

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger L. Couch, Circuit Court Judge

Lucius Simuel Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001607

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Is there probative evidence to support the PCR court's finding Counsel was not deficient because he properly advised Petitioner a conviction at trial could result in a sentence of life without parole and Petitioner was not prejudiced where there was no evidence he would have accepted a plea offer?

STATEMENT OF FACTS

Procedural History

In August of 2008, Petitioner Lucius Simuel, Jr., was arrested after surrendering to law enforcement following an investigation into a home invasion and shooting. In September of 2008, the Beaufort County grand jury indicted Petitioner for assault and battery with intent to kill, possession of a weapon during a violent crime, and first-degree burglary. In June of 2009, the Beaufort County grand jury additionally indicted Petitioner for possession of a handgun by a prohibited person. Prior to trial, the solicitor served timely notice on Petitioner indicating the State would seek a life sentence without the possibility of parole upon conviction based on his prior record. On November 16, 2009, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable Thomas W. Cooper, Jr. presiding.¹ At the conclusion of trial, the jury convicted Petitioner as indicted. App. 948. Pursuant to S.C. Code Ann. § 17-25-45, the trial judge sentenced Petitioner to life imprisonment without the possibility of parole for the burglary and assault and battery with intent to kill convictions. App. 983-984. Additionally, the trial judge sentenced Petitioner to concurrent terms of imprisonment of five years for each of the firearm convictions. App. 984.

Petitioner filed a timely Notice of Appeal. His appeal was perfected by Dayne Phillips, Esquire, and Elizabeth Franklin-Best, Esquire, from the Office of Indigent Defense Division of Appellate Defense. Petitioner's convictions and sentences were affirmed by the South Carolina Supreme Court. State v. Simuel, No. 2012-MO-031 (S.C. July 25, 2012). The validity of the State's LWOP, based on the fraudulent imprisonment charge from Georgia, was the sole issue addressed on appeal. This issue was preserved by Counsel and certified directly by the Supreme

¹ Petitioner's co-defendant, Demetrius Undreus Price, was jointly tried with Petitioner during the trial. Price was also convicted of the same offenses as Petitioner and received identical sentences for those convictions.

Court of South Carolina before affirming the trial court's ruling. Simuel, No. 2012-MO-031. The Remittitur was issued on August 10, 2012.

Petitioner filed an application for post-conviction relief on February 4, 2013. Respondent made its Return on May 29, 2014. An evidentiary hearing into the matter was convened on October 20, 2015 at the Beaufort County Courthouse. Scott W. Lee, Esquire, represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On January 28, 2016, the Honorable Roger L. Couch signed an order of dismissal, dismissing Petitioner's application with prejudice and denying his allegations.

On February 11, 2016, Petitioner filed "Applicant's motion to alter and amend judgment." On July 12, 2016, Judge Couch issued an order denying Petitioner's motion to alter or amend the order of dismissal.

Facts

Following an investigation into a home invasion and shooting incident in Bluffton, South Carolina, Petitioner was arrested and indicted for first-degree burglary, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, and possession of a handgun by a prohibited person. App. 41-42. Based on Petitioner's prior conviction for the offense of false imprisonment in Georgia, the solicitor served timely notice on Petitioner prior to trial of the State's intention to seek a sentence of life imprisonment upon conviction pursuant to S.C. Code Ann. § 17-25-45. App. 958; 960. Subsequently, Petitioner proceeded to trial.

During trial, the solicitor introduced certified copies of Petitioner's out-of-state convictions, which included the indictments and sentencing sheets. App. 455-456; 960-961. One of the certified copies of Petitioner's out-of-state convictions established Petitioner had been previously indicted in Georgia for the offenses of armed robbery, aggravated assault, possession

of a firearm during the commission of a crime, wearing a mask to conceal identity, and kidnapping with bodily injury. App. 456. The kidnapping with bodily injury indictment alleged:

[Petitioner and his co-defendants], in the County and State aforesaid, on or about November 7, 1996, did abduct/steal away Alvan Mable, a person, without lawful authority and hold said person against his will and cause said person to receive bodily injury, to wit: did strike Alvan Mable in the head with a gun and place Mable inside a cooler.

