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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2017-000546

Jalon Ted Taylor, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court deny review where the probative evidence supports the PCR judge's finding counsel was not deficient for failing to inform Petitioner of the maximum sentences or that any alleged deficiency prejudiced him where Counsel testified neither she nor the State promised Petitioner he would receive concurrent sentences and where Petitioner pleaded guilty after the State reduced a charge of attempted murder to first degree assault and battery and dismissed several drug charges?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Lexington County Clerk of Court's orders of commitment. Petitioner was indicted at the March 2011 term of the Lexington County Grand Jury for possession of stolen goods, more than $10,000 (2011-GS-32-0641), at the November 2011 term for forgery, less than $10,000 (2011-GS-32-3399) and attempted murder (2011-GS-32-3506). Kristy Goldberg, Esq., represented Petitioner. On March 15, 2012, Petitioner pled guilty as indicted before the Honorable William P. Keesley to the charges of possession of stolen goods and forgery. Petitioner also pled guilty to the lesser offense of assault and battery in the first degree instead of attempted murder. In exchange for Petitioner's guilty plea, and in addition to reducing the charge from attempted murder to assault and battery, first degree, several drug charges were dismissed. Judge Keesley sentenced him to imprisonment for a term of five (5) years for receiving stolen goods; to a term of five (5) years for forgery; and to a term of ten (10) years for first degree assault and battery. These sentences were to be served consecutively.

A timely notice of appeal was filed and perfected on Petitioner's behalf pursuant to Anders . Wanda H. Carter, Esq., represented Petitioner on appeal. The South Carolina Court of Appeals dismissed the appeal and granted counsel's motion to be relieved. State v. Taylor, Op. No. 2013-UP-308 (S.C. Ct. App. filed July 3, 2013). The Remittitur was issued on July 22, 2013.

Petitioner filed an application for post-conviction relief ("PCR") on April 11, 2013.

Respondent made its Return on September 30, 2015. An evidentiary hearing into the matter was convened on April 18, 2016, at the Lexington County Courthouse, before the Honorable Perry H. Gravely. Petitioner was present and represented by Aimee Zmroczek, Esquire. Petitioner testified on his own behalf, as did his mother, Amanda Jamieson, and Kristy Goldberg, Esquire, ("Counsel") testified on behalf of Respondent. By written Order filed June 1, 2016, Judge Gravely denied and dismissed Petitioner's application for PCR.

Petitioner made a Motion to Reconsider, which was denied by the Court in an order filed on August 17, 2016. Respondent moved to vacate the order pursuant to Rule 5 of the South Carolina Rules of Civil Procedure. In an order filed October 31, 2016, the Court rescinded its prior order, allowed time for both parties to submit memorandums, and ordered that Petitioner's renewed motion to reconsider be considered timely. Petitioner filed his motion to reconsider on or about November 16, 2016, and the State made its return to Petitioner's motion to reconsider on December 7, 2016. In an order filed January 23, 2017, Judge Gravely denied Petitioner's motion to reconsider.

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)).

ARGUMENT

The probative evidence supports the PCR judge's finding counsel was not deficient for failing to inform Petitioner of the maximum sentences or that any alleged deficiency prejudiced him where Counsel testified neither she nor the State promised Petitioner he would receive concurrent sentences and where Petitioner pleaded guilty after the State reduced a charge of attempted murder to first degree assault and battery and dismissed several drug charges.

In a PCR action, the Petitioner bears 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 Petitioner 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 Petitioner 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 Petitioner such that "there is a reasonable probability that, but for counsel's

unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial." Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

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 pleaded 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. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "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." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

This Court should uphold the PCR judge's findings because there is ample evidence in the record to support them. Petitioner alleged he involuntarily pled guilty because counsel failed to explain the plea judge could order the sentences for the three charges to be served consecutively. (App. p. 53.) However, the PCR judge found Petitioner pled guilty with an understanding there were no negotiations or recommendations of a sentence cap of ten years. (App. p. 121-122.) The court found that although Petitioner and his attorney likely expected less than the twenty years to which he was sentenced, the record clearly reflected Petitioner knew the State was not bound to any agreement. (App. p. 122, 132.) The PCR judge also found Petitioner

failed to show he would not have pleaded guilty and would have gone to trial, given the overwhelming evidence against Petitioner, as well as the State's offer to reduce the most serious charge from attempted murder to assault and battery. (App. p. 133.) This Court should give deference to those findings.

The Guilty Plea

At Petitioner's guilty plea, Judge Keesley asked Petitioner if he intended to plead guilty to the three pending charges before the court: assault and battery in the first degree, receiving stolen goods valued at over $10,000, and forgery. (App. pp. 4-5.) Petitioner indicated he understood and denied any impairment to his comprehension of the plea. (App. p. 6.) Petitioner told the court he had agreed to waive his Constitutional rights to a jury trial in exchange for the plea. (App. p. 7.)

