STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2016-002284

ISAAC STARKE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Whether Petitioner's guilty plea was knowing and voluntary even if Plea Counsel told Petitioner he would only represent him if he pled guilty and would not take his case to trial?

STATEMENT OF THE CASE

Isaac Starke ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was true bill indicted at the March 2013 term of the Aiken County Grand Jury for second degree criminal sexual conduct with a minor (2013-GS-02-00406), and third degree criminal sexual conduct with a minor (2013-GS-02-00375). George Anderson, Esquire represented Petitioner. On May 15, 2013, Petitioner pled guilty as indicted before the Honorable Doyet A. Early, III. Judge Early sentenced Petitioner without recommendations or negotiations to a fifteen year term of imprisonment for each charge, with all sentences to run concurrently. Petitioner did not appeal his guilty plea or sentence.

Petitioner subsequently filed an application for post-conviction relief (PCR) on April 7, 2014 (2014-CP-02-00792). Respondent filed its Return on August 6, 2014, requesting an evidentiary hearing. An evidentiary hearing was held on September 20, 2016, at the Aiken County Courthouse before the Honorable Robert E. Hood. Petitioner was present at the hearing and represented by J. Faulkner Wilkes, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. Testimony was presented from Petitioner and Plea Counsel George Anderson.

Following the hearing, Judge Hood issued an Order of Dismissal denying and dismissing the application signed on November 1, 2016 and filed on November 7, 2016. Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on November 8, 2016. Petitioner's Appendix and Petition for Writ of Certiorari were filed on June 16, 2017. This Return to the Petition for Writ of Certiorari follows.

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 of a post-conviction relief 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 post-conviction relief 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).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, *supra*. Where ineffective assistance of counsel is alleged 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, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, *supra*. The applicant must overcome this presumption to receive relief. Cherry, *supra*.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, at 117, 385 S.E.2d at 625 (citing Strickland). 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, at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, 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

Probative evidence supports the PCR court's finding that Petitioner's plea was entered freely, voluntarily, and intelligently, and Petitioner's assertion that Plea Counsel's testimony that he would only represent Petitioner if he pled guilty made his plea involuntary is meritless and is not preserved for appellate review.

Petitioner argues the PCR court erred in finding Petitioner's guilty plea was knowing and voluntary because Plea Counsel told Petitioner he would only represent him if he pled guilty and would not take his case to trial. Petitioner's argument is improper, as it was not raised before the lower court or ruled upon and accordingly is unpreserved for appellate review. Regardless, the PCR court correctly relied on probative evidence in making its finding that Petitioner's plea was knowing and voluntary, and this Court should affirm its findings.

Relevant Law

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate

presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Preservation

The issue Petitioner presents to this Court is clearly and simply unpreserved for appeal. It was never raised or ruled upon by the PCR court. In his Petitioner for Writ of Certiorari, Petitioner attempts to assert that the issue was addressed in the Order of Dismissal, and argues the State purposefully misled opposing counsel into thinking the issue was preserved by drafting an order which mentions the issue but does not rule upon it. PWC 10. This is simply untrue. The mention of this issue to which Petitioner refers is under the "Summary of Relevant Testimony Presented" section of the Order of Dismissal, which simply summarizes the testimony that was presented to the PCR court. App. 182, 185. It is not a ruling, a finding, or a holding. It is simply a shortened recount of the assertions Applicant made on the stand at the evidentiary hearing. There was no opportunity for the PCR court to rule on this issue because it was never presented to the court.

This Court recently ruled on this exact issue in Mangal v. State, Op. No. 27726 (S.C.Sup.Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12). In Mangal, this Court reversed the decision of the Court of Appeals and reinstated the PCR court's order denying post-conviction relief where there was some testimony presented at the evidentiary hearing on a specific issue, but the issue was never raised to the court. This Court relied on the fact that Mangal never mentioned the issue in his written application, no amendment was ever made raising the issue, PCR counsel did not make an oral amendment at the evidentiary hearing to add the issue as a claim, and he did not specifically make the claim at the hearing even when testimony on the issue came up. Unlike in the present case, Mangal's attorney made a brief

mention of the issue in his closing argument at the evidentiary hearing, and later filed a Rule 59(e), SCRCP, motion to reconsider asking the court to address the issue. This Court ruled the PCR court properly refused to rule on the issue, as it was never raised and no testimonial evidence was presented in support of the allegation. This Court held that the PCR court could not be expected to recognize the claim based only on a very brief and broad mention of it in closing argument. Mangal, at 17 ("To the extent PCR counsel's brief statement constitutes a claim for ineffective assistance of counsel, we find a PCR judge would have difficulty recognizing it.")

