCR). The State made its return on February 12, 2013, requesting an evidentiary hearing be convened. Thereafter, on August 28, 2012 and April 17, 2015, Petitioner filed amended applications. A full evidentiary hearing was had on this matter on August 25, 2014 before the Honorable James R. Barber, III. At the conclusion of the hearing, Judge Barber took the matter under advisement and subsequently re-opened the record in order to take additional testimony. In an order filed December 16, 2014, Judge Barber ordered a de novo hearing in this case. A second evidentiary hearing was held on April 20, 2015 at the Pickens County Courthouse. Petitioner was present

and represented by Tara D. Shurling, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. (App.p. 311).

Petitioner testified on his own behalf at the PCR hearing. Also testifying were: Lisa Spangler, Assistant Solicitor Brandi Batson Hinton, Jean Cowan, Richard Douglas Wooten, III, and plea counsel, S. Paul Aaron, Esquire. On May 4, 2015, Petitioner filed a post-hearing memorandum in support of his application for PCR. (App.pp. 297-303). Respondent filed a post-hearing memorandum on May 4, 2015. (App.p. 304-305). Petitioner filed a reply to respondent's memorandum on May 11, 2015. (App.p. 306-310).

Thereafter, Judge Miller denied Petitioner's PCR application by written order filed October 6, 2015. Petitioner subsequently filed a motion to alter or amend, on October 26, 2015. (App.p.325-366). Judge Miller denied Petitioner's 59(e) Motion and it was filed July 25, 2016. (App.p.367). Petitioner filed a timely notice of appeal. This return to petition for writ of certiorari follows.

Factual History

On November 28, 2010, Petitioner's minor niece (Victim #1) spent the night at Petitioner's residence; Petitioner's minor daughter (Victim #2) also lived here and was present. (App.p.47). As Victim #1 was attempted to go sleep, Petitioner started to rub her stomach and began working his way towards her vaginal area (App.p.4). She thwarted his efforts by grabbing his hand and telling him she was going to break it if he did not leave her alone. (App.p.4). The next day, Victim #1 spoke with Petitioner's daughter, who revealed Petitioner had been sexually assaulting her since she was eight years old. Victim #2 reported Petitioner began his sexual assault by touching her genitalia. She revealed he digitally penetrated her and forced her to touch his genitalia, as well as forced her to perform fellatio on him. (App.p.4)

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "**any** evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 "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, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. 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, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

ARGUMENT

There is evidence of probative value in the record to support the PCR judge's finding Petitioner failed to meet his requisite burden of proof of establishing plea counsel was ineffective regarding plea offers conveyed during his representation of Petitioner.

On appeal, Petitioner argues four grounds on which he believes plea counsel was ineffective:(1) failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State; (2) failing to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner; (3) failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period during which plea counsel was under an order of protection and the State was on notice of said order; and (4) failing to convey an advantageous plea offer to Petitioner immediately upon receipt of said offer by plea counsel when he returned to South Carolina after the expiration of his order of protection. In his petition to this court, Petitioner presented these grounds as a single argument, noting all the individual allegations were linked, arise out of the same facts, and allege these prove his plea counsel was ineffective. However, after carefully considering all of these allegations, the PCR judge denied Petitioner's PCR, correctly finding Petitioner has failed to meet his burden of proof in showing that plea counsel's performance was indeed deficient.

In denying Petitioner's application for post-conviction relief, the PCR court found the Petitioner failed to meet his burden of proving plea counsel was ineffective. (App.p.318). In coming to its conclusion, the PCR court cites Davie v. State in relation to when an allegation has been made that a plea offer was not communicated to a defendant. 381 S.C. 601, 675 S.E.2d 416 (2009). In support of its decision to deny Petitioner relief, the PCR court found Plea counsel communicated the plea offer in this case when he returned to town after the conclusion of his

order of protection. (App.p.318). However, the plea offer had expired by this time. (App.p.318). Furthermore, the PCR court found that the order of protection prevented the assistant solicitor from scheduling plea counsel for court appearances but did not limit her ability to convey plea offers.(App.p.318). Plea counsel believed the order of protection would have protected him from being responsible for any court-related activities. Regardless, he conveyed the plea offer when he was able and attempted to have that offer honored by requesting such from the assistant solicitor, her supervisor, and the deputy solicitor. The PCR court found plea counsel's actions and representation in this case were reasonable under the circumstances. See Strickland, 466 U.S. at 688 ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

In Davie v. State, this Court held counsel's failure to convey a plea offer constitutes deficient performance. Davie v. State 381 S.C. 601, 675 S.E.2d 416 (2009). In that case, the petitioner pled guilty to several charges under a plea deal in which he received twenty-seven years. He then filed a PCR, alleging that his plea counsel failed to notify him of a fifteen year plea deal the State offered him prior to pleading guilty. At the PCR hearing, his plea counsel testified he found out about the plea offer after it had expired because he was relocating his office. The PCR court denied the Petitioner relief. In reviewing the Petitioner's claim this court held "to prevail on his claim of ineffective assistance of counsel, Petitioner was required to prove that 1) plea counsel's failure to communicate the State's initial, fifteen-year plea offer constituted deficient performance, and 2) he was prejudiced by this deficient performance, i.e., there is a reasonable probability that but for counsel's deficient performance, he would have accepted the original plea offer." Davie 381 S.C. at 608, 675 S.E.2d at 420. In reversing the PCR court and granting the Petitioner relief, the Davie Court held,