App. 456.

The other counts of the indictments alleged Petitioner committed the crimes during the armed robbery of a restaurant. App. 456. According to the certified copy of Petitioner's sentencing sheet for the charges, Petitioner pled guilty to the crime of wearing a mask to conceal identity and to the lesser-included offenses of robbery and false imprisonment, with the two remaining charges being *nolle prossed*. App. 456.

At the conclusion of trial, Petitioner was convicted of each offense for which he was indicted, including the "most serious" offenses of assault and battery with intent to kill and first-degree burglary. App. 948. During sentencing proceedings, the solicitor noted Petitioner had a prior Georgia conviction for false imprisonment, which he argued was an offense comparable to kidnapping in South Carolina based on the similarities between the elements of each offense. App. 958-959. In response, defense counsel argued the elements of false imprisonment in Georgia and the elements of kidnapping in South Carolina did not match. App. 964. Defense counsel additionally noted false imprisonment in Georgia was only punishable by a maximum ten-year sentence. App. 966. Defense counsel further asserted the South Carolina kidnapping statute contained an exception for kidnappings involving parents while Georgia's false imprisonment statute did not. App. 964-965. Therefore, defense counsel contended a person could commit a false imprisonment in Georgia that would not constitute a kidnapping in South

Carolina, which he argued meant the Georgia offense did not qualify as a predicate offense under South Carolina's recidivist offender statute. App. 965; 966-967.

After considering the issue and reviewing the relevant statutes, the trial judge ruled Petitioner's Georgia false imprisonment conviction could be used to enhance Petitioner's sentence because that offense would be classified as the "most serious" offense of kidnapping in South Carolina. App. 971-972. The trial judge noted Georgia's kidnapping statute was narrower than the statute in South Carolina, with South Carolina's kidnapping statute covering a broader range of misconduct. App. 970-971. Relying on the language of S.C. Code Ann. § 17-25-45, the trial determined Petitioner's prior out-of-state conviction was for an offense that would be classified as a "most serious" offense under that statute. App. 972-973. Based on this ruling, the trial judge sentenced Petitioner to an aggregate sentence of life imprisonment without the possibility of parole pursuant to the recidivist offender statute. App. 984.

Relevant Post-conviction Relief Hearing Testimony

A PCR hearing took place on October 20, 2015, before Judge Couch. Petitioner testified he received the State's LWOP notice. App. 1013. Petitioner also testified there were talks of a twenty-year plea offer, but the plea offer "was never negotiated" and would have been conditioned on his testimony against his codefendant. App. 1011. Counsel testified, "I heard Mr. Simuel testify to it earlier. It was 20 years. I didn't specifically remember that the condition was testifying, but if he says that is what it was, then I'm pretty sure that it was." App. 1049. Counsel's testimony appears to rely on hearing Applicant's testimony concerning a plea offer that was never negotiated or formally offered.

Counsel testified he and Applicant discussed Counsel's belief that Applicant's false imprisonment charge from Georgia should not count as a most serious offense for purposes of LWOP and the State disagreed with his reasoning. App. 1046-1047. Counsel testified he and

Petitioner discussed the possibility Petitioner could receive a sentence of life without parole based on the State's LWOP notice or for his charge of first-degree burglary. App. 1055. Counsel informed Petitioner that the sentence for first-degree burglary carries up to life without parole. App. 1055. Counsel advised Petitioner he did not believe the State's LWOP was proper based on S.C. Code 17-25-45 and he would oppose the LWOP if Petitioner was convicted. However, Counsel also testified there was a chance the courts would not agree with his position. App. 1047-1048. Counsel testified he informed Petitioner, "[I]f I lose on that issue and he's convicted, life without parole, nothing that the Judge can do about it." App. 1048. Judge Couch found Counsel properly advised Petitioner concerning his LWOP. App. 1079. Judge Couch also found Petitioner did not testify he relied on Counsel's advice in choosing to reject the State's plea offer. App. 1080.