The present case should have the same result. Though Petitioner asserted several allegations of ineffective assistance of counsel, he never raised the issue of whether counsel was ineffective for telling him he would only represent him if he pled guilty. It was not raised in his original application, in an amendment, or at the evidentiary hearing. Notably, when the Order denying post-conviction relief was issued, Petitioner did not file a Rule 59(e), SCRCP, motion to reconsider to raised or preserve that specific issue, as required by Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding that when a PCR court fails to make specific findings as to an issue, a Rule 59(e) motion is necessary to preserve the issue for appeal).

Petitioner is clearly in procedural default, and the PCR court's opinion properly fails to address this specific issue because it simply was not presented to the court. While Petitioner insists his failure to raise this issue to the lower court should entitle him to a remand for further evidentiary hearings, he presents no valid reason why his case is extraordinary enough to excuse his procedural mistakes. Petitioner was given the opportunity to raise and fully argue every issue he deemed meritorious at the evidentiary hearing. There is no reason to allow him a second bite at the apple to bring up a new issue that would have been addressed at the hearing if it were truly

meritorious. Here, as in Mangal, there is simply no extraordinary reason to excuse this procedural default, and the issue clearly is not preserved for appeal.

Merits

Even assuming this issue were preserved for appeal, it clearly is not meritorious. Petitioner asserts his guilty plea was involuntary because he was coerced to plead guilty by Plea Counsel, who told him he would only represent him if he pled guilty and not if he went to trial. However, the PCR court properly found Petitioner's plea was entered knowingly and intelligently, and that Plea Counsel was not ineffective in any regard in the representation surrounding his guilty plea.

First, it is extremely important to note that the PCR court found Plea Counsel's testimony to be credible and Petitioner's testimony to be not credible. App. 186. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the post-conviction relief judge's findings on the credibility of witnesses); Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (noting the heightened emphasis reviewing court's place the upon post-conviction relief court's credibility findings) (citing Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (appellate court deference to post-conviction relief court's credibility findings is so great that it required the Court to uphold post-conviction relief court's determination even where testimony at post-conviction relief hearing was unequivocally contradicted by the trial record).

Petitioner's behavior and testimony at the evidentiary hearing was unusual and incredible. Petitioner asserts that he is severely mentally ill. PWC 5. The prosecuting solicitor testified about the difference in Petitioner's behavior from the guilty plea, stating at the

evidentiary hearing that Petitioner "acted extremely different from his demeanor today, both in the—from his tone of voice in the recording with his interview with law enforcement but also at the plea." App. 137, line 14-19. All the testimony presented supported the notion that Petitioner was competent and credible at the guilty plea, and no evidence was presented to show Petitioner was not competent to plead guilty. However, Petitioner's behavior took an extreme turn for the evidentiary hearing, in sharp contrast to his competent demeanor at the plea. For some reason, be it lack of medication or overmedication, or simply malingering, Petitioner became sporadic and exaggerating at the evidentiary hearing, and the PCR court made a finding in its Order of Dismissal that he was not credible. App. 186.

