STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-001773

MICHAEL LEE ROBINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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Did plea counsel's ineffective assistance render Petitioner's guilty plea involuntary where plea counsel advised Petitioner to accept an offer to enter a guilty plea and be sentenced under the law in existence at the time of the commission of the alleged crime, which provided for a maximum sentence of thirty years, rather than risk losing at trial where the state would seek a sentence under the amended law that provided for a mandatory minimum sentence of twenty-five years and a maximum sentence of life imprisonment, which would have violated the ex post facto clauses of the state and federal constitutions?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Petitioner's plea was not rendered involuntary, where the plea colloquy cured any possible inaccurate advice from counsel and Petitioner was facing an effective life sentence prior to his guilty plea

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. During the February 2013 term, the Greenville County Grand Jury indicted Petitioner for first-degree criminal sexual conduct with a minor (2013-GS-23-0666).[1] Jake Erwin, Esquire, represented Petitioner. On October 9, 2013, Petitioner appeared before the Honorable Edward W. Miller and pled guilty to one count of first degree criminal sexual conduct with a minor. Petitioner's other six charges were dismissed. Judge Miller sentenced Petitioner to twenty-five years' imprisonment. Petitioner did not appeal his guilty pleas or convictions.

On July 8, 2014, Petitioner filed an application for post-conviction relief (PCR). The State made its return on October 30, 2014, requesting an evidentiary hearing be convened. An evidentiary hearing was held on June 16, 2015, at the Greenville County Courthouse before the Honorable Perry H. Gravely. Petitioner was present and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's plea counsel, Jake Erwin, Esquire, also testified. Following the evidentiary hearing, Judge Gravely denied Petitioner's application by written order filed July 20, 2015.

Petitioner filed a timely notice of appeal. On January 19, 2016, Petitioner filed a petition for writ of certiorari. On May 2, 2016, the Respondent filed its return to the petition for writ of certiorari. On April 13, 2017, this Court granted certiorari. This brief of Respondent follows.

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[1] Petitioner was indicted for several charges which included multiple first-degree criminal sexual conduct with a minor charges, however it is unclear how many total charges there were. The solicitor stated at the guilty plea Petitioner was charged with six charges and five were dismissed upon his guilty plea. (App.p.8) During the evidentiary hearing Petitioner's plea counsel testified there were seven total charges.(App.p.51)

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 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, 286 S.C. 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, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 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, 466 U.S. 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). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

II. Petitioner's plea was not rendered involuntary, where the plea colloquy cured any possible inaccurate advice from counsel and Petitioner was facing an effective life sentence prior to his guilty plea

Petitioner asserts that plea counsel's ineffective assistance rendered Petitioner's guilty plea involuntary. Specifically, Petitioner argues plea counsel's ineffective assistance render Petitioner's guilty plea involuntary where plea counsel advised Petitioner to accept an offer to enter a guilty plea and be sentenced under the law in existence at the time of the commission of the alleged crime, which provided for a maximum sentence of thirty years, rather than risk losing at trial where the state would seek a sentence under the amended law that provided for a mandatory minimum sentence of twenty-five years and a maximum sentence of life imprisonment, which would have violated the ex post facto clauses of the state and federal constitutions. However, the PCR court properly denied this allegation, as any inaccurate advice from counsel was cured by the plea court's colloquy.[2] Additionally, Petitioner was facing an effective life sentence prior to entering his guilty plea.

In denying the Petitioner's application for PCR, the PCR court found the Petitioner admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (App.p.66). Additionally, the PCR court found that the Petitioner also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel,

[2] Respondent concedes that the issue of whether Petitioner's guilty plea was involuntary given plea counsel's advice is preserved for appellate review. In Petitioner's application for PCR relief, Petitioner alleged that "counsel clearly coerced, influenced applicant into pleading guilty by placing fear into Petitioner of the harsh sentencing threat applicant faced by going to trial in complete disregard of the circumstances and applicant not wanting to plea." (App.p.24) In its order of dismissal, the PCR court found that the Petitioner failed to meet his burden of proving plea counsel either misadvised him about the sentence he would receive or pressured him into pleading. (App.p.67) Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues. Pruitt v. State. 310 S.C. 254, 423 S.E.2d 127 (1992). In the present case, the PCR court did address this issue in its order of dismissal.

and had not been coerced in any way. (App.p.66). Furthermore, in its finding the court noted there was no evidence in the guilty plea transcript to support the Petitioner's assertion that he was pressured into entering a guilty plea; therefore the transcript has refuted this allegation. (App.p.66).

Petitioner was charged with multiple counts of first-degree criminal sexual conduct. While Petitioner was indicted for these charges in 2013, the charges stemmed from incidents that occurred beginning in 1998 and concluding in 2000. At the time of the indictment the statute for first-degree criminal sexual conduct with a minor had been amended in 2012 to increase the penalty for the charge. The new penalty for the charge carried a mandatory minimum sentence of twenty-five years and a maximum sentence of life imprisonment. S.C. Code Ann. §16-3-655(D)(1). Prior to that amendment the statute carried a penalty of zero to thirty years imprisonment. Since the incidents that the Petitioner were charged with happened between 1998 and 2000, he was facing a zero to thirty year sentence on each of the first-degree criminal sexual conduct with a minor. Ultimately Petitioner pled guilty to one count of first-degree criminal sexual conduct with a minor in exchange for the dismissal of his other charges. During the plea, the following exchange took place between the Petitioner, Petitioner's plea counsel, the solicitor, and the plea judge.