The solicitor then began the recitation of the facts, in which she described how investigators tied Petitioner to the theft of a Chevrolet Silverado, which Petitioner then admitted to stealing. (App. pp. 8-9.) The solicitor also described how officers, who were executing a search warrant at a house in Cayce, found Petitioner among a group of men playing dominoes. Officers found drugs and other contraband throughout the house, and Petitioner had $940 of counterfeit currency in his possession. (App. p. 9.) Lastly, the solicitor described how Petitioner, who was driving a Dodge Neon, pulled over when he saw two men walking down the street in West Columbia. Petitioner asked the men to identify themselves, and when one of the men affiliated himself as a West Hill and Blood gang member, Petitioner pulled out a gun and shot the man in the groin. (App. pp. 9-10.) Petitioner initially denied involvement in the shooting, but when confronted with a witness statement identifying Petitioner as the driver of the car immediately before the shooting, Petitioner confessed. (App. p. 11.)

Lieutenant Simmons, the investigator involved in executing the search warrant at the house, informed the court of Petitioner's suspected involvement in numerous other illegal activities involving drugs and stolen goods. (App. pp. 12-14.) Simmons also told the court about their efforts to have Petitioner's bond revoked and asked the plea court on behalf of the citizens of Cayce and the Cayce Police Department to sentence Petitioner to the maximum penalties. (App. p. 14.)

After Simmons spoke, the plea court asked Petitioner if he acknowledged his guilt and still wished to plead to the three charges. (App. p. 15.) Petitioner indicated in the affirmative, and denied any other conditions to the plea agreement other than the reduced charges. (App. p. 15.) Counsel for Petitioner objected to Simmons' mention of other charges unrelated to the plea hearing, but told the court the entirety of the plea agreement was on the record. (App. p. 16.) The solicitor added that numerous other drug charges were dropped in accordance with the plea. (App. p. 16.) The court again confirmed with Petitioner there was nothing else to the plea agreement than what was on the record. (App. pp. 16-17.)

The plea court read through each of the charges individually and asked Petitioner is he understood he faced the maximum sentence in each charge. (App. pp. 18-19.) The plea court also informed Petitioner of his probation revocation, and confirmed Petitioner understood the enhanced sentencing scheme for future violations of any property crimes. (App. pp. 18-19.) The court told Petitioner he faced a possibility of twenty-five years, with an additional three years on the probation matter. Petitioner said he understood. (App. p. 19.) Satisfied that petitioner fully understood the benefits and consequences of his plea, the plea court found petitioner made a free, knowing and voluntary waiver of his rights to trial. (App. p. 19.) The court then read through Petitioner's numerous probation violations. (App. pp. 20-22.)

Petitioner's counsel attempted to defend Petitioner's behavior while out on probation and emphasized petitioner's young age. (App. pp. 23-26.) Counsel then asked the plea judge for leniency and to sentence Petitioner to concurrent sentences for the three charges. (App. p. 27.) After hearing from Petitioner, the plea court sentenced petitioner to the maximum time on the assault and battery and the forgery charges, and only five years on the receiving stolen goods charge. The court also revoked Petitioner's probation in full and ordered the sentences to run consecutively to the probation revocation. (App. pp. 30-31.)

Testimony at the PCR Hearing

Petitioner claimed his attorney told him he would not receive a sentence over ten years if he pleaded guilty. (App. p. 66.) Petitioner also alleged his attorney made this promise in front of Petitioner's family members. (App. p. 67.) Petitioner entered his three sentencing sheets as Plaintiff's Exhibit 1 and claimed that although the sentencing ranges were written across the top, he did not see the following sentence ranges because he signed each sentencing sheet while they were stapled together and only saw the range on the first page of zero to ten years. (App. pp. 10-11.) Further, Petitioner believed his attorney was inefficient for failing to object when law enforcement asked the plea judge to sentence Petitioner to the maximum. (App. p. 12.)

Petitioner admitted he discussed possible defenses with his attorney who advised him that his version of events did not support a self-defense claim. (App. pp. 75-76.) Petitioner also admitted he was aware he was pleading to three different charges. (App. p. 73.) Petitioner also agreed during the plea he told the plea judge he did not have any complaints about counsel or need more time with her, no one made any promises to him, and no one forced or threatened him. (App. p. 77.) Petitioner acknowledged the plea judge told him that any offers from the State needed to be on the record or he would not receive the benefit. (App. p. 78.) Petitioner also

acknowledged the solicitor never told the plea judge about a plea offer of no more than ten years. (App. p. 79.) Petitioner elected to go forward with the plea even after an investigator explained to the court that Petitioner was involved in numerous other crimes. (App. p. 83.) Petitioner told the plea judge he wanted to plead guilty after hearing the plea judge announce the charges carried a maximum of twenty-five years. (App. p. 85.) Petitioner acknowledged that he would have been tried for attempted murder if he had not pleaded to assault and battery, first degree. (App. p. 89.)