At the guilty plea, Plea Counsel informed the plea court that he felt Petitioner understood the offenses, the potential sentences, and the "most serious" strike and mandatory sex offender registry and G.P.S. monitoring. App. 7, line 2-10. Plea Counsel explained to the plea court that he had advised Petitioner of his right to a trial by jury and he still wished to plead guilty. App. 7, line 11-17. Petitioner testified that he understood the effects and implications of his guilty plea and he wished to plead guilty. App. 9-10. Petitioner had no questions for the plea judge. App. 10, line 7-10. The plea court advised Petitioner of his right to remain silent, his right to a jury trial, and his right to present witnesses on his behalf. App. 10, line 15 – App. 11, line 15. Petitioner testified that he had not been threatened or promised anything in order to plead guilty. App. 11, line 16-19. He testified that he was satisfied with his lawyer, there was nothing else he wanted him to do on his behalf, and he was totally and completely satisfied with his representation. App. 11, line 20 – App. 12, line 8. He stated he was not under the influence of drugs or alcohol and he was pleading guilty of his own free will. App. 12, line 9-14.

When the plea judge asked if Petitioner was guilty of the crimes he was accused of, he hesitated, and told the plea court he did not "stick [his] finger in her vagina." App. 13, line 15-16. However, after the Solicitor informed the plea court of the factual basis of the charge, he told the plea court that he was guilty and he did commit the acts as alleged in the indictment. App. 14, line 17-23. The plea judge informed Petitioner that if he denied doing what he was accused of, all he had to do was tell him, and they would have a trial. App. 14, line 24 – App. 15, line 10. The plea court explained to Petitioner the process of having a trial and that he would not accept his guilty plea unless he was actually guilty of the crime as accused. App. 15, line 1-10. Petitioner repeated to the plea court that he was guilty. App. 15, line 11. At the end of the plea, Petitioner apologized to the victim, to the court, and to the community for committing this crime. App. 26, line 23. He stated that it was all his fault, he did not understand why he did it, and it will never happen again. App. 27, line 1-9.

At the evidentiary hearing, Petitioner testified that his guilty plea was involuntary because he was misled by Plea Counsel, and he was promised that he would get a four-year deal in exchange for his plea. However, Plea Counsel testified at the evidentiary hearing that there was never any mention of a four-year deal and he never promised Petitioner he would receive a four-year sentence. He testified he believed Petitioner fully understood what he was doing when he pled guilty. App. 153, line 23 – App. 154, line 3. He further stated Petitioner had been evaluated and was found competent to plead guilty. App. 154, line 4-8. He stated Petitioner well understood the potential sentencing range and that he was pleading with no recommendation by the State. App. 155, line 20-22. Plea Counsel testified that Petitioner admitted committing the crimes to him, but would occasionally change his story and deny the offense. App. 160, line 7-14. He stated that in these instances, he would follow up in another letter with a different

personality and different penmanship and apologize, admitting everything. App. 160, line 22 – App. 161, line 1. Plea Counsel testified that he likely would have told Petitioner at the guilty plea that "if you're guilty of the charges that's what you need to tell the judge. Then if not, then there will be a trial." App. 160, line 11-14.

The PCR court relied on this testimony in making its ruling, and it held Plea Counsel's testimony on the subject was credible. App. 186. The PCR court cited to Plea Counsel's testimony that he advised Petitioner of all facts and risks of pleading guilty, including the potential length of his sentence. App. 189. The PCR court relied on this testimony as well as the record of the guilty plea and further found Petitioner was fully advised of the rights he was waiving by pleading guilty. App. 189. The PCR court held Petitioner was never offered or promised a four-year deal in exchange for his guilty plea, and there was no evidence in the record to support any reliance on this idea or his claim that he was not mentally competent to plead guilty. App. 188-89.

Petitioner's assertion that he was coerced into pleading guilty because Plea Counsel advised him he would only represent him if he pled guilty is meritless. There is nothing in the record to support this assertion, and Petitioner never alleged that he would have gone to trial, rather than plead guilty if Plea Counsel would have represented him at trial.

Conflict of Interest

First, Plea Counsel did not have a conflict of interest which affected his representation. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93,

101, 665 S.E.2d 164, 168 (2008). "If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client." Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citations omitted).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Plea Counsel credibly testified at the evidentiary hearing that he never represented Petitioner's wife on criminal charges; he represented Petitioner and his wife together in family court, in which both of their interests and goals aligned. App. 156-57. Prosecuting Assistant Solicitor Ashley Hammack testified that Petitioner's wife was never investigated or criminally charged as part of this case. App. 138, line 17-18. She stated that Petitioner's wife was extremely non-cooperative with law enforcement and would not testify at trial. App. 138, line 14-22. It is clear from the record and testimony presented that no conflict of interest existed at any point in Plea Counsel's representation.