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).

ARGUMENT

There is probative evidence to support the PCR court's finding Counsel was not deficient because he properly advised Petitioner a conviction at trial could result in a sentence of life without parole and Petitioner was not prejudiced where there was no evidence he would have accepted a plea offer.

Counsel's advice to Petitioner was not deficient where he warned Petitioner of the risks associated with the LWOP and proceeding to trial. Petitioner was not prejudiced where there was no plea offer and Petitioner never indicated he would have taken a plea offer if he understood the LWOP was valid. 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, 300 S.C. at 119, 386 S.E.2d at 626 (emphasis added). There is probative evidence to support the PCR court's finding Counsel "properly advised Applicant as to life without parole." App. 1079. There is also probative evidence to support the PCR court's finding "Applicant provided no testimony that he relied on Counsel's advice in rejecting the plea offer from the State." Therefore, this Court should deny the Petition for Writ of Certiorari based on the following reasons:

- A. Counsel properly informed Petitioner he could receive a sentence of life without parole based on the State's LWOP notice and Petitioner's first-degree burglary charge.

Counsel was not deficient because he properly informed Petitioner he could receive an LWOP sentence in two different ways: either pursuant to S.C. Ann § 17-25-75 based on his prior convictions or if the trial judge sentenced Petitioner to LWOP based on a first-degree burglary conviction. Petitioner has the burden to prove Counsel's performance was deficient. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Counsel's performance is not deficient if it was reasonable under professional norms. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. Counsel

testified he advised Petitioner there was a possibility he would receive a LWOP sentence based on the State's LWOP notice. App. 1055. Counsel also informed Petitioner the maximum sentence range for first-degree burglary is LWOP. App. 1055. Counsel advised Petitioner he did not believe the State's LWOP was proper under S.C. Code 17-25-45 and he would oppose the LWOP sentence if Petitioner was convicted. However, Counsel also advised Petitioner there was a chance the courts would disagree with Counsel's position. App. 1047-1048. At sentencing, Counsel argued the State's pursuit of LWOP based on Petitioner's false imprisonment charge in Georgia was inappropriate. App. 963-964. Counsel objected to the trial court's ruling and preserved the issue for appeal. App. 972-976. The Supreme Court of South Carolina granted direct certiorari and affirmed the trial court's decision. No. 2012-MO-031.

Petitioner's argument misstates Counsel's advice to Petitioner. Counsel never advised Petitioner he would not be eligible for a LWOP sentence if convicted. PWC 8. Counsel also never advised Petitioner his false imprisonment in Georgia would not qualify as a predicate violent crime in South Carolina. PWC 8. Counsel testified he advised Petitioner he believed Petitioner's false imprisonment charge did not make him eligible for LWOP, but there was a risk the courts would disagree with that position. App. 1047-1048. Counsel testified he advised Petitioner he would receive a LWOP sentence if the courts did not agree with Counsel's position that the LWOP was statutorily invalid. "[I]f I lose on that issue and he's convicted, life without parole, nothing that the Judge can do about it." App. 1048. Counsel also testified he advised Petitioner the trial court could find the State's LWOP was not proper and still sentence Petitioner to LWOP based on the sentencing range for first-degree burglary. App. 1055.

Counsel fully explained to Petitioner the risks of moving forward to trial and the possibility the trial court and appellate courts could disagree with Counsel's belief that the

LWOP was not statutorily correct. Based on conversations with Counsel, Petitioner made an informed and intelligent decision to accept the risks associated with proceeding forward to trial. Importantly, the State never made an actual plea offer to Petitioner. Applicant testified the State's plea offer "was never negotiated" and would have been conditioned on future testimony against his codefendant. App. 1011. Counsel's testimony concerning the plea offer appears to rely solely on Applicant's testimony, "I heard Mr. Simuel testify to it earlier. It was 20 years. I didn't specifically remember that the condition was testifying, but if he says that is what it was, then I'm pretty sure that it was." App. 1049. Petitioner made the decision to proceed to trial knowing he faced the possibility of being sentenced to LWOP based on his burglary charge as well as the State's LWOP notice. Therefore, the PCR court had abundant evidence by which to find Counsel was not deficient because he properly advised Petitioner.