THE COURT: Okay. You're up here on this indictment. And it is 2013-674. It alleges that you did in Greenville County between July 1, 1998 and July 31 of 2000 commit a sexual battery on T. H., who was less than eleven years of age. CSC with a minor, first degree, twenty-five years to life.

PLEA COUNSEL: Judge

THE COURT: Do you understand that?

SOLICITOR: Your Honor, this was pre the law changes back in '98 and 2000. The sentence was zero to thirty years.

THE COURT: Thirty years, okay. Still considered a most serious offense.

SOLICITOR: Yes, sir.

THE COURT: If you get convictions for two or more most serious offenses you're eligible for life in prison without parole. It's a violent offense, which means you will basically do a minimum eighty-five percent of the sentence. You understand that?

PETITIONER: Yes, Your Honor.

THE COURT: All right. Understanding the nature of the charge against you and the maximum possible punishment, how do you want to plead?

PETITIONER: Guilty, Your Honor.

Here, during a portion of the colloquy, the plea judge informed Petitioner what he had been charged with and also the potential sentence for that charge. During this exchange, the judge incorrectly stated the sentence for the charge. However, the solicitor prosecuting the case interjected and proceeded to inform the plea judge that the sentence for the charge was actually zero to thirty years because the Petitioner had committed the crimes between 1998 and up until 2000. Immediately upon hearing this, the plea court corrected his prior comments and recited the accurate sentence range Petitioner was facing for this particular offense. Therefore, any possible inaccurate advice from counsel was cured by the plea court's colloquy. Moorehead v. State 329 S.C. 329, 496 S.E.2d 415 (1998).

In Moorehead v. State, this Court held inaccurate advice by plea counsel can be cured at the plea hearing. Moorehead v. State 329 S.C. 329, 496 S.E.2d 415 (1998). In that case, the defendant was charged with criminal sexual conduct third degree and unlawful use of a telephone. He was sentenced to ten years, suspended after seven, and five years' probation. Moorehead filed a PCR application and testified at the hearing that he pled guilty on counsel's advice that he would receive only probation. The PCR court granted Moorehead relief, finding

plea counsel was ineffective for advising the defendant he would receive only probation and that defendant would not have pled guilty but for this erroneous advice. This Court reversed that decision. The Moorehead Court, held

> "when 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. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). At the plea hearing, the trial judge asked the defendant if he understood that the possible sentence for the CSC charge was ten years and the defendant answered that he did. The trial judge also summarized the plea agreement on the record before accepting the defendant's plea and defendant answered that he understood it. Even if trial counsel erroneously informed defendant that his sentence would be probationary, any misconception was cured at the plea hearing."

Moorehead, 329 S.C. at 333, 496 S.E.2d at 416,417. Numerous other cases have also determined any possible inaccurate advice can be cured by the plea court's colloquy. "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." Dalton v. State, 376 S.C. 130,139, 654 S.E. 2d. 870,874 (2007) (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)). See also Stalk v. State, 375 S.C. 289, 299, 652 S.E.2d 402, 406 (2007); Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (2008); Burnett v. State, 352 S.C. 589, 593, 576 S.E.2d 144, 146 (2003); Holden v. State 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011).

Here, the plea judge instructed Petitioner about the charge he was facing and the possible sentence. While the judge may have momentarily stated the incorrect sentence for the charge, the solicitor immediately told the judge what the actual sentence was. The plea judge then

immediately adopted this correction and when asked how he wanted to plead understanding the maximum possible punishment for the charge, the Petitioner responded guilty.

Accordingly, any possible inaccurate advice given by plea counsel was cured by the plea colloquy. 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.").

Additionally, the Petitioner suffered no prejudice as the plea judge conveyed correct information to the Petitioner concerning most serious crimes. During the plea colloquy, the plea judge informed the Petitioner the charge he was pleading to was a most serious offense. (App.p.5). Furthermore, the plea judge informed the Petitioner if he got convictions for two or more most serious offenses he would be eligible for life in prison without parole. Under S.C. Code Ann. §17-25-45, "upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either one or more prior convictions for a most serious offense." S.C. Code Ann. §17-25-45 (A)(1)(a). Initially, Petitioner had been charged with several crimes and among them were multiple counts of first degree criminal sexual conduct with a minor. Under South Carolina law, first degree criminal sexual conduct with a minor is a most serious crime. S.C. Code Ann. §17-25-45 (C)(1). Here, had the state decided to, they could have tried Petitioner on each individual charge of first-degree criminal sexual conduct with a minor separately and once convicted on the second charge Petitioner would have been facing life in prison without the possibility of parole. "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. Moreover, had Petitioner proceeded to trial he would have been facing multiple charges that if found guilty on could have resulted in consecutive sentences in excess of one-hundred years. That in effect would have been a life sentence for the Petitioner. As a result, Petitioner suffered no prejudice from plea counsel's alleged deficiency.

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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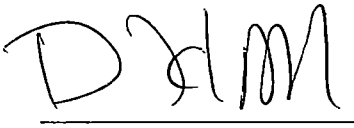
I further certify that all parties required by Rule to be served have been served. This 18th day of August, 2017.



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