The factual scenario surrounding this case differs from other cases where this Court has held there was an actual conflict of interest. For example, in Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017), this Court held there was an actual conflict of interest where trial

counsel represented the petitioner as well as petitioner's mother's boyfriend on unrelated drug charges because there were indicators and allegations of a conspiracy between the two to traffic illegal drugs. Gonzales held that, because these factors indicated an actual conflict of interest, and because the conflict adversely affected counsel's representation, the petitioner was entitled to relief. Gonzales, at 13, 795 S.E.2d at 841. In contrast, in the present case, though Plea Counsel represented Petitioner and his wife simultaneously, Petitioner's wife never faced criminal charges and was only represented in family court. She was not going to be used as a witness at trial to testify against Petitioner. At the time Plea Counsel represented both clients, their goals and interests were aligned—to keep their daughter in the marital home.

Petitioner has not shown that Plea Counsel owed a duty to either client to take some action which could be detrimental to the interests of the other client. Because of this, he cannot show an actual conflict of interest. Because there is no actual conflict of interest, Plea Counsel's representation was not adversely affected in this manner.

Guilty Plea Representation

Second, the fact that Plea Counsel informed Petitioner he would only represent him if he pled guilty is not inappropriate and does not result in unconstitutional representation. Many attorneys choose only to represent criminal clients at a plea hearing. It is common for a lawyer to focus his practice in one specific area and choose not to go to trial as part of that practice. In some counties, there is a specific public defender assigned to handle guilty pleas and nothing more. Just because Plea Counsel, who was privately retained, chose for whatever reason not to represent Petitioner if he went to trial does not mean he forced him to plead guilty. Plea Counsel's testimony showed that he was honest and open with Petitioner from the beginning. He testified that he told Petitioner he does not handle "those kinds of cases" on a trial basis at the

beginning of his representation. App. 152, line 23-24. He testified that Petitioner admitted his guilt, and he would not participate in a trial based on the information he had given him. App. 152, line 20-23. It is reasonable for a private attorney to choose not to take a case based on his belief of the case's likelihood of success, especially once the client has admitted his guilt.

Furthermore, Petitioner's assertion that this practice is unethical because it violates South Carolina's rule of professional conduct against accepting a contingent fee for representing a defendant in a criminal case, is incorrect. South Carolina Rule of Professional Conduct 1.5(d)(2) is in place to prevent attorneys from setting a fee contingent on the outcome of the jury's verdict. Nowhere in the rule or commentary does it prohibit attorneys from representing a client and charging a fee only if they choose to plead guilty.

The record of the guilty plea hearing and the testimony presented clearly shows Petitioner was fully advised of his right to a jury trial. If he had chosen to pursue a trial rather than plead guilty, he could have retained new counsel or asked to be appointed a public defender to represent him at trial. His assertion that he was coerced to plead guilty because of Plea Counsel is not supported by any credible evidence before the Court.

In conclusion, all the relevant testimony from the PCR hearing is probative evidence that the PCR court relied on in holding Petitioner's guilty plea was knowing and voluntary. Petitioner presented no credible evidence of a valid reason to allow him to depart from his statements at the guilty plea hearing. Because the issue raised is not preserved for appeal and because the PCR court's findings were supported by the probative evidence above, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. 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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By: _____
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November 1, 2017

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

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Certiorari to Aiken County
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Appellate Case No. 2016-002284

ISAAC STARKE,

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STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **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:

David Alexander, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 1st day of November, 2017

F. V. Hay

FELICIA V. HAYES
Legal Assistant For Respondent

ALAN WILSON
ATTORNEY GENERAL

November 1, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Isaac Starke, v. State of South Carolina**
Appellate Case No. 2016-002284
Lower Court Case No: 2014-CP-02-0792

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman
Assistant Attorney General
SC Bar # 102214

JAC/fvh
Enclosures

cc: David Alexander, Esquire