> We find that plea counsel's failure to convey the State's initial plea offer to Petitioner constituted deficient performance. Although counsel's failure to do so could be construed as excusable neglect if one believes that the State's written offer was truly lost in the process of counsel's office relocation, we do not believe that such neglect would negate the deficient performance. Even if counsel is given the benefit of the doubt that he was not aware of the plea offer until after the expiration date, we find counsel was deficient in not objecting at the plea hearing. During the plea hearing, the solicitor informed the circuit court judge that [t]he original plea offer in this matter has not been accepted by the due date of September 11th of this year, and so we told the defendant we were ready to go to trial. In view of the solicitor's statement, it was incumbent upon plea counsel to object or in some way indicate to the court that he had no knowledge of the original plea offer. Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence. Because counsel failed to make any attempt to protect Petitioner's interests regarding this significantly lower sentence, we conclude counsel's performance fell below the prevailing professional norms and, thus, constituted deficient performance.

Davie, 381 S.C. at 610,611, 675 S.E.2d at 421. The court ultimately concluded that the Petitioner suffered prejudice and in doing so adopted a case by case approach when analyzing if a Petitioner has suffered prejudice.

In the present case, it is clear from the record that there was a previous plea offer of fifteen years. However, plea counsel was not deficient in relaying that offer to the Petitioner. Plea counsel left the state in early December 2011, having obtained an order of protection. Once he returned in January, the exact date still in dispute, he became aware of the plea offer but it had expired on January 3, 2012. Given that the plea offer had expired, plea counsel attempted to have the state enforce the plea deal but was informed that the deal had expired. Furthermore, plea counsel went so far as to talk to and express his frustration to the solicitor prosecuting the case, her boss and the deputy solicitor of the county in hopes of having the expired plea deal enforced. (App.p.225 ll.10-15). Plea counsel also testified that on the morning of the Petitioner's plea he

met with the solicitor and the plea judge and explained his position. (App.p.225 ll.16-22). The judge informed him that the Petitioner could go to trial as scheduled or take the new plea offer. (App.p.225 ll.16-22). Here unlike in Davie, plea counsel went to the solicitor's boss and the deputy solicitor about the expired plea deal. Additionally, plea counsel made the plea judge aware of the situation. Furthermore, here as Davie suggest, plea counsel did everything he could to protect Petitioner's interests regarding this significantly lower sentence. Regrettably, the state failed to enforce the plea deal which is well within their discretion. A criminal defendant has "no right to be offered a plea." Lafler v. Cooper, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012). The decision whether to offer a plea bargain is within the solicitor's discretion. State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1996)). Our Supreme Court has recognized a plea agreement rests on contractual premises. State v. Gates, 299 S.C. 92, 94-95, 382 S.E.2d 886-87 (1989). Unless intended by both parties, terms and conditions should not be read into a plea agreement. State v. Compton, 366 S.C. 671, 678, 623 S.E.2d 661, 665 (Ct. App. 2005). Parties are free to withdraw offers until performance occurs. Reed v. Becka, 333 S.C. 676, 687, 511 S.E.2d 396, 402 (Ct. App. 1999). A plea agreement is only an "offer" until the defendant enters a court-approved guilty plea. Id. at 668, 511 S.E.2d at 403. Until formal acceptance has occurred, the plea is not binding on the defendant, the State, or the court. Id. This general rule is subject to a detrimental reliance exception. Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007); Reed, 333 S.C. at 688, 511 S.E.2d at 403. Absent a plea of guilt, a defendant may enforce an oral plea agreement upon a showing of detrimental reliance. State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 44, 454 (2007). State prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. Santobello v. New York, 404 U.S.

257, 262 (1971). However, a defendant may not attempt to create a firm commitment out of plea negotiations. Whipple, 324 S.C. at 49, 476 S.E.2d at 687. The State is not bound to accept a defendant's terms simply because a defendant reveals otherwise undiscoverable facts in the hope of securing a favorable plea agreement. State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (2007). Here, while the State's position in not enforcing the plea agreement may have been somewhat strange or unorthodox, it was well within their discretion to do so.

Accordingly, Petitioner has failed to prove the first prong of the Strickland test, that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625(citing Strickland, 466 U.S. at 688. Here, plea counsel performance was reasonable. Plea counsel did everything he could to enforce the plea offer that was extended to the Petitioner while he was under an order of protection once he became aware of it. See Strickland, 466 U.S. at 688. ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."). Considering all the circumstances and the irregularity of this plea deal and ultimately guilty plea, plea counsel's performance was reasonable.

Because Petitioner has failed to establish the first prong, he is unable to make a valid showing of ineffective assistance of counsel. As Petitioner failed to meet his burden of proving ineffective assistance of plea 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.").

Additionally and more recently, the United States Supreme Court held the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers

that lapse or are rejected. Missouri v. Frye 566 U.S. 133 (2012). Furthermore, it held, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Missouri, 566 U.S. at 145. The Court also articulated an analysis for finding prejudice. To 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. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. Missouri, 566 U.S. at 147.

Here, assuming plea counsel was deficient and that Petitioner would have taken the plea offer, he is still unable to show that there is a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. The solicitor testified at the evidentiary that personally she did not think that a fifteen year sentence years was an appropriate offer to begin with considering the nature of the charges. (App.p.250.). "Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands." State v. Thrift, 312 S.C. 282, 29-92, 440 S.E.2d 341, 346 (1997). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." Id. at 292, 440 S.E.2d at 346-47. As a result, Petitioner suffered no prejudice from plea counsel's alleged deficiency.

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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