Accordingly, this Court should deny the petition for certiorari because there is probative evidence to support the PCR court's findings that Petitioner failed to meet his burden of proof under Strickland.

B. Petitioner failed to prove he was prejudiced because he never asserted he would have pleaded guilty if he had been advised the LWOP was valid.

Petitioner has also failed to prove he was prejudiced by Counsel's alleged failure to properly advise him. Petitioner provided no evidence he would have pleaded guilty if he had been advised the LWOP notice was valid. "[I]t is not always necessary for a[n applicant] to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a[n applicant's] self-serving statement may be sufficient to establish actual prejudice." Bell v. State, 410 S.C. 436, 443, 765 S.E.2d 4, 7 (Ct. App. 2014). Here, Petitioner never even made the self-serving statement that he would have pleaded guilty if he had understood the LWOP

notice was valid. Petitioner presented no evidence indicating he would have pleaded guilty if he had understood the LWOP was valid.

The LWOP notice had no effect on the evidence introduced by Petitioner or the State at trial. The jury was not aware of the LWOP notice when they considered the evidence against Petitioner. The LWOP notice had no effect on the outcome of the trial. The LWOP notice only affected Petitioner's decision on whether to plead guilty or proceed to trial. Therefore, the LWOP notice could only have changed the result of the proceeding if Petitioner could have pleaded guilty to avoid a guaranteed LWOP sentence at trial. Petitioner never alleged he would have pleaded guilty if he understood the LWOP notice was valid. Therefore, Petitioner has failed to prove the result of the proceeding would have been different if Counsel had advised him the LWOP notice was valid.

Petitioner's reliance on Lafler v. Cooper, 566 U.S. 156 (2012) is misguided. In Lafler, trial counsel was unequivocally deficient and advised Lafler to decline a plea offer based on an erroneous understanding of the law. Id. at 161. Also, in Lafler, trial counsel's deficiency was conceded by the State. Id. at 166. Here, the State argues Counsel was not deficient and advised Petitioner of the risk the courts would disagree with his argument. The Supreme Court directly certified Counsel's issue and affirmed. Here, there was also no evidence of a finalized plea offer from the State to Petitioner. Petitioner testified the State's plea offer "was never negotiated" and would have been conditioned on potential future testimony against his codefendant. App. 1011. There is only evidence of preliminary plea negotiations between the State and Counsel concerning a potential plea offer from the State. The State did not extend a finalized plea offer that Petitioner could accept. Counsel's testimony concerning the plea offer appears to rely solely on what he heard during Petitioner's testimony, "I heard Mr. Simuel testify to it earlier. It was 20

years. I didn't specifically remember that the condition was testifying, but if he says that is what it was, then I'm pretty sure that it was." App. 1049. Notably, there is also no evidence in this case Petitioner would have taken a plea offer if it had been formalized. Petitioner never even made self-serving post-conviction statements that he would have accepted a plea offer. Therefore, under Lafler, Petitioner was not prejudiced by his failure to accept a plea offer where there was no negotiated plea offer, Counsel was not deficient, and Petitioner never indicated he would accept a plea offer.

Therefore, Counsel was not deficient because Counsel fully informed Petitioner of the risks he was facing by proceeding to trial. Petitioner made the decision to proceed to trial knowing the potential consequences. Further, Petitioner failed to prove he was prejudiced by Counsel's advice. Accordingly, this Court should deny the petition for certiorari because there is probative evidence to support the PCR court's findings that Petitioner failed to meet his burden of proof under Strickland.


CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court grants the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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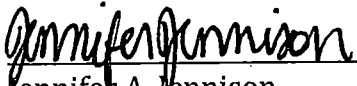
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to the Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 25th day of August, 2017.


Jennifer A. Jennison
Legal Assistant for Petitioner