Plea counsel testified she met with Petitioner at least eight times during her representation. (App. p. 96.) She also had several telephone conversations with Petitioner, and she filed discovery motions and reviewed the discovery with Petitioner prior to his plea. (App. p. 97.) Plea counsel also testified that she discussed with Petitioner how a self-defense claim would not work; however, she said she did explain to Petitioner that he could go to trial and possibly get convicted for assault and battery, first degree, based on his claim that he did not intend to actually shoot someone when he fired the gun at the victim. (App. pp. 98-99.) Counsel summarized the State's evidence against Petitioner was a dry cleaning receipt linking Petitioner to the stolen vehicle, being in physical possession of counterfeit money when police apprehended him, a statement by Petitioner confessing to being in possession of the stolen vehicle, and a statement by Petitioner confessing to firing the gun that shot the victim. (App. pp. 100-101.) Counsel explained that originally the State refused to drop any charges; however, counsel was finally able to negotiate a deal where the State would dismiss the related drug charges and reduce the attempted murder charge to assault and battery, first degree, with no recommendation. (App. pp. 103-104.) Counsel explained there was no agreement with the State as to sentencing, including no promise of concurrent sentences; however, counsel was not expecting consecutive

sentences from the plea judge. (App. p. 104.) Counsel testified that if this case went to trial, she expected the State would have moved forward on all charges, including the drug charges and attempted murder. (App. pp. 105-106, 109.) Counsel read an email she sent to the solicitor that confirmed the understanding:

> The guilty plea is March 15th, 9:00 am, assault and battery first, zero to ten years; forgery, zero to five; possession of stolen goods, zero to five. No agreement as to sentencing. Am I missing anything?

(App. p. 106.) Counsel said she would have communicated the offer to Petitioner in the same manner and would have told him the offer was without an agreed sentencing recommendation. (App. pp. 106-108.)

Counsel testified that through the entirety of her representation of Petitioner, the strategy was to get a plea offer that was fair, given petitioner's version of events the night of the shooting. (App. p. 50.) As long as the offer was appropriate to petitioner's claim of assault and battery, the plan was to accept a plea. (App. p. 50.) Counsel testified that had they gone to trial, petitioner would have been tried for attempted murder, the other two charges, and all the remaining drug charges the State dropped for the plea. (App. p. 110.) Counsel testified she did tell Petitioner about the maximum sentences for each charge, but she did not remember explaining consecutive sentences to him. (App. pp. 114-115.) Finally, while counsel was expecting the sentence to be ten years and communicated that to Petitioner, she never made any promises. (App. p. 113.)

The Record Supports the PCR Court's Findings

In the Order of Dismissal, Judge Gravely found Petitioner failed to meet his burden of proving plea counsel was ineffective. The PCR court noted plea counsel's strong objection on the record to statements made by law enforcement, stating she was "outraged at the . . . allegations . . . which have nothing to do with the actual charges and which I've never even heard

of before today. I would ask that Your Honor just, obviously when we get to that point, sentence him for what he's here today for and the actual facts of these charges." (App. p. 132, *citing* plea transcript, p. 16.) The PCR court also found Petitioner understood he was facing a maximum of twenty-five years and that no promises were made guaranteeing that sentence. (App. p. 132.) The PCR court also found any misconception about Petitioner's possible sentence was cured when the plea court advised him of the correct maximum sentences at the plea hearing. (App. p. 132, *citing* Moorehead v. State. 329 S.C. 329, 333, 496 S.E.2d 415, 416-417 (1998).)

The record reflects Petitioner was informed on numerous occasions of the maximum sentences he faced in each of the three charges. Petitioner was informed and understood the State was making no sentencing recommendation to the court. Counsel testified that though she expected a lesser sentence, she explained to Petitioner what he faced and never promised him he would only receive ten years. "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

Further the PCR court found that given the overwhelming evidence of Petitioner's guilt and the State's reduction of attempted murder to assault and battery, petitioner did not meet his burden of showing he would have elected to go to trial but for counsel's advice. (App. p. 133.) The record reflects that Petitioner was likely to be convicted of most, if not all charges. The record also shows Petitioner obtained the benefit of the lesser assault charge and the dismissal of several drug charges in exchange for the plea. Accordingly, the record 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, he would not have pleaded guilty but would have

insisted on going to trial. See Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983) (affirming the denial of post-conviction relief because appellant failed to prove his attorney's erroneous advice concerning parole eligibility induced guilty plea); Hunter v. State, 316 S.C. 105, 109, 447 S.E.2d 203, 205 (1994).

Therefore, the record supports the lower court's ruling, and the Court should not reverse the decision.

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 issue discussed above.

Respectfully submitted,

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By: 
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PROOF OF SERVICE

I, Susannah Cole, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing copies of the same via inter-agency mail, addressed to his attorney of record:

Katherine H. Hudgins
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 27th day of October, 2017.

Susannah R. Cole, S.C. Bar #68383
Assistant Attorney General